ANNOTATED STANDING ORDERS OF THE NEW SOUTH WALES LEGISLATIVE COUNCIL

Susan Want & Jenelle Moore
Edited by David Blunt

THE FEDERATION PRESS

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FOREWORD

Parliament stands at the apex of our democracy. Its effective functioning, in turn, depends on accumulated respect and authority. The working life of members and parliamentary officers is immersed in precedents from the past – the building blocks that enable our institutions to function. Former Clerk of the Australian Senate Dr Rosemary Laing has said that 'Clerks stand on the shoulders of the reputations forged by their predecessors and peers for non-partisanship, learning, long service and dedication to the institution.'

The walls of Legislative Council offices are lined with journals recording the debates, decisions and proceedings of the Legislative Council since its establishment as Australia's first parliamentary body in 1824. Those journals represent a vast primary record not only of the state's history but also of the evolution and development of a unique parliamentary institution. From time to time, various clerks and officers have sought to sift and organise this data, to find patterns and highlight precedents, and to make that information more accessible for members, parliamentary officers and other interested stakeholders. The Consolidated Indexes to the Journals, work on which commenced under the leadership of former Clerk John Rowlestone Stevenson and continued through to the Clerkship of Leslie Jeckeln, became the foundation for later works. Under the Clerkships of John Evans and Lynn Lovelock procedural precedent systems were further developed, and later digitised. In 2008, the landmark *New South Wales Legislative Council Practice*, now colloquially known as 'Lovelock and Evans', was published.

Each new publication has organised procedural information in a different manner. So, for example, while Lovelock and Evans categorises information by topic, as the name suggests this *Annotated Standing Orders* arranges information by standing order. It is hoped that members, parliamentary officers, commentators and others with a passion for parliamentary democracy will find the information included and the manner in which it is presented a useful addition to the range of reliable and scholarly sources on parliamentary practice and procedure. The writing of each new publication brings to light new information. The new information in the *Annotated Standing Orders* will therefore inform continued work towards the publication of a second edition of Lovelock and Evans.

The production of this commentary has been a work of real scholarship, involving painstaking research by a large team of staff from across the Department of the Legislative Council. I pay particular tribute to the two principal authors, Jenelle Moore and Susan Want, whose passion for the Legislative Council's procedural development has driven the project. Their generosity in recording and sharing their detailed procedural knowledge for the benefit of all readers is gratefully appreciated. Among all of the other contributors

referred to and appropriately acknowledged in the Introduction which follows, particular attention is drawn to the invaluable contribution of Velia Mignacca, and the review of the penultimate version of the publication by John Evans. It is an honour to present the *Annotated Standing Orders of the NSW Legislative Council*.

David Blunt
Clerk of the Parliaments
(Editor)

INTRODUCTION

> [I]n order to appreciate the value of parliamentary procedures it is necessary to understand their rationale, and the fact that procedures are extremely old does not decrease their value, though it may obscure their importance.
>
> Harry Evans[1]

Legislative Council practice has been modified, reformed and modernised over nearly 200 years. The Legislative Council of New South Wales is the oldest legislature in Australia and, consequently, is the forerunner of the adoption of standing orders for parliamentary procedure in the country, drawing on practice and rules in the House of Commons and House of Lords over time. Nevertheless, the Legislative Council has developed its own character, and its own ways.

This book examines the purpose, operation and development of the Council's standing orders since 1856, when New South Wales gained responsible government and the Parliament became bicameral. We have aimed to provide a précis, in plain language, of all of the rules and orders of the House, including illustrative anecdotes and important precedents, together with context to the more obscure and seldom-used rules.

This book is intended to complement Lynn Lovelock and John Evans' *New South Wales Legislative Council Practice*, which examines a history of the political and constitutional development of New South Wales and provides guidance on complex matters of constitutional law and parliamentary privilege pertinent to the Legislative Council.

Our work canvasses over 150 years of proceedings in the House and its committees and incorporates the personal working notes of current and former clerks and procedure officers with a view to providing practical guidance and rationale for the modern-day practice of the Council. Various resources have been examined during the research process, including Minutes of Proceedings of the Council since 1856, *Sydney Morning Herald* reports prior to 1874, Hansard since 1874, procedural resources such as consolidated indexes of minutes and bills registers and reports of the Standing Orders Committees since 1856.

As rules have been challenged and interpreted and clerks have sought to articulate best practice, the rules have conversely become more detailed and complex. The 154 relatively

1 Harry Evans, Clerk-Assistant (Procedure), 'Amendments, amendments', *The House Magazine*, 26 November 1986.

simple rules adopted in 1856 have expanded, with multiple paragraphs and overlapping provisions, and matters of practice and culture have become integral to the operations of the chamber. We have sought to clarify when rules are seemingly contradictory and to emphasise when standing orders necessarily interact or are intended to be complementary.

In the course of our research there have been interesting discoveries: creative and innovative use of standing orders and procedures to great effect, which have since fallen into disuse; rules adopted which have conceded the powers of the Legislative Council to the Assembly before being quickly repealed; and rules that have been the subject of ongoing contention since 1856 and remain unsettled. There have been rules which have consistently applied and those which have fundamentally reformed practice.

However, what has struck us is that notwithstanding the modification of the rules over time and key developments, such as Federation, reconstitution of the Council and the increasing influence of the crossbench, the core principles underpinning the standing orders have remained fundamentally consistent. Themes such as the freedom of speech, the rights of the minority, and the role of the Council as a House of Review echo throughout the various iterations of the rules. This, in our view, is what good procedure looks like – it is independent of politics and trends, it is applied consistently and without favour, and it preserves fair and equal opportunity for members of all political persuasions.

We would like to acknowledge former Clerks of the Parliament John Evans and Lynn Lovelock for the annotations they kept over many years in battered and well-thumbed volumes. These volumes contained reference to little-used procedures as well as examples of the creative and thoughtful use of the standing orders by members. John also lent his considerable procedural knowledge and expertise in editing these annotations, for which we are extremely grateful.

We would also like to thank the Clerk of the Parliaments, David Blunt, for supporting this project, sharing his expertise, and allowing us to pursue our fascination for parliamentary procedure and the history of its development in the Legislative Council. We also acknowledge the support and encouragement of Rosemary Laing, former Clerk of the Australian Senate, whose own publication was a significant source of influence and inspiration for the authors.

Finally, we would like to thank those who assisted in the compilation of this volume. We particularly acknowledge our colleague and collaborator Velia Mignacca, for researching and drafting a number of these annotations. We also acknowledge the work of committee staff, led by Beverly Duffy, Clerk Assistant Committees, in researching practice and procedure of Legislative Council committees for Chapter 35 – Committees, particularly the period before the modern committee system was launched in 1988, from which records are scarce. Selene Hung provided invaluable research assistance on a number of the procedural chapters, and Alex Stedman, Sarah Henderson, Nyoka Friels and Ron Perkins graciously assisted us in researching obscure references buried within the Journals.

Since 1856, the standing orders have been reviewed and redrafted a total of four times, with numerous modifications and omissions made over time. As this chronology demonstrates, modifications have sought to correct minor anomalies, to clarify ambiguities, to improve the conduct of business, to reform procedures of the House and, most importantly, to assist the Council to fulfil its function as a House of Review in scrutinising the Executive Government. This book seeks to describe how the current rules of the Legislative Council have developed, and why.

Susan Want
Jenelle Moore

CHAPTER 1

REPEAL AND OPERATION OF STANDING ORDERS

1. REPEAL OF PREVIOUS RULES AND ORDERS

All existing standing rules and orders of the House are repealed.

Development summary		
1895	Standing order 1	Repeal of previous standing rules and orders
2003	Sessional order 1	Repeal of previous rules and orders
2004	Standing order 1	Repeal of previous rules and orders

This standing order repeals the standing orders that previously applied between 1895 and 2004.

Operation

Section 15 of the *Constitution Act 1902* authorises each House of Parliament to prepare and adopt standing rules and orders as follows:

> 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 His 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.

The rules and orders adopted by the Council are referred to as the standing orders, in keeping with the practice of other Australian jurisdictions and the UK Parliament. The Council's power to adopt and revise its standing orders, together with other temporary rules in the form of sessional orders and resolutions of continuing effect,[1] ensures that the rules that apply in the Council remain relevant to the Council's functions and reflect developments in practice and procedure that vary over time. It is the prerogative of the House to adopt, amend or repeal the standing orders as it sees fit, subject to the approval of the Governor and the other provisions of section 15 of the *Constitution Act 1902*. Nevertheless, any such revision should and will be assessed against the fundamental principles of parliamentary law, practice and procedure, which include: that public business be conducted in a decent and orderly manner; that the rights of the minority are protected; that every member is able to fully and freely express their opinion; that full opportunity is provided for the consideration of every measure; that heedless and impulsive legislative action is prevented; and that the Executive Government is able to be held to account.[2] The power of the House to adopt standing orders under the *Constitution Act 1902* is discussed further in *New South Wales Legislative Council Practice*.[3]

Background and development

As noted in the Introduction, the 2004 standing orders are the fourth in the series of standing orders adopted by the Legislative Council. The terms of standing order 1 were first adopted in 1895 to denote the commencement of new and revised procedures and the setting aside of the rules that had previously applied, and reflect similar terms to those of the Assembly's 1894 SO 1, that 'all previous rules and orders are hereby repealed'. The same approach was taken in 2004.

1 See SO 79 for resolutions of continuing effect.

2 David Blunt, 'Parliamentary traditions, innovation and "the great principles of English parliamentary law"' (Paper presented at Australian and New Zealand Association of Clerks at the Table Professional Development Seminar, Canberra 22-24 January 2012).

3 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 82.

2. WHERE CASES NOT PROVIDED FOR

In any case not provided for in these standing orders, any matter may be decided by the President or Chair of Committees as they think fit. In making any ruling the President or Chair may base their decision on the customs, usages, practices and precedents of the House and parliamentary tradition.

Development summary		
1856	Standing order 1	General rule of practice
1870	Standing order 1	General rule of practice
1895	Standing order 2	Resort to rules, forms, and usages of Imperial Parliament
2003	Sessional order 2	Where cases not provided for
2004	Standing order 2	Where cases not provided for

Matters of procedure are decided by the President or the Chair of Committees in any case not specifically provided for under the standing orders.

Operation

In making any ruling, the President or Chair may base their decision on the customs, usages, practices and precedents of the House and parliamentary tradition.

This standing order reflects a longstanding principle. The President has performed this function in the Council since the commencement of responsible government in 1856, and presiding officers of other Westminster parliaments likewise perform this role in deciding matters of order, practice and procedure.

However, the terms of standing order 2 are particularly notable in view of the preceding standing orders that it has replaced. Under the terms of the 1856, 1870 and 1895 standing orders, in cases not provided for by the standing orders, reference was to be had to the practice of the House of Lords (1856 and 1870) or, more broadly, both Houses of the Imperial Parliament, as articulated in *Erskine May* (1895 standing orders).[4] While the Legislative Council still proudly acknowledges its heritage in this regard, the terms of SO 2 signal the shift away from a dependence on the rules and practice of other parliaments as the House has developed a reliable body of practice and precedent of its own. In the modern day, where reference to the practice of other parliaments is necessary, reference is made to the practice of the Australian Senate,[5] and then to the

4 Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* is considered to be the most authoritative and influential work on parliamentary procedure and British constitutional convention, originally written by British constitutional theorist and Clerk of the House of Commons, Thomas Erskine May. The publication has been regularly updated since its first publication in 1844 to the present day. The work has been influential outside the United Kingdom in countries which use the Westminster system.

5 Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012).

practice of other Australian states and territories, New Zealand,[6] the House of Commons and the House of Lords[7] and, occasionally, the Australian House of Representatives and the Canadian Parliaments.

Background and development

Under the terms of 1856 SO 1, the Legislative Council was required to refer to the practice of the House of Lords in any case not provided for in the standing orders:

> In all cases not hereinafter provided for, resort shall be had to the rules, forms, and practice of the Upper House of the Imperial Parliament; which shall be followed so far as they can be applied.

However, owing to the view that the practice of the Lords was insufficiently comprehensive, the practice of the House of Commons, as articulated in *Erskine May*, was more commonly referred to.

The standing order was readopted in the same terms in 1870, and then amended in the 1895 rewrite to make reference to 'the rules, forms and usages of the Imperial Parliament as laid down in the last Edition of May's Parliamentary Practice', and to specify that the rules should be followed so far as the same can be applied 'to the proceedings of this House, and in the Committee of the Whole House, or any other Committee' (1895 SO 2).

The terms of 1895 SO 2 were amended in 1927 to provide for specific reference to the 13th edition of *Erskine May*, following a recommendation made by the Standing Orders Committee.[8] In speaking to consideration of the report in committee of the whole, the Attorney General stated that the amendment would prevent considerable expense to the House in ordering six copies of 'May' at frequent intervals.[9]

On 15 May 1951, the House agreed to further amend the terms of the standing order to omit the reference to the 13th edition of *Erskine May*, and instead make reference to the 'latest' edition.[10] On moving the motion, Mr Downing[11] noted that the amendment was purely formal in nature, prompted by the publication of a new edition of *Erskine May* and with a view to obviating any further amendments to the standing orders in the event that subsequent editions should be published.[12]

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6 David McGee, *Parliamentary Practice in New Zealand* (Dunmore Publishing Limited, 3rd ed, 2005).

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

8 *Minutes,* NSW Legislative Council, 22 November 1927, p 41; 25 November 1927, p 56.

9 *Hansard,* NSW Legislative Council, 22 November 1927, p 436. The committee had not specified its reasons for making the recommendation in its report (Standing Orders Committee, *Proposed Amended Standing Orders*, *Journal of the Legislative Council*, 1927, vol 103, p 137).

10 *Minutes,* NSW Legislative Council, 15 May 1951, p 81.

11 Minister of Justice and Vice-President of the Executive Council.

12 *Hansard,* NSW Legislative Council, 15 May 1951, p 1927.

Past Presidents' rulings frequently made reference to the practice articulated in *Erskine May*.[13] As noted above, contemporary rulings now most commonly make reference either to the practice of the NSW Legislative Council or to that of the Australian Senate.[14]

3. PRACTICE NOTES

(1) The President may issue practice notes on the procedure and practice to be followed under any standing order.

(2) A practice note may be disallowed, in whole or in part, by motion on notice.

(3) A motion for disallowance will have precedence as business of the House.

Development summary		
2003	Sessional order 3	Practice notes
2004	Standing order 3	Practice notes

The President may issue practice notes on procedures and practice to be followed in the Legislative Council. Practice notes are intended to provide clarity on matters that are otherwise not provided for under the standing orders, or are not clear.

Operation

Practice notes operate in a similar manner to Presidents' rulings, however, by nature a practice note provides for a lengthier exposition than would a ruling. Practice notes are also proactive in nature, made in advance of a point of order arising. Practice notes are subject to disallowance, in whole or in part, by motion on notice (SO 3 (2)). Any such motion has precedence as business of the House (SO 3(3)), so is accordingly listed above most other types of business, including government business and private members' business.

While successive Presidents of the Legislative Council have not chosen to publish practice notes under the authority of SO 3 to date, the adoption of SO 3 in 2004 has provided a mechanism by which advisory notes can be vested with the authority of the President, in the same manner as a ruling, should the need arise. Practice notes should not be conversational or needlessly expansive, but rather should take a form similar to a sessional order – in procedural language and in paragraph form to assist the House in disallowing the note in whole or in part in the same way it would amend a motion (for example, by moving that paragraph (3) be disallowed/omitted).

13 E.g. *Hansard,* NSW Legislative Council, 8 August 1889, p 3851; 22-23 March 1916, p 5684; 16 October 1862, pp 115-117; 6 March 1884, pp 2207-2208.

14 *Hansard*, NSW Legislative Council, 28 June 2007, p 2072; 25 October 2007, p 3363; 13 October 2015, p 4046.

Background and development

File notes relating to the 2004 rewrite of the standing orders suggest that it was envisaged that practice notes could be issued in relation to, for example, reading or quoting from documents, or the need to lodge amendments in writing. Draft practice notes have been prepared dealing with matters such as the precedence of various categories of business, but they have not been issued.

4. RIGHTS OF HOUSE NOT RESTRICTED

Nothing in these standing orders affects the rights, privileges and powers of the House.

Development summary		
2003	Sessional order 4	Rights of House not restricted
2004	Standing order 4	Rights of House not restricted

While standing orders do not infer powers or privileges on the House, they regulate the practical operation of the powers and privileges that the House inherently possesses.

Operation

Standing orders do not infer rights, privileges or powers on the House, and a standing order cannot extend or restrict the rights, privileges or powers inherently possessed by the House, bestowed on the House at law. However, standing order 4 reflects the principle that the standing orders regulate the manner in which the House performs its functions, and the practical operation of the rights, powers and immunities inherently held by the House, including the orderly conduct of business.

The House's power to adopt standing rules and orders is derived from section 15 of the *Constitution Act 1902*. Further discussion on the operation of this provision can be found in *New South Wales Legislative Council Practice*.[15]

Background and development

Standing order 4 was first adopted in 2004. The terms of SO 4 are similar to Senate SO 208, which states:

> Except so far as is expressly provided, these standing orders do not restrict the mode in which the Senate may exercise and uphold its powers, privileges and immunities.

15 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, p 82.

In reference to this rule, *Odgers' Australian Senate Practice* observes:

> Except so far as is expressly provided, the standing orders do not in any way restrict the mode in which the Senate may exercise and uphold its powers, privileges and immunities. This provision saves for the Senate all powers, privileges, and immunities conferred on it by the Constitution. Where there is a clear direction in the Constitution as to the powers of the Senate, that direction overrides any standing order or practice of the Parliament.[16]

It is likely that SO 4 was adopted as a safeguard against a hostile majority amending or adopting a standing order that could take away the rights of the minority or inhibit the accountability of the government.

16 *Odgers' Australian Senate Practice*, 13th ed, p 35.

CHAPTER 2

OPENING OF PARLIAMENT

5. PROCEEDINGS ON OPENING OF PARLIAMENT BY GOVERNOR

(1) On the first day of the meeting of a session of Parliament to be opened by the Governor, where there is a President:

(a) the President will take the Chair at the time stated in the proclamation and read the prayers,

(b) the Clerk will read the proclamation calling Parliament together, and

(c) the Governor will be introduced to the chamber by the Usher of the Black Rod.

(2) On the first day of the meeting of a session of Parliament to be opened by the Governor, where there is no President:

(a) at the time specified in the proclamation the Clerk will read the proclamation calling Parliament together,

(b) the Governor will be introduced to the chamber by the Usher of the Black Rod.

Development summary		
2003	Sessional order 5	Proceedings on opening of Parliament by Governor
2004	Standing order 5	Proceedings on opening of Parliament by Governor

The Houses of Parliament are called to meet for the opening of a new session of Parliament by proclamation of the Governor. The proclamation sets the time and date for the meeting and requires that members attend at Parliament House at that time. Parliament can be opened by the Governor, or by commissioners, usually three senior ministers, appointed by the Governor for the purpose. Standing order 5 provides the proceedings for an opening by the Governor and standing order 6 provides the proceedings for an opening by commissioners.

Operation

Standing order 5(1) provides for the opening by the Governor where there is a President, standing order 5(2) for the opening by the Governor where there is no President.

The significant difference between the two procedures is that when the session is to be opened by the Governor and there is a President, the President takes the chair and reads the prayers and then directs the Clerk to read the proclamation calling the Houses together. If there is no President, the Clerk reads the proclamation at the time specified and the prayers are not read until after the President has been elected, whether the same day or the following day.[1]

The Usher of the Black Rod then announces the Governor who is conducted to the Vice-Regal chair. The Governor directs the Usher of the Black Rod to let the Legislative Assembly know that they should attend the Legislative Council chamber immediately. The Assembly being in attendance, the Governor then reads a prepared speech known as the 'speech on the opening of Parliament' (see SO 7).

At the conclusion of the speech, the Governor hands a copy of the speech to the President and then the Speaker. The Governor and the Vice-Regal party are conducted from the Chamber by the Usher of the Black Rod in procession with the President. On the President resuming the chair, the Assembly and their Speaker withdraw.

An Opening by the Governor usually includes significant pomp and ceremony and takes place in the presence of numerous dignitaries. There have been a range of variations in the ceremonial aspects of an official opening by the Governor. For example, a welcome to country was conducted for the opening of Parliament in 1999 and has been included in each ceremonial opening since. In contrast, the official proceedings of a Governor's opening have remained constant.

Background and development

Standing orders 5, 6 and 7 together provide for the opening of Parliament by the Governor, or by commissioners. Prior to 2004 there were no standing orders which comprehensively provided for the opening of a new session of Parliament. Rather, the procedures of an opening followed tradition which has now been codified in these standing orders.

Traditionally, the first session of Parliament was opened by commissioners and the Governor would attend the following day to give a speech outlining the government's legislative agenda. This trend can be consistently observed from the 1st Parliament to the 23rd Parliament in 1913, after which the attendance of the Governor after a commission opening became less frequent.[2] Until 2011, the usual pattern was for commissioners to open the first session of a new Parliament, or for the Governor, or, on rare occasions the Monarch, to open the second session, and commissioners or the Governor to open subsequent sessions.

1 See, for example, *Minutes,* NSW Legislative Council, 11 May 1999, p 2; 3 May 2011, p 2.

2 The Governor attended Parliament to give a speech following a commission opening in the years 1927, 1930, 1934 and 1952.

There have been two occasions on which the Parliament of New South Wales has been opened by Her Majesty Queen Elizabeth II. On 4 February 1954, Her Majesty, accompanied by His Royal Highness the Duke of Edinburgh, and attended by members of the Royal Household, was announced by the Usher of the Black Rod and conducted to the Royal Chair by the President (the Hon W E Dickson), the Hon R R Downing, LL.B. (Minister of Justice and Vice-President of the Executive Council), the Hon F P Buckley (Secretary for Mines), and officers of the House. His Royal Highness occupied a chair on the dais, to the left of Her Majesty. Following the usual proceedings, Her Majesty commanded the Usher of the Black Rod to inform the Legislative Assembly that it was Her Majesty's pleasure that they attend Her immediately in the Council Chamber. On the attendance of the Legislative Assembly, Her Majesty gave the Opening Speech, following which Her Majesty and His Royal Highness were conducted to the Royal car by the President, the two Ministers in the Council and the officers of the House.[3] On 20 February 1992, Her Majesty again opened a new session of Parliament. On that occasion, at the conclusion of the opening speech, Her Majesty, His Royal Highness, the President and members of the Royal Household were conducted by the Usher of the Black Rod from the Council Chamber in procession to the President's Suite.[4]

In 2011 and 2015, the new Parliament was opened by commissioners, after which the Governor attended Parliament House later in the day to give a speech on the opening of Parliament before a joint sitting of the Council and Assembly. (See SO 6 for further details).

Although the standing orders for the opening of Parliament by the Governor contemplate that the President might not be present, there has not been such an occasion since 1856.

6. PROCEEDINGS ON OPENING OF PARLIAMENT BY COMMISSION

On the first day of the meeting of a session of Parliament to be opened by commissioners,

(a) the Clerk will read the proclamation calling Parliament together,

(b) the Clerk will announce the commissioners appointed to open the Parliament,

(c) a commissioner will direct the Usher of the Black Rod to request the attendance of the members of the Legislative Assembly to hear the commissioners' message,

(d) members of the Assembly will sit in the Council chamber,

(e) a commissioner will then inform the members of both Houses of the purpose of the meeting,

3 *Minutes,* NSW Legislative Council, 4 February 1954, pp 1-3.

4 *Minutes,* NSW Legislative Council, 20 February 1992, pp 1-4.

(f) the Clerk will read the commission appointing the commissioners to open Parliament,

(g) a commissioner will read the commissioners' message, and the members of the Assembly will withdraw,

(h) the Clerk will announce the names of the members elected at the periodic election,

(i) the Clerk will also announce the names of commissioners for swearing members, and read the commission,

(j) new members will take and sign the oath or affirmation of allegiance required by law and sign the roll of the House, and

(k) the House will then proceed to elect a President.

Development summary		
1985	Standing order 3A	Members sworn after Periodic Election
2003	Sessional order 6	Members sworn after Periodic Election
2004	Standing order 6	Members sworn after Periodic Election

Standing order 6 provides the procedures for the opening of Parliament by commissioners appointed by the Governor for that purpose.

There are two main reasons for the practice of commissioners opening the first session of a Parliament after an election. The first reason is that the government may not be in a position to prepare the Governor's speech outlining its legislative agenda. A commission opening occurs without fanfare and with the commissioners delivering a message from the Governor advising the Houses that the Governor 'desires that you take into your earnest consideration such matters as may be submitted to you'.

The second reason is that since 1991, the *Constitution Act 1902* has provided for the President to cease holding office immediately before the Council assembles for the dispatch of business following every periodic election[5] and for the Council to elect a President at its first meeting following every periodic Council election[6] (and for the Assembly to elect a Speaker) after the Parliament has been officially opened. A commission opening does not require the participation of the President and Speaker in proceedings.

The opening of the first session of a new Parliament after an election reflects the practice in other Australian parliaments.

5 *Constitution (Legislative Council) Further Amendment Act 1991*, section 3, Sch 1(b).

6 *Constitution (Legislative Council) Further Amendment Act 1991*, section 3, Sch 1(a), replacing section 22G(1) with new terms.

Operation

The procedures set out in SO 6 codify the established practice for an opening of Parliament by commissioners, usually three ministers, appointed for the purpose by the Governor.

> At the time appointed by the Governor for the meeting of the House, the Clerk reads the proclamation calling Parliament together and announces the commissioners appointed to open the Parliament.
>
> Once seated on the dais, one of the commissioners directs the Usher of the Black Rod to request the attendance of the members of the Legislative Assembly to hear the commissioners' message. Following the return of the Usher of the Black Rod and when members of the Assembly have taken their seats, a commissioner informs the members of both Houses of the purpose of the meeting:
>
> His Excellency 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 His Excellency, to open this session of the Legislative Council and Legislative Assembly and to deliver messages to the Legislative Council and 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 despatch of business.[7]

A Commissioner then reads a message which concludes with the words:

> We are further commanded to acquaint you that the Governor desires that measures be taken by you, as may be deemed expedient, to provide for the peace, welfare and good government of the State.[8]

Following the Commissioners' message being read, the Assembly withdraws.

The Clerk announces the names of the members elected at the periodic election and the names of the members commissioned to administer the Pledge of Loyalty or Oath of Allegiance to the elected members – usually the same members commissioned to open Parliament.

One by one, in the order in which elected, the members are called forward by a Commissioner to take the Pledge of Loyalty or Oath of Allegiance and sign the roll of the House.[9]

After all members elected have been sworn, the House proceeds to the election of the President under SOs 11 to 14.

No business is transacted until after the election of the President and newly elected members have been sworn.

By tradition, a commission opening involves very little ceremony. However, following the opening of the first session of the 55th Parliament in 2011 by commissioners, the

7 See, for example, *Minutes,* NSW Legislative Council, 11 May 1999, p 2.

8 See, for example, *Minutes,* NSW Legislative Council, 3 May 2011, p 4.

9 See SO 61 for detail on the role of the House.

swearing in of new members and election of the President, the Governor attended Parliament House to give a speech to the assembled members of the Legislative Council and the Legislative Assembly. This reflects the practice in the Australian Parliament for the opening of the first session following an election. The proceedings on the attendance of the Governor followed a similar protocol to proceedings when the Governor attends to open Parliament. On arrival at Parliament House, the Governor was met at the centre gates by the President and the Usher of the Black Rod. The Governor inspected an honour guard formed by the emergency services and received a Vice-Regal salute. A traditional smoking ceremony was performed in the Parliament House forecourt. The President was then presented to the Governor in the Jubilee Room in Parliament House, a ceremony which usually occurs at Government House. (See SO 14 Presentation to Governor).

A short time later, the sitting of the Legislative Council resumed. The Usher of the Black Rod announced the Governor to the Legislative Council chamber. She took the Vice-Regal chair on the dais and directed the Usher of the Black Rod to let the Legislative Assembly know that they should attend the Legislative Council chamber immediately to hear the speech on the opening of Parliament.

The practice of the first session of a parliament being opened by commissioners, followed by the Governor attending Parliament for the presentation of the President and to give a speech on the opening of Parliament, was repeated in 2015 and has likely become the established practice.

Background and development

SO 6 is one of the many standing orders adopted in 2004 which codified practice rather than established new practice. There was no predecessor to standing order 6 aside from standing order 3A which was the precursor to standing order 6 (h) and (j).

SO 3A was adopted in 1985, on the recommendation of the Standing Orders Committee in its report tabled on 20 November 1985,[10] to provide for the swearing in of elected members following a periodic election[11]. The amendment to SO 3, now SO 10, was consequential on the adoption of SO 3A and provided for the swearing in of members other than by commissioners on the first sitting day after an election, provisions that had not been required prior to reconstitution of the Council in 1978.[12]

The procedures for the opening of Parliament by commissioners were first established in 1856, with the first parliament after responsible government being opened on 22 May 1856 by the President and two members of the Legislative Council commissioned by the Governor.

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10 *Minutes*, NSW Legislative Council, 20 November 1985, pp 910-914.

11 *Minutes,* NSW Legislative Council, 21 November 1985, pp 933-936; *Hansard,* NSW Legislative Council, 21 November 1985, p 10229.

12 The *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978* introduced direct election.

In the following years it was common for subsequent sessions to be opened by commissioners and on the following day for the Governor to attend Parliament to give a speech on the opening of Parliament to the assembled members of the Legislative Council and the Legislative Assembly.[13] This practice was consistent from the 1st Parliament commencing in 1856 to the 23rd Parliament commencing in 1913, after which the commission opening followed by the attendance of the Governor on the next day became less common[14] and the practice developed whereby the first session of a parliament was opened by commissioners and subsequent sessions by the Governor, although there were some exceptions. This practice was consistent until 2011 when the 55th Parliament, and later the 56th Parliament in 2015, were opened by commissioners, following which the Governor attended Parliament House to give a speech to the assembled members of the Legislative Council and the Legislative Assembly.

Openings for reasons of expediency

There are several precedents of later sessions of a parliament being opened by commissioners with reasons for expediency outlined in the Commissioners' Message to the Council and Assembly including the resignation of the government,[15] death of the Sovereign,[16] urgent legislation[17] and urgent 'exigencies of the Public Service'.[18] The death of a President also triggered an opening of Parliament by commissioners and the attendance of the Governor on the following day.[19]

President's presence at a commission opening

On the numerous occasions prior to 1933 on which the President was one of the commissioners appointed to open parliament, the President would direct the Usher of the Black Rod to let the Assembly know 'the Commissioners desire their immediate attendance in this House to hear the Commission for the Opening of Parliament read'. On the Usher returning and the Assembly being present, the President would request members of both Houses to be seated and would direct the Clerk to read the proclamation on the opening of Parliament. After the commissioners had delivered their message and

13 See, for example, *Minutes,* NSW Legislative Council, 24 January 1865; 27 January 1865.

14 *Minutes,* NSW Legislative Council, 4 November 1927, p 8 (1st session 28th Parliament); 26 November 1930, p 6 (1st session 29th Parliament); 26 April 1934, p 7 (4th session 30th Parliament); 19 August 1952, p 12 (3rd session 36th Parliament).

15 *Minutes,* NSW Legislative Council, 18 January 1887, p 2.

16 *Minutes,* NSW Legislative Council, 14 June 1910, p 3.

17 *Minutes,* NSW Legislative Council, 24 March 1925, p 3 (marriage law); 9 February 1926, p 3 (bills introduced in the last session); 17 April 1928, p 3 (certain bills of an urgent nature); 11 September 1928, p 3 (reform of the Legislative Council).

18 *Minutes,* NSW Legislative Council, 22 September 1926, p 3; 20 December 1926, p 3; 20 October 1936, p 3; 18 September 1945, p 3; 27 August 1946, p 3.

19 *Minutes,* NSW Legislative Council, 18 August 1952, p 2; 9 August, 1966, p 2.

the Assembly had withdrawn, the President read the prayers and the House proceeded to conduct its business in the usual manner.[20]

Since the *Constitution Act 1902* was amended by the *Constitution (Legislative Council) Further Amendment Act 1991* to require the Council to elect a President at its first meeting following every periodic Council election[21] (and for the Assembly to elect a Speaker), there has been only one occasion on which the President has been present at a Commission opening. The 2nd session of the 51st Parliament was opened on 16 April 1996 by commissioners. President Willis, a non-Government member, was present at the opening but was not appointed a commissioner.[22] At the direction of the President, the Clerk read the proclamation convening Parliament and the commission to open parliament, following which the three ministers commissioned for the purpose took their place on the dais and conducted all procedural formalities of the opening.[23]

7. GOVERNOR'S SPEECH

(1) When the Governor attends the chamber, the Usher of the Black Rod will announce and conduct the Governor to the dais.

(2) The Governor will direct the Usher of the Black Rod to command the immediate attendance of the Assembly in the Council chamber.

(3) When the members of the Assembly have come with their Speaker into the Council chamber the Governor will address both Houses of the Parliament.

(4) The President and the Speaker will each receive a copy of the Governor's speech and the Governor will withdraw from the Council chamber.

Development summary		
2003	Sessional order 7	Governor's speech
2004	Standing order 7	Governor's speech

Standing order 7 sets out the procedures for the Governor's attendance and speech to the assembled members of the Legislative Council and the Legislative Assembly in the Legislative Council Chamber. The standing order codifies a practice which has been observed, with some variation, since 1856.

20 See, for example, *Minutes,* NSW Legislative Council, 17 April 1928.

21 The Act also caused the President to cease holding office immediately before the Council assembles for the dispatch of business following every such election.

22 President Willis was elected President in 1991 during a term of the Coalition Government and re-elected in 1995 at the commencement of the 51st Parliament after the election of the Labor Government.

23 *Minutes,* NSW Legislative Council, 16 April 1996, pp 1-3.

Operation

When the Governor attends the Legislative Council and takes the Vice-Regal chair on the dais, the Usher of the Black Rod is directed to command the attendance of the Legislative Assembly in the Legislative Council Chamber, and when the Assembly members are seated the Governor addresses both Houses. At the conclusion of the speech, and following the President and Speaker receiving a copy of the speech, the Governor withdraws. The Governor's speech is printed in full in the minutes of proceedings.

Background and development

The 1843 unicameral Legislative Council standing orders provided for the Governor's opening speech and for a copy to be provided to the Legislative Council:

> 13. That when the Governor shall have delivered his speech, the Speaker shall pray the Governor for a copy thereof.
>
> ...
>
> 15. That the Speaker on his return to the Chair, shall read the Governor's speech to the Council.

However there is no predecessor from 1856 under responsible government to the present. SO 7 is substantially the same as the Australian Senate standing order providing for the Governor-General's speech.

The practice of the Governor's opening speech is based on Westminster tradition where the Sovereign delivers the opening speech in the House of Lords to all members of Parliament. The speech is read from a printed copy and, following the opening, is reported to both Houses and printed in their respective minutes.[24]

In New South Wales, the Governor, or Governor-General,[25] has attended the Legislative Council to give a speech on the opening of Parliament since 1832. By tradition, the speech outlines the government's legislative agenda for the forthcoming session. The first Governor's speech, on 19 January 1832, outlined in some detail the business to be placed before the House during the session and noted in particular that it was 'necessary' for the Council to pass a bill on the constitution of juries of the Supreme Court 'without delay'.[26]

On 5 March 1844, the Governor called the House to meet by proclamation and gave an opening speech noting that the reason for opening Parliament at this 'unusual season of the year' was to lay before it a bill to protect certain magistrates from prosecution following a judgment of the Supreme Court.[27] Only two months later the Governor

24 Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011), pp 158-159.

25 For a short time the office was known as the Governor-General of all the colonies.

26 *Votes and Proceedings of the Legislative Council*, 19 January 1832, p 1.

27 *Votes and Proceedings of the Legislative Council*, 5 March 1844, p 1.

again called the House to meet by proclamation and gave an opening speech discussing the implications on the colony of the arrival of nearly 2,500 immigrants.[28]

On occasions when the Governor or Lieutenant-Governor 'not thinking it fit to be personally present' was not in attendance the President,[29] being a commissioner, would read the speech on the opening of Parliament.

It was also common prior to 1900 for the Governor to attend the Legislative Council to give a speech to the assembled members of the Legislative Council and Legislative Assembly on prorogation – the closure of a session. This first occurred at the conclusion of the first session of the first parliament on 18 March 1857. The procedures reflected those of an opening with the Governor-General being announced by the Usher of the Black Rod, who was then directed to request the attendance of the Legislative Assembly in the Legislative Council Chamber. On the Legislative Assembly being present, the Speaker of the Assembly read a message of congratulations to the Governor-General for being in a position to bring to a close the first session of the first Parliament. The Speaker then handed to the Governor-General for assent the bill for the appropriation from the Consolidated Revenue Fund of New South Wales, to which the Governor-General assented and signed the bill on behalf of Her Majesty. The Governor-General then delivered a speech and at the conclusion of the speech he declared the Parliament prorogued.[30] On other occasions, Parliament was prorogued by proclamation.[31]

As noted under SO 6, it was common in the early years of responsible government for sessions of Parliament to be opened by commissioners and on the following day for the Governor to attend Parliament to give a speech on the opening of Parliament to the assembled members of the Legislative Council and the Legislative Assembly.[32] This practice was consistent from the 1st Parliament commencing in 1856 to the 23rd Parliament commencing in 1913, after which the attendance of the Governor on the day after a commission opening became less common.[33] The practice then developed of commissioners opening the first session of a new Parliament, at which a message from the Governor would be delivered, and the Governor opening subsequent sessions and delivering a speech outlining the government's legislative agenda for the forthcoming session. Since 2011 the first session of the 55th and 56th Parliaments have been opened by commissioners, following which the Governor attended Parliament House to give a speech to the assembled members of the Legislative Council and the Legislative Assembly.

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28 *Votes and Proceedings of the Legislative Council*, 28 May 1844, p 1.

29 See, for example, *Minutes,* NSW Legislative Council, 29 May 1883, pp 2-3; 19 November 1884, pp 2-3; 17 January 1894, pp 2-3; 13 June 1905, pp 2-4.

30 Between 1851 and 1861 the Governor of New South Wales was also appointed as Governor-General.

31 *Journal of the Legislative Council,* 1857, vol 2, p 43.

32 *Minutes,* NSW Legislative Council, 24 January 1865 (Commission opening); 27 January 1865, pp 5-9 (Governor's speech).

33 See SO 6 for the few occasions after 1913 on which the Governor attended Parliament to give a speech following a commission opening.

On three occasions the opening speech has departed from the practice of outlining the Government's legislative agenda.

On 4 February 1954, Queen Elizabeth II became the first monarch to open a session of the New South Wales Parliament and give the opening speech. While this speech did not detail the Government's legislative agenda, the Queen made the following remarks in regard to the Government's legislative agenda:

> My Ministers are giving close attention to matters of importance to the contentment and prosperity of My people in New South Wales, and they will submit their legislative proposals for your consideration.[34]

Her Majesty the Queen was also present at the opening of a new session of Parliament on 20 February 1992 and during her speech again referred to Her Ministers later submitting their legislative proposals for the consideration of the Legislative Council and the Legislative Assembly.[35]

In 2014, the opening of Parliament by Her Excellency Professor the Hon Dame Marie Bashir AD CVO, Governor of New South Wales, provided Her Excellency with an opportunity to address members of both Houses of Parliament prior to her departure from office. Her Excellency's speech to members reflected on her time as Governor.[36]

8. ADDRESS-IN-REPLY

(1) The President will report to the House the speech of the Governor.

(2) A motion for an address-in-reply to the speech may be made forthwith or on a future day, and must be seconded.

(3) Consideration of the Governor's speech will be dealt with as government business.

(4) When the address has been agreed to, a motion will be made that it be presented to the Governor by the President and members.

(5) The President will report to the House the presentation of the address and the reply of the Governor.

Development summary		
2003	Sessional order 8	Address-in-reply
2004	Standing order 8	Address-in-reply

34 *Minutes,* NSW Legislative Council, 4 February 1954, pp 2-3.

35 *Minutes,* NSW Legislative Council, 20 February 1992, p 4; *Hansard,* NSW Legislative Council, 20 February 1992, p 2.

36 *Minutes,* NSW Legislative Council, 9 September 2014, pp 3-5; *Hansard,* NSW Legislative Council, 9 September 2014, pp 1-3.

The Address-in-Reply expresses thanks for the opening speech by the Governor and the Council's loyalty to Australia and the people of New South Wales.

SO 8 sets out the procedures for moving, debating and presenting an Address-in-Reply to the Governor's speech on the opening of a new session of Parliament.[37]

As outlined under SO 7, by tradition the Governor's speech outlines the government's legislative agenda for the forthcoming session. The Address-in-Reply is an opportunity for members to respond to the government's agenda as read by the Governor.

Standing order 120 provides for Addresses that are not in reply to the Governor's speech and standing order 121 provides for the presentation of an Address to the Governor. SO 53 provides for Addresses to the Governor requesting the production of certain papers.

Operation

Following the President reporting the speech of the Governor to the House, a motion for an Address-in-Reply is moved without notice. Addresses to the Governor, or the Queen, except an Address-in-Reply, must be proposed by motion on notice given in the usual manner (SO 120).

A seconder is required for an Address-in-Reply.

The mover and seconder of the Address-in-Reply are traditionally non-ministers from the government party. This practice was established following concerns that, as the speech on the opening of Parliament is prepared by the government and sets out the government's legislative and policy agenda for the coming session, if ministers were to move and second the Address-in-Reply it would effectively be the government proposing a reply to the government's own speech. For example, in 1858 and 1860 objection was taken to a minister being appointed to the select committee to prepare an Address-in-Reply to what was in effect his own speech[38] and in 1875 concerns were again raised that in moving the motion for an Address-in-Reply the Chief Justice was in effect proposing a reply to his own Government's speech.[39] Nevertheless, in 2015 the Address-in-Reply was moved by the Leader of the Government in the Legislative Council and seconded by a member of the Government backbench.[40]

There are no time limits on debate on the Address-in-Reply under the standing orders. The debate is traditionally wide-ranging and may remain on the Notice Paper for many sitting days. Although latitude is allowed to members, debate must be relevant.

Once agreed to, the Address-in-Reply is presented to the Governor by the President and Members. Under SO 121, the President, accompanied by members, proceeds to Government House and, on being admitted to the Governor's presence, reads the Address to the Governor.

37 For other Addresses to the Governor see SO 120 and 121.
38 *Sydney Morning Herald*, 9 December 1858, p 2; 26 September 1860, p 2.
39 *Sydney Morning Herald*, 17 November 1875, p 4.
40 *Minutes,* NSW Legislative Council, 6 May 2015, p 75.

Background and development

The Westminster tradition of replying to the Governor's speech on the opening of Parliament was adopted in the standing orders in 1843 providing that the Council would 'determine on an address to the Governor, in reply to the [opening] speech…'. Between 1856 and 2004 the standing orders were silent on the opening of a new session and the procedure for an Address-in-Reply to the Governor's opening speech.

The 1895 standing orders did not refer to an Address-in-Reply to an *opening* speech. However, under SO 135, when an Address was ordered to be presented by the whole House, the President and members would proceed to Government House where the President read the Address to the Governor with the members who moved and seconded the Address 'being on his left hand'. The tradition that the mover and seconder stand to the left of the President when the Address is read has continued.

The Address-in-Reply is the only motion requiring a seconder. The requirement is a tradition consistent with practice of the House of Commons by which an opportunity to second a motion is provided on some formal occasions including the Address-in-Reply to the Queen's speech.[41]

Originally, the motion for an Address-in-Reply to the Governor's speech was moved on the same day as the Governor's speech[42] and in 1954 was moved on the same day as Her Majesty the Queen's opening speech.[43] However, there are also examples of the motion being moved on a later day.[44] In one instance, the Government's intention to proceed with the Address-in-Reply immediately after the Governor's speech was met with strong opposition. A member sought to adjourn the House to a later hour 'for the convenience of members', presumably so members could consider the speech and prepare their responses.[45]

On the motion for the Address-in-Reply being moved, the Clerk would read the Governor's speech in full. In 1911, it was suggested that the practice be discontinued and the speech be taken as read. However, following objection being taken to such an innovation the speech was read by the Clerk.[46] It was not until 1922 that the Governor's speech was taken as read,[47] with the consent of the House, and from the next session, commencing 7 August 1923, the reading of the Governor's speech by the Clerk was omitted from practice.[48]

Until 1875 a select committee was appointed on motion to prepare the Address-in-Reply with the members being a fair representation of the House. The House would

41 *Erskine May,* 24th ed, p 401.
42 See, for example, *Minutes,* NSW Legislative Council, 14 August 1895, p 7; 22 August 1933, p 5.
43 *Minutes,* NSW Legislative Council, 4 February 1954, p 8.
44 *Minutes,* NSW Legislative Council, 8 November 1927, p 16; 12 September 1928, p 14; 7 September 1932, p 13.
45 *Hansard,* NSW Legislative Council, 17 January 1894, p 3.
46 *Hansard,* NSW Legislative Council, 16 May 1911, pp 5-6.
47 *Hansard,* NSW Legislative Council, 4 July 1922, p 10.
48 *Minutes,* NSW Legislative Council, 7 August 1923, p 11; *Hansard,* NSW Legislative Council, 7 August 1923, p 8.

first adopt the Address as proposed by a select committee, and then a motion would be moved for the Address as read by the Clerk to be adopted and presented by the whole House.

In 1875, a member proposed to amend the Address by way of an amendment to the motion that the Address be adopted and presented by the whole House. The President ruled the amendment out of order as the proper time to amend the Address was paragraph by paragraph as the Clerk read the Address or immediately after the Address had been read.[49] The President's opinion was later referred to the Standing Orders Committee with an instruction for the committee to ascertain the established practice in the Legislative Council, and that of the Legislative Assembly and the Imperial Parliament and what, in the committee's opinion, should be the practice in the future.[50] The committee reported on 19 May 1875, recommending that the House adopt the course taken by the House of Lords which was for an Address to be proposed by motion in an established form. This would allow members to propose amendments to the motion in the usual manner.[51]

The following session, Sir Alfred Stephen proposed a prepared Address-in-Reply to the Governor's speech. An amendment to the motion to require that the only bill to be brought before the House in that session be the Appropriation Bill, so that the session could be brought to a close before Christmas, was unsuccessful and the motion agreed to as read.[52] The House first adopted the Address which is now used to reply to the Governor's opening speech in 1997.[53]

There have been a number of other attempts to amend the Address-in-Reply, the majority having been negatived[54] or withdrawn[55]. In 1889, the order of the day for the Address-in-Reply to the Governor's speech was discharged to avoid an amendment to the Address to express regret at the action of the Governor in appointing certain members to the Legislative Council. In objecting to the motion, a member pressed upon the House that it 'ought to consider whether ... it is not our bounden duty to make some reply to the Governor's speech. Whatever the nature of the reply may be, some reply is due to His Excellency.'[56]

In 1904, the Address-in-Reply was dispensed with at the suggestion of the Governor 'to prevent any unnecessary inconvenience being incurred by honorable members'.[57] Concern was raised during debate for the adjournment of the House that the practice of presenting an Address-in-Reply to the Governor's speech 'is one of the privileges of Parliament' and an 'inherent right of Parliament, in order that members may be able to

49 *Minutes,* NSW Legislative Council, 28 January 1875, p 7.
50 *Minutes,* NSW Legislative Council, 23 March 1875, p 20.
51 *Minutes,* NSW Legislative Council, 19 May 1875, p 55; *Journal of the Legislative Council*, 1875, vol 25, pp 209-215.
52 *Minutes,* NSW Legislative Council, 16 November 1875, pp 3-4.
53 *Minutes,* NSW Legislative Council, 17 September 1997, p 45.
54 See, for example, *Minutes,* NSW Legislative Council, 9 July 1903, p 34.
55 See, for example, *Minutes,* NSW Legislative Council, 24 August 1904, p 8.
56 *Hansard,* NSW Legislative Council, 7 March 1889, p 249.
57 *Hansard,* NSW Legislative Council, 19 January 1904, p 2.

make complaints and remonstrances without let or hindrance' and argued that no such suspension or request [to dispense with an Address-in-Reply] was lawful.[58]

There have been two occasions on which the House did not proceed to present the Address-in-Reply to the Governor due to a quorum not being present[59] and a new time was ascertained.[60] In 1929, the Address-in-Reply was presented immediately after passing.[61]

Although latitude is allowed during debate on the Address-in-Reply, debate must be relevant. In 1920, the President ruled that while members could allude to subjects outside the Address they were not justified in discussing at length anything not referred to in the speech.[62]

9. OPENING OF PARLIAMENT BY THE QUEEN

When Her Majesty the Queen is present in the State and intends to address both Houses of Parliament on opening the session, references in this chapter to the Governor will be read as references to Her Majesty the Queen.

Development summary		
2003	Sessional order 9	Opening of Parliament by the Queen
2004	Standing order 9	Opening of Parliament by the Queen

SO 9 provides that when Her Majesty the Queen is to open Parliament, the reference in this chapter to the Governor is taken as a reference to Her Majesty, thereby making it clear the Her Majesty will perform the roles and functions ordinarily performed by the Governor on the opening of Parliament.

Operation

Her Majesty the Queen attended the Parliament of New South Wales for the opening of the third session of the 37th Parliament on 4 February 1954 and again at the opening of the second session of the 50th Parliament on 20 February 1992.

Background and development

There is no predecessor to standing order 9, which is expressed in similar terms as standing order 4 of the Australian Senate.

58 *Hansard,* NSW Legislative Council, 21 January 1904, pp 136 and 137.
59 *Minutes,* NSW Legislative Council, 16 November 1871, p 8; 22 November 1871, p 9; 17 January 1883, p 15 ; 18 January 1883, p 17.
60 *Minutes,* NSW Legislative Council, 23 November 1871, p 11; 24 January 1883, p 21.
61 *Minutes,* NSW Legislative Council, 19 September 1929, p 22.
62 *Minutes,* NSW Legislative Council, 8 September 1920, p 22.

According to the *Annotated Standing Orders of the Australian Senate*,[63] the precursor to standing order 4 was adopted in 1954 due to the impending visit of Queen Elizabeth II, the first visit to Australia by a reigning monarch. The standing order was adopted to avoid any confusion, embarrassment or doubt cast on proceedings due to the standing orders having referred only to the Governor-General.

10. SWEARING OF NEW MEMBERS

New members may present themselves and take and sign the oath or affirmation required by law and sign the roll of the House at any time during the sitting of the House when there is no business then under consideration.

Development summary		
1895	Standing order 3	When members may be sworn
1946	Standing order 8A	Vacancy in the Office of President
1985	Standing order 3	When members may be sworn
2003	Sessional order 10	Swearing of new members
2004	Standing order 10	Swearing of new members

Section 12 of the *Constitution Act 1902* provides that a member may not sit or vote in the Council until the member has taken the pledge of loyalty or oath of allegiance before the Governor or other person authorised by the Governor for that purpose.

Standing order 10 provides the procedures for swearing in of members following their election to fill a casual vacancy, or if a new member was not sworn on the opening of Parliament after an periodic election according to SO 6.

Read in conjunction with standing order 6, standing order 10 provides for the President or Deputy President to administer the oath during a sitting of the House but not when the House is adjourned or prorogued.

Operation

Under SO 10, new members may present themselves and take and sign the oath or affirmation required by law and sign the roll of the House at any time during the sitting of the House when there is no business then under consideration. SO 10 is distinct from SO 6 and provides for members who were not elected at a periodic election but at a casual vacancy.

Members elected to fill a casual vacancy are usually sworn in at the first opportunity on the next sitting day following the expiration of two days after their election, as required by section 22E of the *Constitution Act 1902*.

It is rare for the Governor to administer the oath or affirmation to a new member. It is normal practice for the President and the Deputy President to have received a

63 Rosemary Laing, *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009).

commission from the Governor to administer the Oath of Allegiance or Pledge of Loyalty 'from time to time', so that they may administer the oath or affirmation to members elected to a casual vacancy. Only in a small number of cases have members taken the oath before the Governor.[64] In 2010, four members elected to fill casual vacancies on 7 September 2010 were sworn by the Governor at Government House on 10 September 2010. This procedure was necessary as the President had not received a commission to administer the oath or affirmation since being elected to the office the year before, and the newly elected members would be prevented from taking their seats in the House and participating in House and committee proceedings until the President had received the commission.[65] The most recent case occurred in August 2016 to allow a member elected to fill a casual vacancy to participate in the annual General Purpose Standing Committee budget estimates hearings.[66]

On taking an oath or affirmation the member is then required to sign the roll of the House. Standing order 61 requires the Clerk to keep the roll of the House which a member must sign 'when the member takes the oath or affirmation'. When taking the oath or affirmation before commissioners the member immediately signs the roll, which is laid out on the Table, before the House.

The procedure for a member to sign the roll after been sworn before the Governor differed in the most recent examples.

In June 1998, on the President informing the House that the Hon Arthur Chesterfield-Evans had been sworn before the Governor, the member presented himself at the Table and signed the roll.[67] This procedure is consistent with precedent and with SO 10, under which a member having taking the oath or affirmation must 'sign the roll of the House at any time during the sitting'. However, in 2010 it was reported that four members elected at a joint sitting had 'presented themselves to Her Excellency the Governor, took the pledge of loyalty and signed the roll of the House'.[68] The procedure followed in June 1998 whereby the member sworn before the Governor later signed the roll before the House was again followed in 2016.[69]

Although not provided for in the current standing orders, the Clerk also keeps a register in which each member's election details are recorded.

Background and development

Between 1856 and 1895 the standing orders did not regulate the swearing in of members and proceedings differed depending on the means of election or appointment of new members.

64 See, for example, *Minutes,* NSW Legislative Council, 1 December 1931, p 388; 23 June 1932, p 5; 20 October 1936, p 4.
65 *Minutes,* NSW Legislative Council, 21 September 2010, p 2057.
66 *Minutes,* NSW Legislative Council, 13 September 2016, p 1109.
67 *Minutes,* NSW Legislative Council, 29 June 1998, p 610.
68 *Minutes,* NSW Legislative Council, 21 September 2010, p 2057.
69 *Minutes,* NSW Legislative Council, 13 September 2016, p 1109.

From 1856 until 1891 members of the Legislative Council would retake the Oath of Allegiance on the assembling of each new Parliament. The practice ceased in 1891 following a resolution of the House, communicated to the Governor, that

> in the opinion of this House, the practice of requiring members of the Legislative Council to take the Oath of Allegiance on the assembling of Parliament, after such members shall once have taken the said Oath (as prescribed by the 33rd section of the *Constitution Act 1902*) is unnecessary, and not required by law, and that such practice should in future be discontinued.[70]

Prior to an amendment to the *Constitution Act 1902* in 1987 to provide that an oath or affirmation of allegiance to the Queen refers also to Her Majesty's heirs and successors, members would also be re-sworn on the demise of the Crown.[71]

Prior to 1895, business would be interrupted for a new member to take the oath and subscribe the roll of the House.[72] SO 3 as adopted in 1895 provided for members to take the oath or affirmation as required by law and sign the roll of the House at any time during the sitting of the House but no debate or business could be interrupted for that purpose, although business was interrupted on at least one occasion.[73]

Procedures for swearing in a new member under SO 3 changed as provisions in the *Constitution Act 1902* changed.

Until reconstitution of the Legislative Council in 1934,[74] upon the report of a message from the Governor or the Premier[75] advising of the appointment of a new member under section 16 of the *Constitution Act 1902*, the member would produce the Writ of Appointment, present themselves at the Table, take the Oath before the President and subscribe the roll of the House.[76] On occasion, the swearing in occurred on a subsequent day.[77]

Following reconstitution in 1934 and until 1978,[78] during which time members were indirectly elected by members of the Council and Assembly, on the return of the Writ, the Clerk would announce the elected members who then presented themselves at the Table, subscribed the roll and took the oath before the President or a commissioner.[79]

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70 *Minutes,* NSW Legislative Council, 29 July 1891, p 22.

71 *Minutes*, NSW Legislative Council, 14 June 1910, pp 2-5 (death of King Edward VII); 18 February 1936, pp 70-71 (death of King George V); 15 December 1936, p 78 (abdication of King Edward VIII); 27 February 1952, pp 226-227 (death of King George VI).

72 See, for example, *Minutes,* NSW Legislative Council, 7 September 1859, p 9.

73 *Minutes,* NSW Legislative Council, 30 August 1921, p 10.

74 Section 21(1) of the *Constitution Act* as inserted by the *Constitution Amendment (Legislative Council) Act 1932* (No. 2 of 1933). Section 21(1) became section 22G(1) and (2) in 1978.

75 *Minutes,* NSW Legislative Council, 8 September 1932, p 15.

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

77 See, for example, *Minutes,* NSW Legislative Council, 8 September 1932, p 15; 13 September 1932, p 20 (Hon Wilson Moses).

78 The *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978* introduced direct election.

79 *Minutes,* NSW Legislative Council, 24 April 1934, pp 3-4 and p 5.

SO 8A, adopted in 1946[80] with the principal purpose of providing for the election of the President when a vacancy occurred, also provided that where such a vacancy arose during a session any new members were to be sworn before commissioners appointed by the Governor before the President was chosen in accordance with section 42 of the *Constitution Further Amendment (Legislative Council Elections) Act 1932-1937*. Where SO 8A was applied, new members were sworn before a minister or one of two other members of the House usually including the Chairman of Committees who had been specially commissioned by the Governor to administer the oath.[81]

Standing order 3 was amended and new SO 3A was adopted on 21 November 1985.[82] The new provisions were recommended by the Standing Orders Committee in its report tabled on 20 November 1985. New SO 3A, which was incorporated into SO 6 in 2004, provided for the swearing in of members elected at a periodic election and included a provision for the Clerk to announce the name or names of the commissioner or commissioners appointed by the Governor for swearing members and for the Clerk to read the commission. The amendment to SO 3, now in SO 10, was consequential on the adoption of SO 3A and provided for the swearing in of members other than by commissioners on the first sitting day after an election, provisions that had not been required prior to reconstitution in 1978.

As well as the roll of the House, the Clerk keeps a register of members in which the details of each member's term of service is recorded. The register of members was provided for in standing order 2 of 1856 which read:

> A Register of the Members of this Council shall be kept by the Clerk, in which shall be entered the name of each Member summoned, the date of the Writ of Summons, the date of his taking his seat, and, on his ceasing to be a Member, the date and cause thereof.

SO 2 was renumbered SO 3 in 1870 and readopted in similar terms as SO 26 in 1895. The 1895 standing order was amended in 1934 to provide that 'A list of the Members for the time being, prepared from the Register by the Clerk, and signed by the President, shall be at all times upon the Table'.[83]

Although there is no provision in the current standing orders requiring the Clerk to keep a register, the practice has continued. (For further information about the roll and the register see SO 61).

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80 *Minutes*, NSW Legislative Council, 30 April 1946, pp 140-141.

81 See, for example, *Minutes*, NSW Legislative Council, 23 April 1964, pp 451-453; 23 April 1970, pp 301-303.

82 *Minutes,* NSW Legislative Council, 20 November 1985, pp 910-914.

83 *Minutes,* NSW Legislative Council, 31 July 1934, p 94.

CHAPTER 3

OFFICE OF THE PRESIDENT

11. TERM OF OFFICE

The office of President becomes vacant:

(a) immediately before the House assembles for the dispatch of business at its first meeting following a periodic Council election,

(b) if the President ceases to be a member of the House,

(c) if the President is removed from office by a vote of the House, or

(d) if the President resigns in writing addressed to the Governor.

Development summary		
2003	Sessional order 11	Term of office
2004	Standing order 11	Term of office

SO 11 provides for the office of President to become vacant in the same circumstances as were prescribed by section 22G(3) of the *Constitution Act 1902* at the time the standing order was adopted. Prior to this there were no rules regarding the term of office.

In 2014, section 22G(3) of the *Constitution Act 1902* was amended as a consequence of the insertion of section 22G(6A) which provides that if the business of the Legislative Council is suspended by the dissolution or expiry of the Legislative Assembly, the President and the Deputy President continue in those offices until the Legislative Council first meets after the periodic Council election.

While the Council is not competent to meet and conduct business following the expiry of the Assembly, administrative and staffing issues often require action by the President. The extension of the President's term in the period following the expiry of the Parliament was intended to ensure that any administrative and staffing issues which might arise could still be attended to. It also addressed an anomaly under the Act as it then stood whereby the Speaker remained in office following the expiry of his or her term of service as a member until a new Speaker was elected in the new Parliament but the office of the President automatically became vacant when the incumbent's term of service expired.

If the President ceases to be a member of the Council by resigning as a member, being disqualified from Parliament or being expelled from the House, the office of President becomes vacant under section 22G(3)(a) of the *Constitution Act 1902* and SO 11(b).

Operation

Under SO 11, the office of the President becomes vacant when one of four prescribed circumstances arises.

Under SO 11(a), the President ceases to hold office immediately before the House assembles for the dispatch of business at its first meeting following a periodic Council election. The President remains in office following the expiry of the Assembly until immediately before the Council meets in the new Parliament. At that point, the office of President becomes vacant under section 22G(3) of the *Constitution Act 1902* and SO 11(a).

Under SO 11(b), the President ceases to be President on ceasing to be a member of the House. Prior to the adoption of section 22G(6A) in 2014, when the President's term as a member expired, the office of President became vacant under section 22G(3)(a) of the *Constitution Act 1902*, as it then stood, and SO 11(b). In such cases the Council was without a President from the time of the expiry of the Assembly until the appointment of a successor in the new Parliament.[1] As a result of the 2014 amendment, the President continues to be the President until the Council assembles for the dispatch of business in the new Parliament under section 22G(3)(a) and 22G(6A) of the *Constitution Act 1902*.

Under SO 11(c), the President ceases to hold office if removed from office by a vote of the House. There have been two attempts to remove a President from office both by motion 'That the Honourable [name], President, be removed from such office'. On both occasions a contingent notice was moved to allow notice of motion on the Notice Paper to be called on forthwith.

SO 11(d) provides the fourth circumstance in which the office of the President becomes vacant, by the President resigning in writing addressed to the Governor. Since the Presidency became an elected office in 1934, two Presidents have resigned from the office. President Willis tendered his resignation to the Governor on Friday 26 June 1998 'with effect from 9 am on Monday 29 June 1998'.[2] On 24 November 2009, the Clerk informed the House that communication had been received from the Governor advising that President Primrose had tendered his resignation as President on 17 November 2009 'with immediate effect'.[3] Mr Primrose had resigned as a consequence of being appointed on 17 November 2009 by the Governor as a minister[4] and therefore could no longer be

1 For example, following the expiry of President Chadwick's term of service on 5 March 1999, the office of President remained vacant until President Burgmann was elected on 11 May 1999. Following the expiry of President Burgmann's term of service on 2 March 2007, the office remained vacant until President Primrose was elected on 8 May 2007.

2 *Minutes,* NSW Legislative Council, 29 June 1998, p 610.

3 *Minutes,* NSW Legislative Council, 24 November 2009, p 1531.

4 *Minutes,* NSW Legislative Council, 24 November 2009, pp 1533-1534.

recognised as the independent and impartial representative of the Council according to section 22G(1) of the *Constitution Act 1902*.

Background and development

When the first Council was established it consisted of a group of appointed advisors presided over by the Governor. However, with the introduction of elections for a part of its membership in 1842 an elected Speakership of the Council was established. The Council was required to elect a Speaker before proceeding to the dispatch of any other business and whenever the place of Speaker became vacant by 'death, resignation, or removal of the Speaker'[5] and 'after any dissolution or other termination of the Legislation Council'.[6] The first Speaker, the Hon Alexander Macleay, resigned in 1846 by announcing his retirement to the House. His successor, the Hon Charles Nicholson, was elected the same day and was re-elected as Speaker at the commencement of the next two Councils and remained in office until 29 February 1856 when the Council was dissolved prior to the first meeting of the bicameral Parliament.[7]

In 1856, the Council was reconstituted as a fully appointed House, and the Speaker of the Council was replaced by a President. Section 7 of the *Constitution Act 1855* empowered the Governor to appoint a member of the Council to be President 'from time to time' and to 'remove him and appoint another in his stead'. Similarly, section 21(1) of the *Constitution Act 1902* provided for the Governor to appoint a member of the Council to be President. In practice, members of the Council were appointed for life at this time and Presidents remained in office until they resigned or died.

In 1933, with the reconstitution of the Council as an indirectly elected House and the introduction of fixed 12-year terms for its members, the Presidency, too, became an elected office. Section 21(1) of the *Constitution Act 1902* provided that the President was to be elected by the Council before the House proceeded to the dispatch of business and as often as the office became vacant. It also provided that the President was to cease holding office on ceasing to be a member of the Council, could be removed from office by vote of the House and could resign in writing to the Governor. From then on, most Presidents remained in office until they ceased being a member due to the expiry of their term of service.

In 1978, the Council was reconstituted as a popularly elected House of members serving three terms of the Assembly (two terms from 1991). These reforms resulted in the replacement of section 21(1) of the *Constitution Act 1902* with two new provisions concerning the President's term. Section 22G(1) provided for the Council to elect a President before proceeding to the dispatch of any other business after the 'first appointed day' (the day for the return of the writ for the first periodic Council election

5 SO 2 adopted in 1843; *Australian Constitutions Act (No. 1) 1842*, 5 & 6 Vic, c 76 (Imp), section 23.

6 SO 1 adopted in 1843.

7 *Votes and Proceedings of the Legislative Council*, 19 May 1846, p 11; 15 May 1849, p 1; 14 October 1851, p 1; *Parliamentary Record,* Part 10, p 1; *NSW Government Gazette,* vol 1, no. 36/1856, 29 February 1856, p 740, 'Proclamation'.

held on 7 October 1978) and whenever the office became vacant. Section 22G(2) provided for the President to cease holding office in the same circumstances as had been provided for in 1933.

As the President could remain in office until ceasing to be a member on the expiry of the term of service it was common for the term of the President to extend across multiple Parliaments. However, in 1991, following two attempts to remove the then President from office by vote of the House (see below), section 22G(1) of the *Constitution Act 1902* was amended to require the Council to elect a President at its first meeting following every periodic Council election and at any other time when the office becomes vacant. At the same time section 22G(2) was amended to include a requirement for the President to cease holding office immediately before the Council assembles for the dispatch of business after a periodic Council election.

The first attempt to remove the President, an Opposition member, by vote occurred in 1988, on the second sitting day of the 49th Parliament. The House first agreed to a motion on contingent notice by the Leader of the Government, Mr Pickering, for a notice of motion on the Notice Paper concerning the office of President to proceed forthwith. Mr Pickering then moved that the then President, the Hon John Johnson, whose term as a member was not due to expire until the end of the 50th Parliament, be removed from such office. In support of the motion Mr Pickering argued that there was no convention that the President had tenure for the term of his or her parliamentary life barring incapacity or misconduct and that cases where Presidents had remained in office following a change of government had been due to the numbers in the House at the time rather than any convention regarding the office. Ultimately an Opposition amendment to omit all words after 'That' and insert instead an expression of respect for the President and the impartial manner in which he discharged his duties was agreed to on division with crossbench support. [8]

In 1991, on the second sitting day of the 50th Parliament, the House again agreed to a motion on contingent notice by Mr Pickering giving precedence to a motion concerning the office of the President, following which Mr Pickering again moved a motion to remove the same President from office. The new Leader of the Opposition, Mr Egan, moved an amendment expressing support for the President in the same terms as had been moved in 1988, arguing that the Government's motion would have had the effect of diminishing the impartiality and independence of the Presidency as the office would be reopened for election whenever the numbers changed in the House.[9] In this instance, however, the Minister for Health, Mr Hannaford, moved an amendment to the Opposition amendment to add: 'but that notwithstanding the above, he be removed from such office to allow the House to elect a new President following the recent general election'. Each of the amendments was agreed to on division and the motion as amended was carried on a further division in which two Crossbench members voted

8 *Hansard*, NSW Legislative Council, 28 April 1988, pp 76-81; *Minutes*, NSW Legislative Council, 28 April 1988, pp 22-23.

9 *Hansard*, NSW Legislative Council, 3 July 1991, pp 102-103.

with the Government. The former President then took a seat in the chamber, the Acting Clerk announced that a vacancy in the office of the President had occurred and an election to fill the vacancy was held. The former President was among the nominated candidates but a Government member, the Hon Max Willis MLC, was elected instead.[10]

SO 11 adopted in 2004 provides for the office of President to become vacant in the same circumstances as were prescribed by section 22G(3) of the *Constitution Act 1902* at the time the standing order was adopted. Prior to the adoption of SO 11 there were no standing orders providing for the term of the President.

In 2014, section 22G(3) of the *Constitution Act 1902* was amended as a consequence of the insertion of section 22G(6)(A), as outlined above, to provide that where the President's term of service as a member expires the President continues to be the President, though no longer a member of the House, until the Council first assembles for the dispatch of business following the periodic Council election.

12. ELECTION OF PRESIDENT

(1) Whenever the office of the President becomes vacant the Clerk will act as Chair of the House for the election of the President, and will have the powers of the President under the standing orders while acting.

(2) A member, addressing the Clerk, will propose to the House as President a member then present, and move that the member take the Chair of the House as President. The speech of the member proposing the motion and of any other member may not exceed 15 minutes.

(3) If only one member is proposed as President, the member proposed is declared elected without any question being put. The newly elected President will then express a sense of the honour proposed to be conferred on them, and will be conducted to the Chair.

(4) If 2 or more members are proposed as President, a motion will be made regarding each such member, that the member take the Chair of the House as President, and each member so proposed will express a sense of the honour proposed to be conferred on them, and may address the House.

Development summary		
1946	Standing order 8A	Vacancy in the Office of President
2003	Sessional order 12	Election of President
2004	Standing order 12	Election of President

10 *Minutes*, NSW Legislative Council, 3 July 1991, pp 32-35.

The Legislative Council chooses one of its members to be its President.[11] SO 11 and sections 22G(3) and 22G(6A) of the *Constitution Act 1902* provide for the term of office of the President and the circumstances in which the office becomes vacant. Standing order 12 provides the procedures for election of the President. Prior to the adoption of SOs 12 and 13, the Senate procedure for electing the President had applied to the election of the President in the Council by way of section 22G(4) of the *Constitution Act 1902*.

Operation

Standing order 12 is drafted in similar terms to Senate standing order 6, under which the President was elected in the Council between 1991 and the adoption of SO 12 in 2003.

Whenever the office of the President becomes vacant, the Clerk will act as Chair of the House for the election of the President, and will have the powers of the President under the standing orders while acting.

Under the current procedure, the Clerk has left the chair at the suggestion of the Leader of the Government,[12] made a statement requesting the media to respect the privacy of members during the ballot,[13] and determined a point of order after the doors were locked for the conduct of the ballot.[14]

Under SO 12(2), a member addresses the Clerk and proposes to the House a member as President and moves that the member take the chair of the House as President.[15]

The speech of the member proposing the motion and of any other member may not exceed 15 minutes. The extent of debate on the motion has varied. In past cases, the mover of each motion usually gave a short speech in support of the nominated candidate. In the election held in 1995 another member also gave a speech after purporting to 'second' the motion.[16] In 1998, after the speech by the mover of the first motion, the former President gave a speech in which he referred to the events which had led to his resignation the

11 Some other jurisdictions draw their presiding officer from outside the Parliament. For example, in the Solomon Islands the Speaker is not a member of Parliament: Standing Orders of the National Parliament of Solomon Islands, SO 5(1); *Constitution of Solomon Islands*, Schedule, sections 50(c) and 64(1).

12 *Minutes,* NSW Legislative Council, 29 June 1998, p 611; Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 241, n 71.

13 *Hansard*, 29 June 1998, p 6716; 11 May 1999, p 4; 29 April 2003, p 4.

14 *Hansard*, 29 June 1998, pp 6716-6717.

15 SO 12(2) requires that 'a member then present' be proposed as President. Under section 22G(3)(a) and (6A) of the *Constitution Act 1902,* the President ceases to hold office on ceasing to be a member of the Council or when the Council first assembles for the dispatch of business following a periodic Council election.

16 *Hansard*, NSW Legislative Council, 2 May 1995, p 4 (RTM Bull, Deputy Leader of the Opposition).

previous week.[17] When more than one member was proposed as President, debate ensued after each motion was moved.[18]

In the first election held under SO 12, there was no debate apart from the addresses by the candidates.[19] In the next election the second motion was debated in the form of a speech by the mover[20] and in the most recent elections there was again no debate.[21]

Consistent with former provisions for the election of the President, SO 12 requires that a member being proposed as President must be then present. There is no record of a member being proposed who was not then present.[22] Although no record was found of a member objecting to being proposed as President, in 1946 a member proposed as Chairman of Committees asked that his name be withdrawn.[23] Following the adoption of the Senate procedure for electing the President, the Deputy Clerk advised in writing[24] that the practice in the Senate adhered to the principle that a member has the inherent right to refuse a nomination and that if a nominee refused the nomination the motion would lapse. The Deputy Clerk also noted a precedent in the House of Representatives in 1909 where the nominee had asked that the member who had proposed him withdraw his nomination and the mover had then withdrawn the motion by leave.[25]

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17 *Hansard*, NSW Legislative Council, 29 June 1998, p 6714. The former President, Mr Willis, went on to be nominated as a candidate in the election to fill the vacancy caused by his own resignation but was unsuccessful in the ballot.

18 *Minutes*, NSW Legislative Council, 29 June 1998, p 611; *Minutes,* NSW Legislative Council, 11 May 1999, p 6; 29 April 2003, p 7. In 2003, only the final motion was debated in the form of a speech by the mover: *Hansard*, NSW Legislative Council, 29 April 2003, pp 3-4.

19 *Minutes*, NSW Legislative Council, 8 May 2007, p 6; *Hansard*, NSW Legislative Council, 8 May 2007, p 3.

20 *Minutes*, NSW Legislative Council, 24 November 2009, p 1531; *Hansard*, NSW Legislative Council, 24 November 2009, pp 19633-19634.

21 *Minutes*, NSW Legislative Council, 3 May 2011, p 6; 5 May 2015, p 6.

22 There have been occasions on which the Chair of Committees was nominated by motion in their absence. See, *Minutes*, NSW Legislative Council, 24 July 1912, p 11*; Hansard,* 25 July 1912, p 73; *Minutes*, NSW Legislative Council, 28 March 1968, pp 17and 23; *Hansard*, NSW Legislative Council, 28 March 1968, pp 125-126. On 28 March 1968, the member moving the motion to appoint an absent member as Chair stated that he had a letter from the member intimating his preparedness to accept the nomination. However, the House ultimately agreed to a motion proposing another member as Chair.

23 *Hansard*, NSW Legislative Council, 30 April 1946, pp 3655-3656.

24 Correspondence from the Deputy Clerk to the Opposition Whip, 'Nomination of candidates for election of President in the Legislative Council', 5 October 1995.

25 During the period when the statutory rules for the election of the President were in force the Clerk sought advice from the Crown Solicitor as to whether a member could refuse consent to nomination. The Crown Solicitor advised that if a member objected to his nomination he should, by addressing himself to the Clerk, make his objection known before anyone had the opportunity of seconding the nomination. If despite this objection the nomination was seconded the member would have to abide the result and, if chosen as President and still of the same mind, would need to resign by writing to the Governor: Crown Solicitor, 'Election of President of the Legislative Council', 4 August 1966, p 4.

If only one member is proposed as President, the member proposed is declared elected without any question being put. The newly elected President then expresses a sense of the honour proposed to be conferred on them.

If more than one member is proposed as President, a motion is moved in regard to each member, as provided under SO 12(2). Under the standing order, each member so proposed is required to express a sense of the honour proposed to be conferred on them but in practice the candidates 'submit themselves to the House' in line with longstanding practice.[26]

Unlike a non-contested election, when more than one member is proposed as President each candidate may also address the House, following which a ballot is conducted under SO 13.

The elected President is conducted to the Chair, usually by two of the member's party colleagues.[27]

Background and development

Between 1843 and 1856, the election of a Speaker of the Council was modelled on the then existing model for the election of the Speaker of the House of Commons.[28] Under the provisions of SO 3, 4, 5 and 6, a member then present could be nominated, and if only one member was nominated no question was put and the proposer and seconder would 'place the member nominated in the Chair'. If more than one member was nominated the Clerk was to put the question on the name of the person first proposed, and if a majority of members present supported the nomination, the member was declared elected.[29] Under the *Australian Constitutions Act (No 1) 1842* the Governor could disallow the Council's choice of Speaker and upon such disallowance being signified to the Council the Council was to choose another Speaker.[30]

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26 *Minutes*, NSW Legislative Council, 8 May 2007, p 6; 24 November 2009, p 1531. During the period when the Senate procedure was in force before the adoption of SO 12, practice varied. In 1998, the *Minutes* recorded all four candidates as expressing a sense of the honour to be conferred while *Hansard* recorded only one as doing so: *Minutes*, NSW Legislative Council, 29 June 1998, p 611; *Hansard*, NSW Legislative Council, 29 June 1998, p 6716. In 1999, the *Minutes* recorded all three candidates as expressing a sense of the honour to be conferred but this was not reflected in *Hansard*: *Minutes*, NSW Legislative Council, 11 May 1999, p 6; *Hansard*, NSW Legislative Council, 11 May 1999, pp 3-4. In 2003, neither the *Minutes* nor *Hansard* recorded any of the candidates as expressing a sense of the honour to be conferred: *Minutes*, NSW Legislative Council, 29 April 2003, p 7; *Hansard*, NSW Legislative Council 29 April 2003, p 4. In each election the candidates 'submitted themselves to the House'.

27 This reflects the tradition in the House of Commons where the Speaker-elect is escorted as if unwilling to the chair. However, the relevance of this tradition to Australian parliaments has been questioned: see Harry Evans, 'The traditional, the quaint and the useful: pitfalls of reforming parliamentary procedures', in *Papers on Parliament*, Number 52, *Harry Evans: Selected Writings* (Department of the Senate, December 2009), p 148.

28 See Thomas Erskine May Esquire, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Charles Knight & Co, 1st ed, 1844), pp 136-137.

29 See, for example, *Votes and Proceedings of the Legislative Council*, 1 August 1843, p 1; 15 May 1849, p 1.

30 5 & 6 Vic, c 76, section 23.

With the establishment of responsible government and a bicameral Parliament in 1856, the Speaker of the Council was replaced by a President. From 1856 until 1933 the President was appointed by the Governor, as were all members of the Council. Accordingly, new standing orders adopted in 1856 and 1895 did not refer to the President's appointment.

With the introduction of indirect elections for the Council in 1933, the Presidency, too, became an elected office.[31] The rules for the election of the President were first prescribed in section 42 of the *Constitution Further Amendment (Legislative Council Elections) Act 1932 (1933 No. 5*).

The standing orders were not amended at that time to provide additional procedures for electing the President. Under the statutory rules, the Clerk acted as Chair and motions proposing a member to be President were to be seconded. If only one member was nominated, that member was called to the chair, expressed his sense of the honour to be conferred and submitted himself to the House, and on again being called was conducted to the chair by the mover and the seconder of the motion.[32] If two or more members were nominated, each member addressed themselves to the House, the Clerk put the question on the first motion and if that motion was carried the member was conducted to the chair.[33] If the question on the first motion was negative, or the numbers were equal, the Clerk put the question on each successive motion until a majority was recorded in favour of one of the candidates. When acting as the Chair during the election of the President, the Clerk followed the practice of acknowledging members by standing up, pointing to the member and then sitting down, rather than calling the member by name.[34]

However, in 1946 a standing order was adopted for the swearing in of members which provided that whenever the office of President became vacant the Clerk was to report the vacancy to the House at the next sitting and referred to the statutory rules for the election of the President.[35] Under SO 8A, where a vacancy in the office of President arose during a session any new members were to be sworn before commissioners appointed by the Governor before the President was chosen, in accordance with section 42 of the *Constitution Further Amendment (Legislative Council Elections) Act 1932-1937*. Where SO 8A was applied, new members were sworn before a minister and one or two other

31 Section 21(1) of the *Constitution Act 1902* as inserted by the *Constitution Amendment (Legislative Council) Act 1932* (No. 2 of 1933). Section 21(1) became section 22G(1) and (2) in 1978.

32 See, for example, *Minutes*, NSW Legislative Council, 30 April 1946, pp 168-169 (President Farrar); 18 August 1952, pp 4-5 (President Dickson); 23 April 1964, p 453 (President Dickson); 9 August 1966, p 4 (President Budd); 23 April 1970, p 303 (President Budd); 7 November 1978, p 5 (President Johnson); 1 May 1984, p 7 (President Johnson).

33 *Minutes*, NSW Legislative Council, 24 April 1934, p 5 (President Peden); 3 July 1991, pp 34-35 (President Willis).

34 The minutes recorded this practice with respect to the first member who spoke, but it is likely the same practice was followed by the Clerk when acknowledging each member who sought to speak.

35 *Minutes*, NSW Legislative Council, 3 April 1946, pp 140-141.

members of the House, usually including the Chairman of Committees who had been specially commissioned by the Governor to administer the oath.[36]

During debate on the motion for adoption of SO 8A, it was stated that the provision was necessary to address the impending situation whereby, on 22 April 1946, the terms of service of the President, the Hon Sir John Beverley Peden, and the Chair of Committees would expire under section 17F(3) of the *Constitution Act 1902* and there would be no presiding officer to take their place. In the absence of the provision of the proposed SO 8A, the only option was for the Parliament to be prorogued and a new session commenced by commissioners with powers similar to those that had been reposed in the commission appointed to open the first session of the reconstituted Legislative Council in 1934.[37]

The terms of SO 8A were similar to those of section 40 of the *Constitution Further Amendment (Legislative Council Elections) Act 1933,* which was a temporary measure applying to the swearing in of newly elected members and the election of the first President after reconstitution. Section 40 was based on standing orders of the Legislative Assembly under which, after an election, members were to be sworn by commissioners prior to that House commencing to elect its Speaker.

The rules for the election of the President prescribed in section 42 of the *Constitution Further Amendment (Legislative Council Elections) Act 1932 (1933 No. 5*) were repealed in 1978 and substantially re-enacted in clause 11 of Schedule 4 of the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*. In 1985, standing order 8A was amended to provide: 'The President shall then be chosen in accordance with the provisions of Schedule 4 to the Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978'.[38]

In 1991, the statutory rules for the election of the President were repealed and a new procedure was established by section 22G(2A) of the *Constitution Act 1902*, introducing a secret ballot for a contested election for the President rather than by open voting or division.

This provision[39] required the President to be chosen in accordance with the procedure for choosing the President of the Senate until standing rules and orders of the Legislative Council otherwise provided. Under the Senate procedure, the Clerk acts as Chair and

36 See, for example, *Minutes*, NSW Legislative Council, 23 April 1964, pp 451-453; 23 April 1970, pp 301-303.

37 The situation arose as President Peden, who had been an appointed member and President prior to reconstitution, had been elected to the reconstituted Council for a period of 12 years from 23 April 1934 and on 24 April 1934 became the first elected President of the Council. Under ss 17D and 17F of the *Constitution Amendment (Legislative Council) Act 1932* (No. 2 of 1933), members elected for 12 years from 23 April 1934 would cease to be members on 22 April 1946, and under s 21 of the Act, the President would cease to hold office at the time he ceased to be a member.

38 *Minutes*, NSW Legislative Council, 20 November 1985, pp 910-914; 21 November 1985, pp 933-936; 29 November 1985, p 1052.

39 Section 22G(2A) was renumbered section 22G(4) in 1992.

has the 'powers of the President under the standing orders'.[40] There is no requirement for motions to be seconded.[41] Where there is only one nomination the candidate is called to the chair without a question put, expresses a sense of the honour to be conferred and is conducted to the chair by the senator or senators who proposed the candidate.[42] Where there is more than one nomination, Senate SO 6(4) requires that each candidate is to express a sense of the honour to be conferred and may address the Senate, the address usually consisting of the candidate submitting to the will of the Senate.[43] Any debate does not occur until all motions have been moved.[44]A ballot is then held to decide the outcome of the election, following which the successful candidate is conducted to the chair. [45]

SO 12 adopted in 2003 varies slightly from the Senate standing order. While the Senate standing order provides for a single nominee to be 'called' by the Senate to the chair, SO 12 provides for the nominee to be 'declared elected' which is consistent with the language of SO 13(2) concerning the outcome of a ballot.[46]

13. BALLOT

(1) When a ballot is required, the bells will be rung and the doors locked, as in a division.

(2) When 2 members have been proposed as President, ballot papers will be distributed by the Clerks to all members in their places. Members must write on the ballot paper the name of the candidate for whom they wish to

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40 Before the powers of the President were conferred on the Senate Clerk by an amendment to the Senate standing orders in 1934, the Clerk had followed the practice of mutely standing and pointing to a member who addressed him as had been the practice in the Council. With the amendment, the Clerk gained the right to call a senator by name in the same manner as the President 'allowing the "painful procedure" of pointing to be abandoned': Rosemary Laing, *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009), pp 60-63, SO 6 'Election of the President'.

41 An earlier requirement for seconding of motions generally was omitted from the Senate standing orders in 1981, although the practice of seconding nominees for President continued to be followed in the Senate as a courtesy: H Evans (ed), *Odgers' Australian Senate Practice* (Australian Government Publishing Service, Canberra, 7th ed, 1995), p 141.

42 *Odgers' Australian Senate Practice* (Royal Australian Institute of Public Administration (ACT Division) Canberra, 6th ed, 1991), p 176; 13th ed, 2012, p 141.

43 *Odgers' Australian Senate Practice*, 6th ed, 1991, p 176; 13th ed, 2012, p 141.

44 The 6th edition of *Odgers' Australian Senate Practice,* published in 1991, contemplated that motions could be debated in turn after being moved: p 176. However, the 7th edition, published in 1995, took the view that the time limit on debate imposed by SO 6(2) 'means that debate cannot occur until all nominations have been received, so that any senator speaking is able to refer to all nominations': p 141. Similarly, the 13th edition at p 141 states that 'debate cannot occur until all nominations have been received, so that any senator speaking is able to refer to all nominations'.

45 Senate SO 7 mandates a 'ballot' rather than a 'secret ballot', but the election is conducted by secret ballot: *Odgers' Australian Senate Practice*, 13th ed, p 142.

46 The practice of 'declaring' a sole candidate elected began during the period when the Senate procedure applied despite inconsistency with the terms of Senate SO 6: see, for example, *Minutes*, NSW Legislative Council, 2 May 1995, p 6. Hansard, however, has continued to record sole nominees being 'called' to the chair since the period of the statutory rules. See, for example, *Hansard,* NSW Legislative Council, 1 May 1984, p 4; 2 May 1995, p 2; 3 May 2011, p 3.

vote, and deposit it in the ballot box provided by the Clerk. The candidate who has the greater number of votes is to be declared elected President, and will be conducted to the Chair.

(3) When 2 or more members have been proposed, the votes will be similarly taken and the member who has the greatest number of votes will be the President, provided that member has also a majority of the votes of the members present.

(4) If no candidate has such a majority, the name of the candidate having the smallest number of votes will be withdrawn, and a fresh ballot will take place; and this will be done as often as necessary, until one candidate is elected as President by such a majority, and the member elected will be conducted to the Chair.

(5) If there is an equality of votes, the votes will be again taken, and if again there is an equality of votes, the Clerk will determine, by lot, which of the candidates, having the same number of votes will be withdrawn, as if the candidate had obtained the lesser number of votes.

Development summary		
2003	Sessional order 13	Ballot
2004	Stranding order 13	Ballot

Under SO 12 and 13, if more than one member is proposed as President, the President must be chosen by ballot. SO 13 sets out the procedures for the conduct of a ballot to elect the President.

While SO 13 does not expressly mandate a *secret* ballot, contested elections in the Council are conducted by secret ballot.

Operation

When two or more members are proposed as President under SO 12, the election is determined by a ballot conducted under SO 13. When a ballot is required, the bells are rung for five minutes and then the doors locked, as in a division.

Ballot papers are distributed by the Clerks to all members in their places. Members must write on the ballot paper the name of the candidate for whom they wish to vote. The Clerk demonstrates to members in the Chamber that the ballot boxes are empty, then locks the boxes before moving around the chamber allowing members in their places to deposit their ballot papers in the ballot boxes.[47]

When all members present have cast their vote, the Clerk asks the nominator of each candidate to act as a scrutineer during the counting of the votes. The ballot boxes are

47 In practice, the Clerk distributes ballot papers along one side of the chamber and collects those ballot papers in one ballot box, the Deputy Clerk similarly distributes and collects ballot papers on the other side of the chamber.

then opened in the chamber and the votes are counted by the Clerk witnessed by the scrutineers, usually the nominators of each candidate.[48]

The candidate who has the greater number of votes is declared elected President, provided that the member also has a majority of the votes of the members present.

If no candidate has such a majority, the name of the candidate having the smallest number of votes is withdrawn, and a fresh ballot is conducted. This will be repeated as often as necessary, until one candidate is elected by a majority.

If there is an equality of votes, the ballot is repeated and if there is again an equality of votes, the Clerk determines by lot, that is, by drawing a name out of a hat, to determine which of the candidates having the same number of votes will be withdrawn, as if the candidate had obtained the lesser number of votes.

The elected President is then conducted to the chair, as if unwilling, by their party colleagues, usually the mover and seconder. (See SO 14).

In each ballot held under SO 13 to date, a candidate has achieved the necessary majority at the first ballot and it has not been necessary to invoke the procedures for resolving stalemates or tied votes in SO 13(4) or (5).

Background and development

Between 1856 and 1933, the President was appointed by the Governor.

In 1933, statutory rules were adopted which provided for contested elections to be determined by voting on successive motions.[49] The Clerk was to put the first motion, and if that motion was carried the candidate was to be declared elected. If the question on the first motion was negatived or the numbers were equal, the Clerk was to put the question on each motion in turn until a majority was recorded in favour of one of the candidates.

No procedures were prescribed to deal with cases where a majority of votes was not achieved after all the questions had been put. Accordingly, in 1966 the Clerk sought advice from the Crown Solicitor in relation to an anticipated scenario where multiple candidates would be nominated but none would receive a majority. The Crown Solicitor advised that if there was no alternative, the Clerk would be justified in causing an adjournment of the House. On the resumption of the proceedings the Clerk could accept a suspension motion to enable nominations to be resubmitted and could also accept nominations which had not previously been moved.[50] In the event, however, the election proceeded with only a single nomination and the anticipated difficulties did not arise.

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48 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008) pp 199-200.

49 *Constitution Further Amendment (Legislative Council Elections) Act 1932* (1933 No. 5), section 42; clause 11 of Schedule 4 of the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*.

50 Crown Solicitor, advice to the Clerk of the Parliaments, 'Election of President of the Legislative Council', 4 August 1966, pp 4-5.

In 1991, the statutory rules for the election of the President were repealed and a new procedure for the election was introduced. Section 22G(2A) of *Constitution Act 1902*, renumbered section 22G(4) in 1992, provided that the President was to be chosen in accordance with the procedure for choosing the President of the Senate until the standing rules and orders of the Council otherwise provided. In the Senate, contested elections for the President are conducted by secret ballot rather than by open voting in division.[51]

The Senate provisions applied until the adoption of SOs 12 and 13 in 2003. SO 13 is in similar terms to Senate SO 7, the main difference being the inclusion of additional detail in SO 13(1) and (2) in line with SO 135 which concerns the conduct of ballots generally in the Council. A further difference concerns the nature of the majority which is required where only two candidates are proposed. Under Senate SO 7, the candidate with 'the greater number of votes' shall be President. Under SO 13(3) the successful candidate must obtain 'the greatest number of votes' as well as 'a majority of the votes of the members present'.

The Council conducted four elections in accordance with the Senate procedure between 1995 and 2003. The last three elections were contested and were decided by the use of the ballot procedure under Senate SO 7. Before each ballot, the bells were rung for five minutes and the doors locked in line with the Council's procedure for ballots for membership of select committees.[52] In each case, before the bells were rung, the Clerk made a statement requesting the media present in the chamber to respect the privacy of members during the conduct of the ballot and not focus their cameras closely on members while they were voting.[53]

In each case, the necessary majority was obtained at the first round of voting without the need for the deadlock procedures.[54] However, during the election of the President in 1998, after the doors had been locked, the Leader of the Government raised a point of order that the Opposition had not honoured an arrangement for pairs and suggested that the Clerk leave the chair until 8.00 pm. On the point of order, the Opposition argued that pairs are granted to prevent an imbalance when the House votes on policy matters and not when individual members are required to vote in a secret ballot. The Clerk ruled:

> The sessional orders of the House provide for the recording of pairs for members who are absent from divisions, but the standing orders do not officially recognise pairs; they provide that members must be present in the House to record their vote in a division. The bells have been rung and the doors have been locked,

51 Senate SO 7 mandates a 'ballot' rather than a 'secret ballot', but the election is conducted by secret ballot: *Odgers' Australian Senate Practice*, 13th ed, p 142.

52 SO 237 at that time provided that: 'Before the House proceeds to ballot for a select committee, the bells shall be rung as in a division'. SO 128 required that in the case of a division the bells were to be rung for five minutes following which the doors were to be locked.

53 *Hansard*, NSW Legislative Council, 29 June 1998, p 6716; 11 May 1999, p 4; 29 April 2003, p 4.

54 *Minutes*, NSW Legislative Council, 29 June 1998, p 611; 11 May 1999, p 6; 29 April 2003, p 7.

so I cannot now leave the chair; the House must proceed with the conduct of the ballot. When the ballot is completed and the doors are unlocked, I could entertain a suggestion that I leave the chair until a later hour.[55]

14. PRESENTATION TO GOVERNOR

(1) Having been conducted to the Chair, the member so elected will return acknowledgments to the House and assume the Chair.

(2) Members may congratulate the President, and a Minister will inform the House of the time at which the Governor will receive the House for the purpose of presenting their President.

Development summary		
2003	Sessional order 14	Presentation to Governor
2004	Standing order 14	Presentation to Governor

SO 14 codifies several longstanding traditions for the election of the President. The first is that the member elected as President is conducted to the chair by two or three of their party colleagues; the second is that the President acknowledges the honour of being elected; the third is that members congratulate the President; and the fourth is that the President is presented to the Governor.

Operation

It is a tradition that having been elected as President, a member is conducted to the chair, as if unwilling, by their party colleagues. This practice is said to be based on a Westminster tradition in which newly elected Speakers show a reluctance to take on the role due to the historic hazards of offending the monarch.[56] While these days obsolete, the practice continues in the Council.

Once on the dais, the President returns acknowledgements to the House and assumes the chair. In recent years, the acknowledgements have tended to be brief and usually include reference to the honour conferred and thanks for the confidence the House has reposed.

However, following the elections for the President in 2007 and 2009, the President spoke both before and after taking the chair. Before taking the chair, the President expressed a sense of the honour conferred and submitted to the House, repeating the formula recited on being nominated as a candidate. After taking the chair, the President expressed a consciousness of the honour conferred in being chosen as the House's independent and

55 *Hansard*, NSW Legislative Council, 29 June 1998, pp 6716-6717.

56 See Laing, *Annotated Standing Orders of the Australian Senate*, SO 8; See Harry Evans, 'The traditional, the quaint and the useful: pitfalls of reforming parliamentary procedures', *Papers on Parliament*, No. 52, *Harry Evans: Selected Writings* (Department of the Senate, December 2009), p 148.

impartial President and thanks for the confidence the House had reposed, and in 2007 also acknowledged the House was meeting on Eora land.[57]

Under SO 14(2), members may then congratulate the President. While senior members usually undertake this role, as outlined below, the role has fallen to different office holders at different times. Following the election of the President in 2007, a minister who was not the Vice-President of the Executive Council congratulated the President.[58]

Under SO 14(2) a minister will then inform the House of the time at which the Governor will receive the House for the purpose of presenting their President. SO 14 does not prescribe when the minister should inform the House, or when the House should most appropriately proceed to Government House.

In most cases, the minister has advised the House immediately after the election of the President of the time at which the Governor would receive the House. However, the minister has also announced immediately after the election that he *would* inform the House when he had ascertained when the Governor would receive the President and did not make the announcement until the following day,[59] a later day,[60] or later in proceedings.[61]

Most commonly, the minister has advised that the Governor would receive the House on the same day[62] or the day following the election of the President.[63]

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57 *Hansard*, NSW Legislative Council, 8 May 2007, pp 3-4; 24 November 2009, p 19634. The minutes, however, only recorded that acknowledgements had been made before taking the chair: *Minutes*, NSW Legislative Council, 8 May 2007, p 7; 24 November 2009, p 1532.

58 *Hansard*, NSW Legislative Council, 8 May 2007, p 4 (Hon John Della Bosca, Minister for Education and Training, Minister for Industrial Relations, Minister for the Central Coast, and Minister Assisting the Minister for Finance).

59 *Minutes*, NSW Legislative Council, 11 May 1999, p 7 (minister advised he would inform the House when he had ascertained the Governor would receive the House); 12 May 1999, p 39 (minister advised that the Governor would receive the House on 27 May 1999 at 5.15 pm); 29 April 2003, p 8 (minister advised he would inform the House when he had ascertained the Governor would receive the House); 30 April 2003, p 38 (minister advised that the Governor would receive the House on 7 May 2003 at 5.30 pm).

60 *Minutes,* NSW Legislative Council, 8 May 2007, p 8 (minister advised he would inform the House when he had ascertained that the Governor would receive the House); 25 September 2007, p 223 (minister advised the Governor would receive the House that day at 4.00 pm); 24 November 2009, p 1533 (minister advised he would inform the House when he had ascertained the Governor would receive the House); 1 December 2009, p 1589 (minister advised the Governor would receive the House on 2 December 2009 at 11.30 am.

61 *Minutes*, NSW Legislative Council, 2 May 1995, p 6; 3 May 2011, p 6. In these cases the minister made the announcement after the President had said the prayers.

62 *Minutes*, NSW Legislative Council, 9 August 1966, p 4; 23 April 1970, p 303; 2 May 1995, p 6; 3 May 2011, p 6.

63 *Minutes,* NSW Legislative Council, 7 November 1978, p 5 ; 8 November 1978, p 8; 1 May 1984, p 7; 2 May 1984, p 10; 29 June 1998, p 612; 30 June 1998, p 623.

In 2011 and 2015 on the President being elected following the periodic Council election, the President was presented to the Governor in the Jubilee Room at Parliament House rather than at Government House.

On return to the House, the President reports that 'in the name and on behalf of the House I laid claim to all its undoubted rights and privileges, particularly to freedom of speech in debate, to free access to Her Excellency when occasion should require, and asked that the most favourable construction should, on all occasions, be put upon its language and proceedings'. (See below for further discussion).

Background and development

As outlined under SO 12, the procedure for election of the Council's presiding officer has changed a number of times since 1843:

- between 1843 and 1856 the Speaker was elected by the Council
- between 1856 and 1933 the President was appointed by the Governor
- between 1934 and 1991 the President was elected under statutory rules
- between 1991 and 2003 the President was elected under the Senate procedure for electing the President
- in 2003 the Council adopted SO 12.

With each new provision for the election of the President there have been variations to the procedures which the House follows. These are described below.

The provision under SO 14(1) that the President be conducted to the chair has been observed in the Council since 1843.

The provision under SO 14(1) that the member elected to preside over the Council be required to make some form of acknowledgement to the House can also be observed since 1843, however the provision and practice has varied. Between 1843 and 1856 newly elected Speakers of the Council would make an acknowledgement to the House while 'standing on the upper step' before taking the chair,[64] in accordance with the practice of Speakers of the House of Commons.[65] Between 1856 and 1932, when Presidents were appointed by the Governor rather than elected, the usual practice was for the President to produce the commission or instrument appointing him without

64 *Sydney Morning Herald*, 2 August 1843, p 3 (the first Speaker returned thanks and gave an assurance that he would perform the duties of the office to the utmost of his abilities); *Votes and Proceedings of the Legislative Council*, 19 May 1846, p 5; 15 May 1849, p 1; 14 October 1851, p 1 (the next Speaker, who was elected to the office on three successive occasions, expressed thanks for the high honour the Council had been pleased to confer; acknowledgements; and a true sense of the honour conferred on him before taking the chair).

65 *Erskine May*, 1st ed, p 137.

making any acknowledgement.[66] On most occasions, the instrument of appointment would be read by the Clerk, although on one occasion the appointment was announced in a ministerial statement.[67] Between 1933 and 1991 the successful candidate 'standing on the step' was required to 'return his acknowledgements to the House for the honour conferred upon him and take the Chair'.[68] The Senate procedure followed from 1991 to 2003 provided for the President to 'return acknowledgements to the Senate and assume the Chair', as does current SO 14.

Once elected, members congratulate the President, a tradition which commenced in the colonial Council and is now contained in SO 14(2). Following the second election for a Speaker of the Council in 1846, the Speaker was congratulated on his elevation to so highly important and honourable an office.[69] After the next two elections, in 1849 and 1851, the Colonial Secretary congratulated the Speaker on taking the Chair.[70] Between 1856 and 1933 when Presidents were appointed by the Governor, new Presidents were not always congratulated in the House. The statutory rules for the election of the President in force from 1933 to 1991 did not refer to the issue of congratulations nor did the then standing orders. However, the President would be congratulated by the Vice-President of the Executive Council and in some cases by other members on returning from being presented to the Governor,[71] or on taking the chair after his election[72] or on taking the chair and on returning from the Governor.[73] The President would then thank members for their remarks. Following the adoption of the Senate procedure in the Council, the President has been congratulated on taking the chair by the Vice-President of the Executive Council or by 'Honourable members'[74] and the President would then acknowledge members' remarks. As many as 17 members congratulated the first female President of the Legislative Council following her election in 1998.[75]

Under SO 14(2), following the President assuming the chair, a minister informs the House of the time at which the Governor will receive the House for the purpose of presenting their President. This procedure has been observed since the Colonial Council, with the exception of the years between 1856 and 1933 when the President was appointed by

66 *Minutes*, NSW Legislative Council, 22 May 1856, p 1; 29 January 1857 p 52; 3 September 1861, p 1; 9 September 1873, p 1; 27 January 1892, p 201.

67 *Minutes*, NSW Legislative Council, 12 February 1929, p 165.

68 *Constitution Further Amendment (Legislative Council Elections) Act 1932* (No 5, 1933), section 42(6); *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*, Sch 4, clause 11(8). In practice, the minutes would record the President standing on the 'upper' step, as had occurred during the period of the Speakership.

69 *Votes and Proceedings of the Legislative Council*, 19 May 1846, p 1.

70 *Votes and Proceedings of the Legislative Council*, 15 May 1849, p 2; 14 October 1851, p 1.

71 *Minutes*, NSW Legislative Council, 30 April 1946, p 169; 18 August 1952, p 5; 23 April 1964, p 453; 9 August 1966, p 4; 8 November 1978, p 8; 2 May 1984, p 10.

72 *Minutes*, NSW Legislative Council, 24 April 1934, p 5; 23 April 1970, p 303.

73 *Minutes*, NSW Legislative Council, 3 July 1991, pp 35 and 46.

74 See, for example, *Minutes*, NSW Legislative Council, 2 May 1995, p 6; 29 June 1998, p 612; 11 May 1999, p 6; 29 April 2003, p 8.

75 *Hansard*, NSW Legislative Council, 29 June 1998, pp 6717-6720.

the Governor, even though there were no standing orders providing for the procedures following the election until the adoption of SO 14 in 2003.

Senate SO 8 also includes two additional provisions not adopted in practice, or in Council standing order 14. The first is that it prescribes that once the minister has informed the Senate of the time at which the Governor-General will receive the Senate for the purpose of presenting their President, the sitting of the Senate 'shall then be suspended or adjourned until that time, unless the Governor-General receives the Senate at once'. The second is that before the Senate proceeds to any business the President, accompanied by senators, *shall* be presented to the Governor-General.[76]

The principle embodied in Senate SO 8, that the President should be presented to the Governor-General immediately after the election, or at least at the earliest opportunity, has not always been followed in the Council. While the time for the Governor to receive the House has most often been the same day, or the following day, there have been occasions on which the President has been presented to the Governor two weeks after his election[77], three sitting days after his election[78] and after a three-month adjournment of the House.[79] In addition, the House has commenced consideration of business following the President's election and prior to the President's presentation to the Governor. For example:

- when the time for the presentation was on a future day the House has continued to sit rather than adjourning or being suspended[80]
- when it was the next day, the House has agreed to a motion for a special adjournment for the House to meet 15 minutes prior to the time set for presentation of the President and on the next sitting day the House has met according to adjournment, prayers were read, and then the House proceeded to Government House[81]
- when the time came for members to proceed to the Governor, business was interrupted[82] or the House adjourned.[83]

As noted earlier, following the 2011 and 2015 elections, the newly elected President was presented to the Governor in the Jubilee Room at Parliament House, rather than at Government House. On these occasions, on taking the chair the President read the prayers and then the minister informed the House that the Governor would receive the

76 Senate SO 8.
77 See *Minutes*, NSW Legislative Council, 11 May 1999, p 7; 12 May 1999, p 39; 1 June 1999, p 110.
78 *Minutes*, NSW Legislative Council, 29 April 2003, p 8; 30 April 2003, p 38; 8 May 2003, p 72.
79 *Minutes,* NSW Legislative Council, 8 May 2007, pp 6-7; 27 September 2007, p 253.
80 *Minutes*, NSW Legislative Council, 29 June 1998, pp 612-618; 30 June 1998, pp 619-623; 11 May 1999, p 7; 12 May 1999, p 39; 1 June 1999, p 110.
81 *Minutes*, NSW Legislative Council, 7 November 1978, p 5; 8 November 1978, pp 7-8; 1 May 1984, pp 7-8; 2 May 1984, pp 9-10.
82 *Minutes*, NSW Legislative Council, 2 May 1995, p 6; 30 June 1998, p 623.
83 See, for example, *Minutes*, NSW Legislative Council, 27 May 1999, p 108; 1 June 1999, p 110; 7 May 2003, p 69.

Legislative Council to present their President to the Governor in the Jubilee Room some short time later. The House proceeded to conduct business of a formal nature until it was time for the President to leave the chair in order to be presented to the Governor.[84] This appears likely to be the future practice for the presentation of the President to the Governor following an election.

Claiming the undoubted rights and privileges

Following the first election for a President of the Council in 1934, the President reported that, on being presented to the Governor 'he had then, on behalf of the House, had the honor to lay claim to its undoubted rights and privileges and prayed that the most favourable construction be put upon all its proceedings, to which the Governor readily assented'.[85] A similar claim had been laid by the last Speaker of the Council in 1851[86] which reflected the symbolic claim laid by new Speakers of the House of Commons.[87] At the commencement of responsible government, the newly elected Speaker of the Assembly, having been presented to the Governor, informed that House that he had laid claim to 'all the undoubted rights and privileges of the Assembly'. The President, being appointed by the Governor between 1856 and 1934, was not presented, and did not lay such claim. However, on reconstitution of the Council in 1934, following which the President was to be elected, the President did claim on behalf of the House the 'usual rights and privileges' when presented to the Governor.[88] However, subsequent Presidents did not claim such rights on behalf of the House until 2003. In that year, the new President reported that on being presented to the Governor:

> ... she had then, in the name and on behalf of the House, laid claim to all their undoubted rights and privileges, particularly to freedom of speech in debate, to free access to Her Excellency when occasion should require, and asked that the most favourable construction should, on all occasions, be put upon their language and proceedings, to all of which the Governor readily assented.[89]

The same claim has been laid by each new President of the Council ever since.

There is no equivalent procedure in the Senate, where the presentation of the President to the Governor-General is considered 'essentially the formal introduction of one officer of the Commonwealth'. A draft of the forerunner to Senate SO 8(3) included reference

84 *Minutes*, NSW Legislative Council, 3 May 2011, p 10; 5 May 2015, p 12.

85 *Minutes*, NSW Legislative Council, 24 April 1934, p 6.

86 In 1851, on returning from being presented to the Governor, the Speaker reported to the House that 'he had, in their name and on their behalf, laid claim to all the rights and privileges properly pertaining to them, and that His Excellency the Governor-General had confirmed to them all such rights and privileges as full and amply as heretofore': *Votes and Proceedings of the Legislative Council*, 15 October 1851, p 1.

87 See, for example, Sir T Lonsdale Webster (ed), *A treatise on the Law, Privileges, Proceedings, and Usages of Parliament* (Butterworth and Co, 13th ed, 1924), p 156.

88 *Minutes,* NSW Legislative Council, 24 April 1934, p 6; *Hansard*, NSW Legislative Council, 24 April 1934, p 6.

89 *Minutes*, NSW Legislative Council, 8 May 2003, p 72.

to the President laying claim to the privileges of the Senate and praying for favourable construction, but the reference was later omitted as it was seen as involving claims for rights which the Crown cannot grant. In that regard, an early President of the Senate, President Baker, observed that the Houses of the federal Parliament have all the powers, immunities and privileges of the British House of Commons by virtue of section 49 of the Commonwealth Constitution and that 'it is under that section … that we are exempt from the law of libel and from arrest while attending Parliament'.[90]

90 Laing, *Annotated Standing Orders of the Australian Senate*, SO 8.

CHAPTER 4

DEPUTY PRESIDENT AND CHAIR OF COMMITTEES

15. ELECTION OF DEPUTY PRESIDENT

(1) At the commencement of the sittings following a periodic Council election, or when any vacancy occurs, the House is, by motion without notice, to elect a member to be Deputy President and Chair of Committees.

(2) The Deputy President and Chair of Committees will be elected in a similar manner as the President. However, the President will conduct the election, and where there is an equality of votes, will exercise a casting vote.

Development summary		
1870	Standing order 48	Appointment of Chairman of Committees
1895	Standing order 7 (a) and (b)	Appointment of Chairman of Committees
2003	Sessional order 15	Election of Deputy President
2004	Standing order 15	Election of Deputy President

Together, standing orders 15, 16, 17, 20, 21 and 22 prescribe the election and term of the Deputy President, the duty of the Deputy President, and the role of the Deputy President in the absence of the President.

Unlike the President, who was appointed by the Governor until 1934, the Chairman of Committees, now also known as the Deputy President, has always been elected by the Council. Until 2004, the standing orders provided for the election of the Chair of Committees to be by motion on notice. The current procedure is modelled on the election of the Deputy President of the Senate.

Operation

The election of the Deputy President is conducted in a manner similar to the election of the President under SO 12 except that the President conducts the election and has a casting vote if there is an equality of votes. Under SO 12, if there is only one candidate the member is declared elected without any question put but if the election is contested a ballot is held under SO 13. Candidates 'submit themselves to the House' after

being nominated, as is the practice with the election of the President, and members congratulate the elected member from their places.

In the first election held under SO 15, there were two nominations, the candidates submitted themselves to the House, the bells were rung for one minute by leave[1] and a ballot was held which resulted in a majority of 24:17.[2] A similar process was followed in the next election which was held later in the same Parliament to fill a vacancy in the office, except that the mover of the second motion gave a short speech immediately after moving his motion as provided under SO 12.[3] In 2011, by contrast, there was only one candidate who submitted herself to the House[4] and was declared elected without a question being put.

Background and development

In the first few years of responsible government, the Chairman of Committees was appointed at the beginning of every session by motion on notice.[5] From 1861, the practice was to appoint the Chairman by motion without notice.[6] However, SO 48 adopted in 1870[7] precluded the appointment of the Chairman without notice.

New standing orders adopted in 1895 included SO 7(a), (b) and (c). SO 7(a) and (b) formalised the practice of appointing the Chairman in every session and continued the requirement for notice.

In 1922, in the second session of the 26th Parliament, SO 7(a) was amended to provide for the Chairman to be appointed 'at the commencement of the first session of each Parliament' rather than at the commencement of each session, which was consistent with the practice in the Assembly.[8] In the next session, however, the President ruled that the new SO 7 would not become operative until the commencement of the following Parliament and that for the remainder of the 26th Parliament it would be necessary for the House to appoint a Chairman in every session under the old SO 7.[9] The House therefore continued to appoint a Chairman in each remaining session of that Parliament.[10]

In 1934, following the reconstitution of the Council to allow for the indirect election of its members, SO 7(a) was amended to provide for the election of the Chairman

1 SO 13(1) and SO 114(2) provide for the bells to be rung for five minutes when a ballot is required.
2 *Minutes*, NSW Legislative Council, 8 May 2007, p 7.
3 *Minutes*, NSW Legislative Council, 24 November 2009, p 1532; *Hansard*, NSW Legislative Council, 24 November 2009, pp 19633-19634.
4 *Minutes*, NSW Legislative Council, 3 May 2011, pp 6-7.
5 For example, *Minutes*, NSW Legislative Council, 4 June 1856, p 8; 12 August 1857, p 7.
6 New South Wales Legislative Council, *Consolidated Index to the Minutes of the Proceedings and Printed Papers*, 1856-1874, vol 1, p 176.
7 Proposed by the Standing Orders Committee as SO 49, adopted by the House as SO 48.
8 *Minutes*, NSW Legislative Council, 3 August 1922, p 36.
9 *Minutes*, NSW Legislative Council, 6 September 1923, pp 29-30; *Hansard*, NSW Legislative Council, 6 September 1923, p 697 (President Flowers).
10 *Minutes*, NSW Legislative Council, 12 September 1923, p 36 (3rd session); 2 July 1924, p 13 (4th session); 26 March 1925, p 18 (5th session).

'In the session in which this standing order is approved by the Governor, and thereafter in the first session of each Parliament'. This amendment was intended to allow the newly reconstituted Council to appoint its own Chairman rather than waiting until the start of the next Parliament to do so. In that regard, Mr Manning observed: 'Owing to the reconstitution of the Legislative Council, it becomes desirable to enable honourable Members to take charge of their own business, and the necessary machinery for that purpose is provided by the proposed amended standing order.'[11]

In 1946, the words 'In the session in which this standing order is approved by the Governor, and thereafter' in SO 7(a), having by then become redundant, were omitted.[12]

The provision for the Chair of Committees to be appointed by motion on notice caused, on some occasions, procedural complexities.

The motion to appoint the Chair was open to amendment. In 1884, a notice of motion was given to appoint Mr Jacob as Chairman and a contingent notice of motion was given to amend the question to appoint Mr Piddington instead.[13] However, on the day for which the notice was set down, the motion to appoint Mr Jacob was withdrawn and the contingent notice 'consequently … [fell] to the ground' and Mr Docker was appointed Chairman instead by motion without notice and by leave.[14]

On 2 May 1934, an amendment to the motion to appoint the Chairman was moved to replace the name of Mr Farrar with that of Mr Culbert but the amendment was negatived on division and the original question carried on the voices.[15] Similarly, on 12 March 1969 an amendment to the motion to appoint the Chairman to replace Mr McKay with Mr Wright was negatived on division and the original question carried on the voices.[16] By contrast, on 28 April 1988, a Government motion to appoint Mr Willis as Chairman was successfully amended on division by the Opposition to appoint Sir Adrian Solomons instead.[17]

On 30 April 1946, after a motion had been moved proposing Lieutenant-Colonel Steele as Chairman, Sir Norman Kater (Country Party) moved an amendment proposing Mr Archer (Labor). Mr Archer, however, stated that: 'I realise this is political chicanery on the part of the Hon Sir Norman Kater …' and asked that his name be withdrawn. The President ruled that as Mr Archer had asked that his name be withdrawn the amendment should be withdrawn, following which Sir Norman Kater withdrew his amendment.[18] The amendment was not recorded in the minutes.

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11 *Hansard*, NSW Legislative Council, 27 April 1934, p 54.

12 *Minutes*, NSW Legislative Council, 3 April 1946, pp 140-141.

13 *Journal of the Legislative Council,* 19 November 1884, p 6 ('Notices of Motions and Orders of the Day').

14 *Minutes*, NSW Legislative Council, 26 November 1884, p 8; *Hansard*, NSW Legislative Council, 26 November 1884, pp 141-142 (President Hay).

15 *Minutes*, NSW Legislative Council, 2 May 1934, p 19.

16 *Minutes*, NSW Legislative Council, 12 March 1969, p 386.

17 *Minutes*, NSW Legislative Council, 28 April 1988, pp 23-25.

18 *Hansard*, NSW Legislative Council, 30 April 1946, pp 3655-3656.

There were also incidents where two notices of motions proposing different members as Chair of Committees were given. In 1967, two notices of motion having been given proposing different candidates as Chairman, the President advised that with the consent of the House the subject of the motions would be submitted at one time which would obviate the need for a second debate on the same subject if the first motion was not carried and would allow the merits of the second candidate to be referred to which would otherwise be precluded if the first motion was carried. He further advised that at the conclusion of the debate the movers would be permitted to speak in reply if they desired and that the motions would be put in the order in which they appeared on the business paper. Following the President's statement, each motion was moved in turn, the first motion was negatived on division after debate and the second was carried on the voices.[19] The same process was followed in 1968 when two notices of motion were again given for the appointment of the Chair. In that case, however, the first motion was carried on division and the second motion was discharged from the Notice Paper.[20]

On 30 April 2003, on the motion of the Leader of the Opposition, the House agreed without debate to a sessional order varying SO 7(a) to dispense with the requirement for notice of a motion to appoint the Chairman and to require the Chairman to be elected in a similar manner to the President.[21]

The sessional order reflected SO 10 of the Australian Senate which provides for the Deputy President and Chairman of Committees to be appointed in a similar manner to the President. At the time the Council had not provided for the election of the President in its standing orders, but section 22G(4) of the *Constitution Act 1902* required the President to be elected in accordance with the procedure for choosing the President of the Senate.

Shortly after the adoption of the sessional order, a ballot was held to elect a Chairman in accordance with the Senate procedure.[22]

16. Term of Office – Deputy President

The Deputy President will hold office for the life of the Parliament in which elected and until a successor is elected.

Development summary		
1895	Standing order 7	Appointment of Chairman of Committees
1922–1946	Standing order 7	Appointment of Chairman of Committees
2003	Sessional order 16	Term of Office – Deputy President
2004	Standing order 16	Term of Office – Deputy President

19 *Minutes*, NSW Legislative Council, 2 August 1967, p 24 (President Budd).

20 *Minutes*, NSW Legislative Council, 28 March 1968, p 23 (President Budd). In both elections the successful candidate was Mr Eskell.

21 *Minutes*, NSW Legislative Council, 30 April 2003, p 38.

22 The ballot resulted in a majority of 23:16 for one of the two candidates, and two informal votes, *Minutes*, NSW Legistative Council, 30 April 2003, pp 48-49.

The term of office of the Deputy President is governed by SO 16 and the *Constitution Act 1902*.

Operation

In 2014, the *Constitution Act 1902* section 22G(3) was amended as a consequence of the insertion of section 22G(6A) which provides that if the business of the Legislative Council is suspended by the dissolution or expiry of the Legislative Assembly, the President and the Deputy President continue in those offices until the Legislative Council first meets after the periodic Council election even if their term as a member ceases on the expiry of the Assembly.

While the Council is not competent to sit following the expiry of the Assembly,[23] administrative or staffing issues can arise which require action by the Deputy President as acting President if the President is absent or unavailable.[24]

Before the passage of the *Constitution Amendment (Parliamentary Presiding Officers) Act 2014* the office of the Deputy President became vacant if the incumbent's term of service as a member expired and the office remained vacant until a successor was elected in the next Parliament. Further, the Deputy President could only act as the President if the President was absent from the state, and there was no provision for the Deputy President to act if the office of the President was vacant or if the President was present but unavailable. Consequently, for example, if the term of service of both the President and the Deputy President had expired there would be no President or acting President of the Council until the office was filled in the new Parliament.

In addition to the circumstances outlined above, the Deputy President also ceases to hold office if he or she resigns from the office of Deputy President,[25] resigns as a member of the Council, is disqualified from the House, is expelled from the House, or dies.[26] In 1969, the Chair was removed from the office by vote of the House on the motion that the 'Chairman of Committees of the Whole House be removed from such office'.[27]

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23 *Constitution Act 1902,* section 22F.

24 Sections 22G(7) and (7A) of the *Constitution Act 1902* provide for the Deputy President to act as the President if there is vacancy in the office of the President, if the President is absent from the state or if the President is otherwise unavailable to exercise and perform the powers, authorities, duties and functions of the President.

25 See, for example, *Minutes,* NSW Legislative Council, 15 January 1873, p 36; *Sydney Morning Herald*, 16 January 1873, p 2 (Chairman resigned as a result of ill health); 9 February 1875, pp 15-16 (Chairman resigned following the acceptance of an office under the Crown); 24 July 1912, p 11; *Hansard*, NSW Legislative Council, 24 July 1912, pp 29-30 (Chairman resigned on the first sitting day of the session, however, it is debateable whether it was necessary to resign in this circumstance as the House was obliged to appoint a Chairman in the new session in any event.)

26 *Minutes*, NSW Legislative Council, 17 March 1885, p 2 (Mr Docker in 1884); 30 November 1887, p 61 (Mr Piddington); 12 June 1900, p 2 (Mr Jacob).

27 *Minutes*, NSW Legislative Council, 6 March 1969, p 369; *Hansard*, NSW Legislative Council, 6 March 1969, pp 4262-4285 (Debate on the motion referred to allegations that the Chair had attempted to obtain false evidence in court proceedings).

The first member to be elected Deputy President under the current standing orders, the Hon Amanda Fazio, remained in office from April 2003[28] until she was elected to fill a vacancy in the office of the President in November 2009 following the resignation of the President. Her replacement held office until her term as a member expired at the end of that Parliament.[29] The next Deputy President, who was elected at the commencement of the 55th Parliament in 2011, remained in office following the expiry of her term as a member at the end of that Parliament until the Council first met in the following Parliament – the first occasion that section 22G(6A)(b) of the *Constitution Act 1902* had been applied.[30]

Background and development

From 1856 to 1895 the appointment of the Chairman of Committees was expressed as being for the present session[31] or during the present session and until a fresh appointment be made in the next session.[32] In 1895, the usual practice was codified by the adoption of SO 7(a) which provided that the Chairman was to be appointed in each session and to hold office until his successor was appointed. SO 7(b) provided that where a vacancy occurred a new Chairman was to be appointed in like manner.

On 23 December 1913, the only sitting day of the first session of the 23rd Parliament, Mr O'Conor was reappointed Chairman by consent and without previous notice 'for this day only'.[33]

In 1922, SO 7(a) was amended to provide that the Chairman was to be appointed at the commencement of the first session of each Parliament rather than in each session.

In 1927, SO 7(b) was amended to provide that a Chairman appointed to fill a vacancy in the office would continue to hold office until his successor was appointed. During debate, it was argued that in the absence of such a provision the House could only appoint a successor for the duration of the session then in course and not for the rest of the Parliament and that the new provision would enable a successor to hold office in the same way as the present Chairman.[34]

In 1934, following the reconstitution of the Council to allow for the indirect election of its members for 12-year terms, a new SO 7(a) was adopted to provide for the House to appoint by motion a member to be Chairman of Committees to hold office for the duration of the Parliament and until a successor was appointed unless the House otherwise directed. In debate, the Attorney General advised that the new provision would allow the reconstituted Council to appoint its own Chairman and ensure that 'the first appointment of Chairman shall be for the duration of the Parliament in which

28 *Minutes*, NSW Legislative Council, 30 April 2003, pp 48-49.
29 *Minutes*, NSW Legislative Council, 24 November 2009, p 1532 (Ms Griffin).
30 *Minutes*, NSW Legislative Council, 3 May 2011, pp 6-7 (Ms Gardiner).
31 See, for example, *Minutes*, NSW Legislative Council, 25 March 1858, p 8; 1 February 1870, p 8.
32 See, for example, *Minutes*, NSW Legislative Council, 11 August 1870, p 3; 31 August 1892, p 9.
33 *Minutes*, NSW Legislative Council, 23 December 1913, p 8.
34 *Hansard*, NSW Legislative Council, 22 November 1927, p 436 (Mr Boyce).

approval is given to the standing order: that is to say, for now onwards'.[35] SO 7(b) was consequentially amended.

In 1946, SO 7(b) was again amended to provide that the Chairman would cease to hold office on ceasing to be a member. This proviso reflected the fact that, with the introduction of fixed 12-year terms for Council members in 1934, the Chairman of Committees would cease holding office during the life of the Parliament in which he had been appointed if his term of service as a member under the *Constitution Act 1902* expired.

No comparable proviso was added to SO 7(a) with respect to a Chairman who had been appointed at the start of a session. However, after 1934 there were cases in which Chairmen appointed at the start of a session ceased to hold office during the Parliament in which they had been appointed due to the expiry of their 12-year term.[36] After 1978, when the term of Council members was aligned to the terms of the Assembly rather than being defined in calendar years, it was no longer possible for a member's term to expire during a Parliament. In that period, if the Chairman's term as a member expired, the office remained vacant until the next parliament when a successor was elected by the House.[37]

17. DUTY OF CHAIR

(1) The Deputy President, when presiding in the House, will exercise the same authority and have the same duties and powers as the President, but will give place to the President whenever the President arrives in the House.

(2) The Chair of Committees will take the Chair at the table in all committees of the whole House.

Development summary		
1856	Standing order 7	Absence of President
	Standing order 8	Chairman of Committees
1870	Standing order 8	Absence of President
	Standing order 9	Chairman of Committees

35 *Hansard*, NSW Legislative Council, 27 April 1934, p 54 (Mr Manning).

36 For example, Mr Farrar, appointed Chairman in the first session of the 34th Parliament, ceased holding office on the expiry of his term as a member during the third session of that Parliament and was replaced by Mr Steele. Mr Steele, reappointed Chairman in the first session of the 35th Parliament ceased holding office on the expiry of his term as a member during the third session of that Parliament and was re-appointed to fill the resulting vacancy having been re-elected as a member of the House.

37 For example, following the expiry of the term of service of Mr Healey at the end of the 48th Parliament on 22 February 1988, the office of Chairman remained vacant until Mr Solomons was appointed in the 49th Parliament on 28 April 1988. Following the expiry of the term of service of Mr Gay following the end of the 50th Parliament on 3 March 1995, the office of Chairman remained vacant until Mr Gay was reappointed to the office in the 51st Parliament on 2 May 1995, having been re-elected as a member of the House.

Development summary		
1895	Standing order 4 Standing order 5	Absence of President Duties etc of Deputy President
2003	Sessional order 17	Duty of Chair
2004	Standing order 17	Duty of Chair

Standing order 17 makes it clear that when presiding in the House, the Deputy President exercises the same authority as the President, but must give place to the President whenever the President is in the House. The standing order also provides that the Chair of Committees has principal responsibility for presiding in committee of the whole House.

Operation

Under SO 17(1), the Deputy President presides in the House if the President is absent (SO 20) or requests the Deputy President to take the chair (SO 22). When presiding in the House, the Deputy President has the same authority, duties and powers as the President. By contrast, the powers of the Chair in committee of the whole are limited in certain respects as the committee is a subordinate body which reports to the House. For example, while the Chair is vested with the same authority as the President for determining questions of order and rules of debate, and for calling a member to order and having a member removed from the chamber under SO 192, if the Chair names a member for wilful or vexatious breach of the standing orders under SO 175 the Chair must report such action to the House.[38]

When leaving the chair, the President will wait until the Chair of Committees or another temporary chairman comes forward before vacating the chair. When the President arrives in the House to take the chair, the Deputy President or Temporary Chair presiding will give place to the President.

If there is a vacancy in the office of the President, the Deputy President does not preside as the House is required to elect a new President (SO 12(1)).[39]

Under SO 17(2) the Deputy President takes the chair in committee of the whole House. Although the standing order refers to the Chair of Committees taking the chair at the table in *all* committees of the whole House, for practical reasons it is common for a Temporary Chair available at the time to take the chair of a committee of the whole.

If the Deputy President is in the President's chair immediately prior to the House resolving into a committee of the whole, a Temporary Chair will usually take over the role of Deputy President to allow the Chair of Committees to take the chair in committee.

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38 For further details, see chapter 27, 'Committee of the Whole House' and chapter 30, 'Conduct of members and strangers'.

39 Section 22G(7)-(7A) of the *Constitution Act 1902* provide for the Deputy President to act as the President if there is a vacancy in the office of the President, but this will only occur when the House is not sitting.

Similarly, when a committee of the whole is required to report to the House, the President, or any available Temporary Chair, will usually take the President's chair in order to receive the report from committee.

Background and development

Two of the standing orders adopted in 1856 were the precursors to SO 17. SO 7 (renumbered SO 8 on the adoption of new SO 2 in 1863) concerned the duty of the Chairman of Committees in the absence of the President, and provided that in the absence of both the President and Chairman of Committees, the House would stand adjourned to the next sitting day. SO 8 (renumbered SO 9 in 1863) concerned the authority of the Chair of Committees, also providing that the Chair was to give place to the President on his arrival in the House.

SO 7 was repealed in 1870 and replaced with a new standing order which provided that in the absence of the President and Chairman of Committees the members present, if a quorum was present, could elect a member to act as President, the question to be put by the Clerk.[40]

In 1895, the provisions of SO 7 (renumbered SO 9 on the renumbering of SO 22 in 1870) were adopted in SO 4 in similar terms. In 1909, SO 7(c) was replaced by a new provision for the President to nominate two members to act as Temporary Chairmen of Committees when requested by or in the absence of the Chairman.[41] SO 7(c) was amended in 1927 to provide for three instead of two Temporary Chairmen of Committees who were to be nominated by the President at the commencement of each session.[42] At the same time, SO 4 was amended to provide for a Temporary Chairman to act as Deputy President in the absence of the President and Chairman of Committees and if the Temporary Chairs were also absent the House would then proceed to elect one of its number to act as President, or adjourn. The possibility that the House would need to elect a member to act as President in the absence of the President, Deputy President and Temporary Chairs is reflected in current SO 21.

SO 5 of 1895 was adopted in the same terms as SO 8 as originally adopted, substituting 'Chairman of Committees' with 'Deputy President'.

The 2003 provisions under SO 17(1) clarifies that the Deputy President will exercise the same authority and have the same duties and powers as the President 'when presiding in the House'.

SO 17(2) which has no precedent in the former standing orders, reflects established parliamentary practice and SO 11 of the Australian Senate.[43]

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40 *Minutes*, NSW Legislative Council, 10 November 1870, p 66; *Journal of the Legislative Council,* 1870-71, vol 19, Part 1, pp 325-328.

41 *Hansard*, NSW Legislative Council, 3 November 1909, p 3197.

42 *Minutes,* NSW Legislative Council, 15 November 1927, p 29.

43 Senate SO 11, 'Duty of Chair': 'The Chairman of Committees shall take the chair of the committee at the table whenever a committee of the whole is constituted'.

18. TEMPORARY CHAIRS

The President will nominate at the commencement of each session a panel of not less than three members who may act as Temporary Chairs of Committees when requested, or in the absence of the Chair of Committees.

Development summary		
1909	Standing order 7(c)	Appointment of Chair of Committees
2003	Sessional order 18	Temporary Chairs
2004	Standing order 18	Temporary Chairs

Temporary Chairs preside in the House or in committee of the whole on a temporary basis when required (SOs 18, 21, 22 and 174). A Temporary Chair exercises the full authority of the President or Chair of Committees, as relevant, when presiding and as required by the standing orders (SO 36).

Operation

At the commencement of each session, usually during the formal proceedings at the beginning of the sitting day, the President nominates the members who will act as Temporary Chairs of Committees. Since 2003, when the current rules were adopted, Temporary Chairs have been nominated on the first sitting day of a new session,[44] on the second sitting day of a new session,[45] on the third day of a new session,[46] on the ninth day of a new session,[47] and as required.[48]

The selection of the members to be nominated is a matter for the President.[49] The members nominated are usually drawn from the government, opposition and crossbench.

A Temporary Chair can step down from the role by notifying the President of their intention to do so. In 2014, the President informed the House that one of the Temporary Chairs had stood down from the position of Temporary Chair due to other areas of responsibility.[50] In 2016, the President informed the House that a Temporary Chair had

44 On the first day of the 2nd session of the 55th Parliament in September 2014, debate on the motion for the Address-in-Reply was interrupted to allow the President to nominate Temporary Chairs: *Minutes*, NSW Legislative Council, 9 September 2014, p 16.

45 *Minutes,* NSW Legislative Council, 23 May 2006, p 16; 6 May 2015, pp 54-55.

46 *Minutes,* NSW Legislative Council, 10 May 2007, p 52.

47 *Minutes,* NSW Legislative Council, 24 May 2011, p 117.

48 *Minutes,* NSW Legislative Council, 26 October 2004, p 1069; 29 March 2006, p 1920; 25 February 2010, p 1667; 20 June 2013, p 1842; 21 August 2013, p 1907.

49 Although there were cases in which the Deputy President in the absence of the President nominated an additional Temporary Chairman or the Acting President nominated Temporary Chairmen at the start of the session: *Minutes,* NSW Legislative Council, 7 March 1945, p 87; 25 February 1992, pp 7-8.

50 *Minutes,* NSW Legislative Council, 12 August 2014, p 2647.

stood down from their role following their appointment as a Parliamentary Secretary.[51] The Temporary Chair did so in deference to the convention that the presiding officer or their equivalent, as the impartial representative of the House, ought not to be a member of the Executive.

The authority under the standing order for a Temporary Chair to act as President is limited to the role of presiding in the House and does not extend to the other duties and functions of the President. However, if a majority of members request a recall of the House under SO 36, if the President and the Deputy President are unavailable, the Clerk is to notify one of the Temporary Chairs who must then summon the Council on behalf of the President.

Background and development

Before the adoption of provision for the appointment of Temporary Chairs, the House would appoint a Deputy Chairman by motion without notice for the day in the absence of the Chairman. In that regard SO 7(c) adopted in 1895 provided that: 'In the absence of the Chairman the House shall appoint a Deputy Chairman for that day only on motion without notice'.

In 1909, the Standing Orders Committee recommended that SO 7(c) be replaced by a new provision which would allow the President to nominate two members to act as Temporary Chairmen of Committees when requested by or in the absence of the Chairman. During debate on the proposed amendment Mr Hughes noted that the current Chairman of Committees was ill but that under the current standing orders the House could only appoint another member to take the chair from day to day. Mr Hughes also pointed out that the absence of the Chairman was often notified just before the House was due to meet so that another member had to take the chair at only a moment's notice and that the Assembly's standing orders enabled the Speaker to nominate a Temporary Chairman who could act in place of the Chair even where the Chair was present, such as when a sitting carried into the late hours of the evening. The new SO 7(c), which had received the approval of the current Chairman of Committees, was subsequently agreed to by the House.[52]

In 1927, the Standing Orders Committee recommended that SO 7(c) be amended to provide for three instead of two Temporary Chairmen of Committees who were to be nominated by the President at the commencement of each session.[53] In debate it was noted that in the Assembly, which had fewer members than the Council at that time, five Temporary Chairmen were appointed.[54] The amendment was agreed to by the House without further debate.

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51 *Minutes*, NSW Legislative Council, 13 September 2016, p 1110.

52 *Hansard*, NSW Legislative Council, 3 November 1909, p 3197.

53 *Minutes,* NSW Legislative Council, 15 November 1927, p 29.

54 *Hansard*, NSW Legislative Council, 22 November 1927, p 436. At that time there were 101 members of the Council.

However, the provision still proved too limited. From 1984, it became the practice for a government motion to be moved at the start of each session to suspend standing orders to allow for the nomination of five Temporary Chairmen, instead of the three provided by SO 7(c).[55] In 1996 and 1999 the motion provided for the nomination of seven Temporary Chairs.[56]

Due to the limited number of Temporary Chairs able to be appointed, it was also regularly necessary to replace them due to their absence from the state,[57] or just due to their absence,[58] due to their resignation from the position of Temporary Chairmen,[59] in place of one of the Temporary Chairmen without specifying any reason,[60] or in place of one of the Temporary Chairs on their resignation from the Council.[61] In other cases, a Temporary Chairman was appointed during the session without specifying any reason.[62]

SO 18 now provides for the nomination of 'not less than three' Temporary Chairs, allowing for flexibility in the maximum number appointed.

19. TITLE

The Chair of Committees and Temporary Chair of Committees may be referred to as Chairperson, Chairman or Chairwoman.

Development summary		
2003	Sessional order 19	Title
2004	Standing order 19	Title

SO 19 specifies the manner in which the Chair and Temporary Chairs of Committees may be referred to.

Operation

Standing order 19 employs gender neutral language providing for the Chair of Committees and Temporary Chairs to be referred to as Chairperson, Chairman or

55 *Minutes,* NSW Legislative Council, 14 August 1984, pp 16-17; 28 April 1988, p 25; 22 February 1990, p 27; 25 February 1992, pp 7-8.
56 *Minutes,* NSW Legislative Council, 23 April 1996, pp 60-61; 12 May 1999, p 40; 8 September 1999, pp 13-14.
57 *Minutes,* NSW Legislative Council, 22 September 1949, p 178.
58 *Minutes,* NSW Legislative Council, 13 April 1950, p 289.
59 *Minutes,* NSW Legislative Council, 10 October 1990, p 456.
60 *Minutes,* NSW Legislative Council, 15 March 1994, p 70.
61 *Minutes,* NSW Legislative Council, 5 May 1998, p 408; 17 September 1998, p 700.
62 *Minutes,* NSW Legislative Council, 7 March 1945, p 87; 4 September 1962, p 13; 30 October 1962, p 60.

Chairwoman when presiding in committee of the whole.[63] In practice, the Chair of Committees and Temporary Chairs are usually referred to as Madam Chair or Mr Chair.

When presiding in the House, the Chair of Committees is referred to as the Deputy President or as the Acting President if the President is absent (see SO 20)[64] and Temporary Chairs as Deputy President.

Background

Earlier standing orders[65] referred to the 'Chairman of Committees', 'Temporary Chairman of Committees' and 'Deputy Chairman of Committees'.

63 Similarly, section 19(2) of *the Interpretation Act 1987* provides that: 'The office of chairperson, chairman or chairwoman may be referred to by whichever of those words is appropriate in relation to the particular holder of that office'.

64 Section 22G(7) of the *Constitution Act 1902* provides for the 'Deputy President and Chair of Committees' to act as the President if the President is unavailable. However, the title Deputy President is used in the proceedings of the House.

65 1856 SOs 7, 8, 9, 39, 40, 41, 42, 44, 52, 53, 94, 116, 120 and 144; 1895 SOs 7, 8, 11, 12, 24, 83, 90, 97, 173, 184, 188, 192, 216, 218, 220, 223, 225, 230, 234, 243, 245, 251, 254 and 255.

CHAPTER 5

ABSENCE OF PRESIDENT, DEPUTY PRESIDENT AND OFFICERS

20. ABSENCE OF PRESIDENT

In the absence of the President, the Deputy President will perform the duties and exercise the authority of President in relation to all proceedings of the House.

Development summary		
1856	Standing order 7 Standing order 8	Absence of President Chairman of Committees
1870	Standing order 8	Absence of President
1895	Standing order 4 Standing order 5	Absence of President Duties etc. of Deputy-President
2003	Sessional order 20	Absence of President
2004	Standing order 20	Absence of President

Standing order 20 provides that, in the absence of the President, the Deputy President will perform the duties and exercise the authority of the President in relation to all proceedings in the House. The terms of the standing order distinguish the role from that undertaken when the President is unavailable under section 22G(7) of the *Constitution Act 1902*. Under the Constitution, when the Deputy President and Chair of Committees acts as the President they may exercise and perform all the powers, authorities, duties and functions of the President, including administrative functions.[1]

1 See, for example, *Minutes*, NSW Legislative Council, 20 April 2010, p 1737; 21 April 2010, p 1750; 22 April 2010, p 1758. Under section 7(A) for the purposes of subsection (7), the President is unavailable if there is a vacancy in the office of the President or if the President is absent from the state or otherwise unavailable to exercise and perform the powers, authorities, duties and functions of the President.

Operation

Standing order 20 provides that in the absence of the President, the Deputy President is to take the chair and perform the duties and exercise the authority of the President in relation to all proceedings in the House.

If the President is absent at the commencement of the sitting, the Usher of the Black Rod announces the Deputy President or Temporary Chair who takes the chair. The minutes of proceedings record when the President is absent at the commencement of the sitting and if the President takes the chair later during the sitting day.[2]

In September 2001, in the absence of the President, the Deputy President took the chair at the commencement of proceedings. The President later attended during committee of the whole and was recorded as present for the sitting day, but did not take the chair in the House.[3]

Background and development

Under SOs 7 and 8 of 1856, in the absence of the President, the duties of the President were performed by the Chairman of Committees. Should the President and Chairman of Committees be absent, the Council would stand adjourned to the next sitting day. When in the chair, the Chairman of Committees exercised the same authority, and had the same duties as the President, but was required to 'give place' to the President on his arrival in the House.

In 1870, the Standing Orders Committee recommended an amendment to SO 7 (by then renumbered SO 8) to provide that in the absence of the President and Chairman of Committees the question on the motion that the House stand adjourned until the next sitting day was to be put by the Clerk. The provision was the subject of considerable debate in committee of the whole[4] which resulted in an amendment to provide that in the absence of the President and the Chairman of Committees, the House, if there was a quorum, was to elect a member to act as President for the time being, and the question on that matter was to be put by the Senior Clerk. If no member was so elected the House would stand adjourned to the next sitting day with the question on the adjournment being put by the Clerk.[5]

In 1895, SOs 4 and 5 were adopted in similar terms to the 1870 standing orders, providing that, in the absence of the President, the Chair of Committees would perform the duties of the President as Deputy President. For example, on 17 March 1981, in the absence of the President, the Chair of Committees took the chair at the commencement of

2 See, for example, *Minutes*, NSW Legislative Council, 3 June 1931, p 157; 23 May 1939, p 177; 23 August 1966, p 51; 24 August 1966, p 57; 25 August 1957, p 61; 9 October 1979, p 111; 17 March 1981, p 343; 18 March 1981, p 355; 19 March 1981, p 365; 22 October 1987, p 1175; 27 October 1987, p 1189; 22 March 2005, p 1279 and 1286.

3 *Minutes*, NSW Legislative Council, 25 September 2001, p 1171.

4 *Sydney Morning Herald,* 3 January 1870, p 2.

5 *Minutes*, NSW Legislative Council, 10 November 1870, p 66.

proceedings. Following prayers, the Deputy President advised the House that according to section 22G(5) of the *Constitution Act 1902* he would act in the place of the President during the President's absence in New Zealand attending a Conference of Presiding Officers and Clerks. In accordance with SO 4, the minutes referred to the Chair of Committees as the Deputy President.[6]

In 1927, standing order 4 was amended to provide for a Temporary Chair to perform the duties of President as Deputy President in the absence of the President and Chair of Committees.[7] If the President, Chair of Committees and Temporary Chair were absent, the House could then proceed to elect a member to act as President for the time being, a provision now contained in SO 22.

The 2004 standing orders refer to the office of Deputy President and Chair of Committees, rather than the office of Chair of Committees.

21. ABSENCE OF PRESIDENT AND DEPUTY PRESIDENT

(1) If both the President and the Deputy President are absent, one of the Temporary Chairs of Committees will act as President.

(2) If no Temporary Chairs are available in the absence of the President and Deputy President, the members present, if a quorum, will elect a member present to act as President for that day only, the question being put to the House by the Clerk.

Development summary		
1856	Standing order 7	Absence of President
1870	Standing order 8	Absence of President
1895	Standing order 4 Standing order 5	Absence of President Duties etc. of Deputy-President
1909	Standing order 7(c)	Nomination of Temporary Chairman
2003	Sessional order 21	Absence of President and Deputy President
2004	Standing order 21	Absence of President and Deputy President

Under SO 20, in the absence of the President, the Deputy President performs the duties and exercises the authority of the President in relation to all proceedings in the House.

Under SO 21, if both the President and Deputy President are absent, a Temporary Chair appointed under SO 18 will act as President. If no Temporary Chair is available, the House may elect a member present to act as President for that day only.

6 *Minutes*, NSW Legislative Council, 17 March 1981, p 343; 18 March 1981, p 355; 19 March 1981, p 365.

7 *Minutes*, NSW Legislative Council, 22 November 1927, p 41.

Operation

SO 21 provides for a member to take the chair in the absence of the President and Deputy President. Usually, a Temporary Chair is available to act as President, and is often scheduled to do so. If there is no Temporary Chair available, the House may elect a member to act as President for that day only.

Temporary Chairs frequently take the chair throughout the sitting day, but have also done so at the beginning of the sitting[8] in the absence of the President and Deputy President.

The standing order replicates the provisions under the previous standing order with the omission of the provision for the House to adjourn in the absence of the President and Deputy President rather than elect a President for that day only.

The authority under the standing order for a Temporary Chair to act as President is limited to the role of presiding in the House and not to the other duties and functions of the President.[9] However, if a majority of members requests a recall of the House under SO 36, if the President and the Deputy President are unavailable, the Clerk is to notify one of the Temporary Chairs who must then summon the Council on behalf of the President.

Background and development

Under the 1856 standing orders, there was no provision for the absence of both the President and Deputy President (then referred to as the Chairman of Committees). Should the President and Chairman of Committees be absent, the Council would stand adjourned to the next sitting day.

In 1870, the Standing Orders Committee reported on a reference concerning all the standing and sessional orders relating to conduct of business of the House. The committee proposed an amendment to standing order 8 (adopted as SO 7) to provide that, in the absence of the President and the Chairman of Committees, the House would stand adjourned. During consideration in committee of the whole on 2 November 1870, the committee further amended standing order 8 to provide that, in the absence of the President and the Chairman of Committees, the members present, if there was a quorum, were to elect one of its number to act as President for the time being, the question in that case being put by the Clerk, and otherwise the Council would stand adjourned to the next sitting day, the adjournment being declared by the Clerk.[10]

In January 1873, on the motion that a report from committee of the whole be adopted, an amendment was moved to recommit the bill and appoint the Hon Joseph Docker to

8 *Minutes,* NSW Legislative Council, 25 September 1949, p 181.

9 Under section 7(A) for the purposes of subsection (7), the President is unavailable if there is a vacancy in the office of the President or if the President is absent from the state or otherwise unavailable to exercise and perform the powers, authorities, duties and functions of the President.

10 *Minutes,* NSW Legislative Council, 2 November 1870, pp 62-63; 3 November 1870, p 66.

take the chair in committee of the whole 'during this evening only'.[11] On the following day, on the order of the day being read for further consideration of a bill, a motion was moved 'by consent' that the Hon Joseph Docker take the chair in committee of the whole 'during the present sitting of the Council'. On the motion being agreed to, the House resolved into committee of the whole.[12]

SO 4 and SO 5 adopted in 1895 contained the same provisions for the absence of the President as the 1870 standing orders.

In 1909, SO 7, which provided for the appointment of the Chairman of Committees, was amended to allow the President to nominate, at each session, two members to act as Temporary Chairmen of Committees when requested by, or in the absence of, the Chairmen of Committees. A Temporary Chairman while acting under the new standing order would have all the powers of the Chairman of Committees of the Whole House, provided that the Temporary Chair would immediately vacate the chair on the return and at the request of the Chairman of Committees.[13] In 1927, the standing order was again amended on the recommendation of the Standing Orders Committee, in its report tabled on 15 November 1927, to provide for the President to nominate three members to act as Temporary Chairmen of Committees.[14] During consideration of the report in committee of the whole, it was noted that there had been occasions on which both the President and the Chairman of Committees had been absent and the amendment would allow a Temporary Chairman of Committees to preside in such circumstances.[15]

The provision proved still to be too limited. In 1948, on a bill being read a second time, a motion was moved that the President leave the chair, and the House resolve itself into a committee of the whole to consider the bill in detail. Although the question was agreed to, in the absence of the Chair of Committees due to illness, and it being apparent on the President calling the names of three temporary Chairs that none were present, the President left the chair in order to consult with the 'Representative of the Government and Sir Henry Manning'. On the President resuming the chair, a motion was agreed to 'that the necessary action consequential upon the passing of the resolution of the House,- "That the President do now leave the Chair and the House resolve itself into a Committee of the Whole to consider the Bill in detail," – be postponed and stand an Order of the Day for a later hour of the Sitting'.[16]

Due to the limits of SO 7(c), in order for sufficient numbers of Temporary Chairs to be appointed, standing orders were frequently suspended to allow more than three Temporary Chairs to be appointed.[17]

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11 *Minutes,* NSW Legislative Council, 15 January 1873, p 36.

12 *Minutes,* NSW Legislative Council, 16 January 1873, p 40.

13 *Minutes,* NSW Legislative Council, 3 November 1909, p 102 (see also consequential amendment to former SO 217 re committee of the whole).

14 *Minutes,* NSW Legislative Council, 15 November 1927, p 29.

15 *Minutes,* NSW Legislative Council, 22 November 1927, p 41; *Hansard,* NSW Legislative Council, 22 November 1927, p 436.

16 *Minutes,* NSW Legislative Council, 4 August 1948, p 178.

17 See, for example, *Minutes,* NSW Legislative Council, 23 April 1996, p 60.

In 2004, the new standing order provided for the President to nominate a panel of not less than three members to act as Temporary Chairs. See standing order 18 for further discussion on Temporary Chairs.

22. RELIEF OF PRESIDENT

(1) The Deputy President will take the Chair when requested by the President, without any announcement to the House.

(2) In the absence of the Deputy President, one of the Temporary Chairs will take the Chair, without any announcement to the House.

Development summary		
1895	Standing order 8	Chairman to act as Deputy-President
1909	Standing order 8	Chairman to act as Deputy-President
2003	Sessional order 22	Relief of President
2004	Standing order 22	Relief of President

The purpose of SO 22 is to make it clear that when requested to do so by the President the Deputy President or a Temporary Chair will take the chair to provide temporary relief without any requirement for the House to be advised of the reason or duration of the relief.

Operation

It is common during a sitting day for the President to be required to attend to matters outside the chamber and for the Deputy President or a Temporary Chair to relieve the President during that time. SO 22 allows the President to be absent from time to time when required.

Past Presidents have established rosters for the Chair, or assigned regular sessions to the Deputy President or Temporary Chairs.

While no announcement is made on the Deputy President or Temporary Chair taking the chair during sittings, the Minutes of Proceedings record when the President, or the Deputy President or a Temporary Chair, reports a message from the Governor[18] or from the Assembly,[19] leaves the chair when the House resolved into committee of the whole,[20] or announces a matter to the House.[21]

When a resolution of the House is to be communicated by message to the Assembly, the member in the chair at the time the resolution is agreed to signs the message.

18 *Minutes,* NSW Legislative Council, 9 September 2010, p 2044.
19 *Minutes,* NSW Legislative Council, 22 May 2013, p 1735.
20 *Minutes,* NSW Legislative Council, 24 May 2000, p 451.
21 *Minutes,* NSW Legislative Council, 14 October 2015, p 447.

Background and development

Standing order 22 is based on 1895 SO 8 as amended in November 1909. SO 8 in its original form provided for the Chair of Committees to take the chair as Deputy President when required to do so. The amendments made to standing orders 7(c) and 8 in 1909 together provided for the appointment of a Temporary Chair to act as President in the absence of the President and the Chair of Committees, and to provide relief for the President when requested to do so without formal notification to the House.

An amendment was also agreed to 1895 SO 217, to provide that the Chairman could appoint a Temporary Chairman to act in his place during committee of the whole should he desire to leave the chair.

23. LEAVING THE CHAIR

The President may leave the Chair at any time to suit the convenience of the members, without any question being put.

Development summary		
2003	Sessional order 23	Leaving the Chair
2004	Standing order 23	Leaving the Chair

The provisions of standing order 23 adopted in 2004, codified for the first time a long-held practice that, to suit the convenience of members, the President can leave the chair to suspend the sitting for a period of time.

Operation

When the President leaves the chair 'for the convenience of members', business is only temporarily interrupted and resumes at the point in the routine of business which the House had reached prior to the suspension. A suspension for the convenience of members requires the consent of the House.

Each sitting day, the President leaves the chair at the suggestion of a minister for the lunch and dinner breaks until a particular time. These breaks in proceedings are not recorded in the Minutes of Proceedings. The bells are rung for resumption of proceedings two minutes before the time suggested by the minister.

If the time for resumption is not fixed when the President leaves the chair, the House resumes on the ringing 'of a long bell', an expression first used in 1991. On that occasion, a member objected to certain words used in debate and requested that the words 'be taken down', meaning that the words are recorded in the minutes, a provision omitted from the standing orders adopted in 2004. As the member speaking had been speaking 'off the cuff' and could not recall the exact words used, it was necessary for the President to leave the chair in order to check the Hansard transcript. The President left the chair at 2.59 pm 'until

the ringing of a long bell'. At 3.15 pm the House resumed, the President read the words objected to and directed the Clerk to take down the words.[22]

Background and development

As well as the lunch and dinner breaks each day, there are numerous examples of the President leaving the chair for various reasons, such as to wait for a message from the Assembly on a bill,[23] or some other action pending in the other House,[24] to permit 'negotiations and discussions' concerning legislation being considered in committee of the whole,[25] to enable the President to consider a point of order raised as to whether or not a bill before the House was in order,[26] and due to a power outage.[27]

Prior to 1991, when the President left the chair until an unspecified time, the Minutes of Proceedings recorded the President as leaving the chair 'during pleasure'[28] and later 'until a later hour'.[29] Since 1991, the term 'until the ringing of a long bell' has been used.

On the second last day of scheduled sittings for the first half of 2009, it became apparent that the Government did not have the support of the House for one of its key legislative proposals. In the early hours of 25 June 2009, the Leader of the House proceeded to move the 'special adjournment' for the House to next meet at 2.30 pm on 1 September 2009, thereby preventing the House from sitting the following day as scheduled.[30] When the Opposition Whip sought to amend the motion in an attempt to allow the House to continue debating the contested Government legislation, the only minister then present exited the chamber. As the House cannot meet unless a minister is present in the chamber under SO 34, the President was obliged to leave the chair without a question being put, and without a time for resumption having been set.

On Tuesday 1 September 2009 at 2.30 pm, some three months later, the bells were rung and the House resumed debate on the motion of the minister for the special adjournment. An amendment to the motion was agreed to that the House adjourn, thereby drawing to a close the sitting day of 24 June 2009.[31] The next sitting day commenced 15 minutes later.[32]

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22 *Minutes,* NSW Legislative Council, 19 March 1991, p 84; *Hansard,* NSW Legislative Council, 19 March 1991, pp 1904-1906.

23 *Minutes,* NSW Legislative Council, 1 June 1883, p 11 (*Tramways Declaratory Bill*).

24 *Minutes,* NSW Legislative Council, 21 December 1888, p 67; *Hansard,* NSW Legislative Council, 21 December 1888, pp 1414-1416.

25 *Minutes,* NSW Legislative Council, 15 December 1993, pp 462-463; *Hansard,* NSW Legislative Council, 15 December 1993, pp 6171 and 6176.

26 *Minutes,* NSW Legislative Council, 21 January 1926, p 160.

27 *Minutes,* NSW Legislative Council, 23 February 2016, pp 644-645.

28 *Minutes,* NSW Legislative Council, 16 January 1889, p 80.

29 *Minutes,* NSW Legislative Council, 30 June and 1 July 1982 am, p 7.

30 A special adjournment is used to fix the next sitting day and time to a day other than the next day scheduled by sessional order.

31 *Minutes,* NSW Legislative Council, 24 June 2009, pp 1282-1283.

32 *Minutes,* NSW Legislative Council, 1 September 2009, p 1287.

See SO 34 for further information on the requirement for a minister to be present in the House and SO 193 providing for the President to suspend sitting or adjourn House.

24. ABSENCE OF THE CLERK

In the absence of the Clerk, the Clerk's duties will be performed by the Deputy Clerk, or in the absence of both, by the next senior officer.

Development summary		
1895	Standing order 6	Absence of the Clerk
2003	Sessional order 24	Absence of the Clerk
2004	Standing order 24	Absence of the Clerk

The Clerk is the senior-most officer of the Legislative Council and is responsible for providing procedural advice to the President and members, and managing and leading the Department of the Legislative Council in supporting the sittings of the House and its committees. The Clerk also has joint responsibilities with the Clerk of the Legislative Assembly and the Executive Manager, Department of Parliamentary Services for the parliament's administration.

Operation

The Clerk is appointed by the Governor, on the advice of the President through the Executive Council.

Since 1895, provision has been made under the standing orders for the Clerk's duties to be performed by the next most senior officer in the Clerk's absence.

Where the Clerk is absent for an extended period, the Deputy Clerk may be formally appointed to the position of Acting Clerk and will sign the House Papers as such.[33] The Acting Clerk is officially appointed by the Governor[34], however, in some cases the Deputy Clerk may be appointed for internal purposes as Acting Clerk to facilitate administrative arrangements.[35] During temporary absences, the officer simply signs as the Deputy Clerk.[36]

33 Deputy Clerk appointed as Acting Clerk while the Clerk undertook a period of leave to provide technical assistance to the Eastern Cape Provincial Legislature in South Africa: *Minutes,* NSW Legislative Council, 23 October 2002, p 408. Deputy Clerk appointed Acting Clerk during absence of the Clerk: *Minutes,* NSW Legislative Council, 23 September 1986, p 278; Acting Clerk officially sworn: *Minutes,* NSW Legislative Council, 23 September 1986, p 279; Acting Clerk appointed following retirement of the Clerk of the Parliaments: *Minutes,* NSW Legislative Council, 1 August 1989, p 767; 9 May 2007, p 14.

34 *Minutes,* NSW Legislative Council, 23 September 1986, p 279; 23 October 2002, p 408.

35 For example, the Deputy Clerk may 'act up' and carry out the responsibilities of the Clerk during a short period of absence.

36 *Minutes,* NSW Legislative Council, 25 October 1989, p 1015; 24 May 2011, p 122; 20 June 2013, p 1847.

Background and development

The standing orders did not make reference to the convention to be followed in the absence of the Clerk prior to 1895. Between 1895 and 2003 the standing order referred to the 'Clerk-assistant', or the officer next in seniority. In practice, the officer was formally appointed to the role of Acting Clerk and the House informed of the fact.[37] In cases where the Clerk Assistant had not been formally appointed as Acting Clerk, the officer signed the House Papers with their name, 'for the Clerk of the Parliaments'.[38]

Since 2004, the standing order has referred to the Deputy Clerk, who has held the second-most senior office in the Department of the Legislative Council in more recent years.

Death of the Clerk of the Parliaments while in office

In 1971, the Clerk of the Parliaments, Major General John Rowlstone Stevenson CBE DSO ED, passed away while in office. Major General Stevenson's death occurred during the mid-year recess, and was reported by the President on the next sitting day, by which time the Governor had appointed a successor. On the President announcing Major General Stevenson's passing, the Leader of the Government moved a condolence motion regarding 'the removal, by death,' of Major Stevenson. Members addressed the House in eulogy and the motion was passed unanimously, members and officers of the House standing.[39]

Death of former officers

As a matter of courtesy, the President has on occasion announced the passing of former senior officers of the Department of the Legislative Council.[40]

25. PARLIAMENTARY SECRETARY

A parliamentary secretary may act as a Minister in the House in all respects, except in relation to answering questions with and without notice.

Development summary		
1999–2003	Sessional order	Parliamentary Secretaries
2003	Sessional order 25	Parliamentary secretary
2004	Standing order 25	Parliamentary secretary

Parliamentary secretaries are appointed by the Premier to assist ministers with their official and administrative responsibilities. SO 25 outlines the restrictions that apply to those arrangements in the House.

37 *Minutes,* NSW Legislative Council, 22 August 1882, p 1; 7 December 1914, p 93.
38 *Minutes,* NSW Legislative Council, 7 July 1914, p 7; 12 June 1935, p 8.
39 *Minutes,* NSW Legislative Council, 4 August 1971, p 14.
40 For example, *Minutes*, NSW Legislative Council, 4 April 2000, p 345 (former Clerk Assistant); 23 August 2016, p 1058 (former Clerk Assistant and Usher of the Black Rod).

Operation

Under section 38B of the *Constitution Act 1902*, the Premier may, from time to time, appoint members of either House to hold office as a parliamentary secretary. The functions of a parliamentary secretary are determined by the Premier (section 38C). While there is no requirement that a minister be appointed from the membership of either House (though in practice they are), parliamentary secretaries *must* be appointed from the membership of either House (section 38B).

Under SO 25, a parliamentary secretary may act in the capacity of a minister in the House in almost all respects – that is, a parliamentary secretary may perform duties such as tabling documents, moving procedural motions on bills, speaking to amendments in committee of the whole on behalf of the government and moving the adjournment of the House. The only limitation on parliamentary secretaries in this regard applies to answers to questions with and without notice, which remain the responsibility of the minister. To date, a minister has not sought to have a parliamentary secretary speak on their behalf for the purposes of a budget estimates hearing. This is a matter of convention, as discussed below.

In recent years, the tasks that have most often fallen to parliamentary secretaries in the House have related to the tabling of papers, which by convention usually falls to the most junior minister in the House, and managing the passage of legislation through the House, particularly in regard to bills that have originated in the Legislative Assembly and fall within a portfolio for which the parliamentary secretary has official responsibilities.[41]

While certain restrictions apply to powers of parliamentary secretaries to act in the capacity of a minister in the House, other restrictions similarly apply to their powers outside the House. For example, Parliamentary Secretaries are not permitted to sign Executive Council minutes.[42]

In the Assembly, SO 366 further restricts the role of parliamentary secretaries. For example, Assembly secretaries cannot adjourn the House, declare a bill urgent, introduce a money bill, appoint an estimates committee, move a motion to suspend a member or be the subject of an order for papers.[43]

Parliamentary secretaries and private members' business

A parliamentary secretary may take carriage of a motion, bill or other item in their capacity as a private member.

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41 For example, in the 55th Parliament (2011-2015), the Hon David Clarke, Parliamentary Secretary for Justice, regularly managed the passage of legislation in the Legislative Council that fell within the portfolio of the Attorney General and Minister for Justice.

42 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004), p 710, citing New South Wales Ministerial Handbook.

43 Russell Grove, *NSW Legislative Assembly Practice, Procedure and Privilege* (Parliament of NSW, 2007), pp 35-36.

For example, in 2010, the Hon Penny Sharpe (Lab), Parliamentary Secretary, took carriage of a private member's bill that had originated in the Legislative Assembly.[44]

Parliamentary secretary speaking on the motion to adjourn the House

Under SO 31(4)(a), the question on the adjournment of the House is put after 30 minutes of debate, or, when a minister wishes to speak, at the conclusion of the minister's remarks. Under this provision, a minister, or a parliamentary secretary speaking under the provision, is not limited to the five minutes allowed to other members during the adjournment debate. On 9 June 2005, a parliamentary secretary rose to speak at the end of the adjournment debate, just prior to the question being put. While there was no question raised as to the ability of the parliamentary secretary to take advantage of SO 31(4)(a) and speak for an unlimited time, a number of points of order were taken that the scope of the debate should be limited to matters raised during the adjournment debate, or at least on matters raised that day in the House. The points of order were not upheld and the member continued for approximately 20 minutes.[45]

On 22 June 2005, the House subsequently agreed to a sessional order moved by the Hon Duncan Gay, Deputy Leader of the Opposition, that standing order 25 be amended to extend the limitation on a parliamentary secretary's capacity to act on behalf of a minister to speaking on the motion for the adjournment of the House under SO 31(4)(a).[46] The sessional order was not readopted in subsequent sessions.

Background

The first parliamentary secretaries were appointed on 27 June 1967, and were drawn from the Legislative Assembly only. They were not members of the Executive Council or of Cabinet, and received no remuneration.[47]

In 1975, *the Constitution Act 1902* was amended to regularise the office of parliamentary secretary, however the provisions still only applied to members of the Legislative Assembly.[48]

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44 Adoption Amendment (Same Sex Couples) Bill 2010 (No 2), *Minutes,* NSW Legislative Council, 7 September 2010, p 2023. Proceedings on the bill were also significant because members of the Liberal and Labor parties, including a minister, moved amendments to the bill in committee of the whole in their capacity as members, rather than as party representatives.

45 *Hansard*, NSW Legislative Council, 9 June 2005, pp 16877-16879.

46 *Minutes,* NSW Legislative Council, 22 June 2005, p 1487.

47 At the time at which they were appointed, it was stated that the duties of Parliamentary Secretaries would be to assist ministers with correspondence, interviews and attendance at functions, and generally relieve ministers of some of the duties associated with their administration that the minister is not required by law to perform personally. *(Hansard,* NSW Legislative Council, 1 August 1967, p 10).

48 *Constitution and Other Acts (Amendment) Act 1975*, ss 7-10.

The Act was further amended in 1988 to enable members of the Legislative Council to be appointed as parliamentary secretaries,[49] however, members were not appointed to the roles until 1991. The first parliamentary secretaries appointed in the Legislative Council were the Hon Richard Bull (Parliamentary Secretary) and the Hon James Samios (Senior Parliamentary Secretary).[50] When the 1988 amendment was made to the *Constitution Act 1902*, parliamentary secretaries had no legal authority, performed no parliamentary functions and only provided assistance to ministers with correspondence, ceremonial duties and some policy matters. However, on 12 May 1999, a sessional order was passed on motion of the Leader of the Government in the Legislative Council, providing:

> That any member appointed as a parliamentary secretary under section 38B of the *Constitution Act 1902* may exercise the powers and perform the functions conferred upon ministers by the procedures of the Legislative Council, but may not be asked or answer questions which may be put to ministers under standing orders 29 or 32 or represent a minister before a committee considering estimates.[51]

This, in effect, enabled parliamentary secretaries to assist in matters such as the passage of legislation and adjournment of the House. In addition to the provisions of the current standing orders, parliamentary secretaries were also prohibited from representing a minister before a committee considering the budget estimates. While this was not carried over to the 2004 standing orders, the convention has continued that parliamentary secretaries do not represent ministers at budget estimates.

The sessional order was subsequently readopted each session,[52] and then incorporated into the revised standing orders in 2004, which omitted the prohibition on representing a minister for the purposes of a budget estimates hearing. The reasons for this omission do not appear to be a matter of record.

26. LEADERSHIP OF PARTIES AND GROUPS

After each periodic Council election and whenever changes occur, the leaders of parties or groups with two or more members in the House may announce the leadership of the parties or groups represented in the House.

Development summary		
1988–2003	Sessional order	Leadership of parties and groups
2003	Sessional order 26	Leadership of parties and groups
2004	Standing order 26	Leadership of parties and groups

49 *Constitution (Parliamentary Secretaries) Amendment Act 1988 No. 2*, Schs 1 and 2.

50 *Minutes,* NSW Legislative Council, 21 August 1991, p 63.

51 *Minutes,* NSW Legislative Council, 12 May 1999, p 50. The motion was agreed to with other sessional orders in globo (together on one motion), without debate.

52 *Minutes,* NSW Legislative Council, 8 September 1999, p 30; 12 March 2002, p 40; 30 April 2003, p 46.

It is common practice for most parties represented in the Council to nominate leaders and deputy leaders. SO 26 provides a formal opportunity for each party to inform other members of those internal party arrangements.

Operation

Following a periodic election, and usually during the first sitting week, the leaders of each party represented in the House may make an announcement regarding the leadership and deputy leadership of that party, where applicable. The announcement is usually made at the conclusion of formalities, before the House proceeds to business listed on the Notice Paper, and after formalities listed in the routine of business under standing order 38, such as messages, formal business, petitions, notices and postponements.

Similar announcements may also be made following a change in the administration of the government,[53] or where a new leader is nominated.

In practice, the major parties usually announce a leader, deputy leader, whip and deputy whip.[54] Some crossbench parties, such as the Christian Democratic Party and the Australian Democrats have announced a party leader,[55] while The Greens and the Shooters, Fishers and Farmers Party (formerly the Shooters Party) have either chosen not to nominate a leader[56] or to nominate a 'senior party member',[57] in place of a leader.

The announcement of party leadership (and other officeholders, such as the appointment of ministers and parliamentary secretaries) is the administrative trigger on which payment arrangements are made for additional salaries under the provisions of the *Parliamentary Remuneration Act 1989*, where applicable.

Background and development

In 1988, the House adopted a new sessional order providing that, as soon as practicable after each periodic Council election and whenever a change shall occur, announcements may be made in the House as to the leadership in the House of parties or groups represented in the Legislative Council, where those parties or groups were comprised of two or more members.[58]

53 *Minutes,* NSW Legislative Council, 22 February 2005, p 1222.

54 *Minutes,* NSW Legislative Council, 3 May 2011, p 9; 9 May 2007, pp 18-20. The Nationals also announce a party leader (*Minutes,* NSW Legislative Council, 9 May 2007, p 19), however, other Coalition positions such as the Deputy Whip are frequently filled by Nationals members.

55 *Minutes,* NSW Legislative Council, 3 May 2011, p 10.

56 *Minutes,* NSW Legislative Council, 3 May 2011, p 9.

57 *Minutes,* NSW Legislative Council, 11 May 1999, p 16.

58 *Minutes,* NSW Legislative Council, 24 May 1988, p 49. The sessional order was adopted as formal business, without debate.

The new provision reflected the growing number of crossbench members and minor parties elected to the Legislative Council following the reconstitution of the House in 1978.[59]

The resolution was readopted in similar terms each session,[60] with the exception of 1991, during which the terms were amended to include a requirement that parties or groups must be registered under the *Parliamentary Electorates and Elections Act 1912*.[61] The sessional order was ultimately incorporated into the 2004 rewrite of the standing orders.

59 See Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 656, for the representation of parties in the Legislative Council since 1978.

60 *Minutes,* NSW Legislative Council, 18 August 1988, p 26; 22 February 1990, p 25; 21 February 1991, p 25; 4 March 1992, p 23; 2 March 1994, p 29; 24 May 1995, p 26; 17 April 1996, p 28; 17 September 1997, p 38; 12 May 1999, p 45; 8 September 1999, p 26; 12 March 2002, p 36; 30 April 2003, p 46.

61 *Minutes,* NSW Legislative Council, 2 July 1991, p 18. The amendment was adopted in the same year as the *Parliamentary Electorates and Elections (Amendment) Bill 1991*, which implemented recommendations made by the Joint Select Committee on the Process and Funding of the Electoral System, including those imposed new requirements for the registration of parties.

CHAPTER 6

SITTING, QUORUM AND ADJOURNMENT OF HOUSE

27. MEETING OF COUNCIL

The bells will ring for two minutes prior to the time appointed for a meeting of the Council, and the President on being announced by the Usher of the Black Rod, will then take the Chair, and acknowledge the House.

Development summary		
2003	Sessional order 27	Meeting of the Council
2004	Standing order 27	Meeting of the Council

This standing order regulates the schedule for the ringing of the bells to summon members to attend the Chamber each sitting day.

Operation

It has long been the practice in the Legislative Council that the bells are rung 15 minutes prior to the time fixed for the meeting of the House for a period of one minute, and then again from two minutes prior to the time fixed for the meeting of the House. The 15-minute bell acts as an early signal to members and staff that business for the day will commence shortly. Two minutes before the time fixed for meeting, a second bell is then rung to summon members to the chamber. At the time fixed for meeting, the bells cease ringing and the Usher of the Black Rod announces the President to the House.[1] Before taking the chair, the President first acknowledges members on their right and the members on their left. Members respond in kind.

On rare occasion when the electronic bells have ceased to work, Chamber and Support staff have walked the corridors ringing a hand-held bell to summons members to the chamber.

1 Responsibility for ringing the bells lies with the Usher of the Black Rod and Chamber and Support.

Background and development

Standing order 27 was first adopted in 2004 and was drafted in similar terms to that of Senate standing order 49 (Meeting of Senate), which states:

> The bells shall be rung for 5 minutes prior to the time appointed for a meeting of the Senate, and the President shall then take the chair.

The *Annotated Standing Orders of the Australian Senate* notes that although it had long been customary to ring the bells and it had been done on the authority of the President prior to the adoption of provision to that effect in the standing orders, inclusion of standing order 49 was thought necessary 'to obviate mistakes'.[2]

As noted above, the adoption of SO 27 has formalised the longstanding practice of the Legislative Council.

28. PRAYERS

(1) The President, on taking the Chair each day, will read the following prayers:

Almighty God, we humbly beseech Thee to vouchsafe Thy blessing upon this Parliament. Direct and prosper our deliberations to the advancement of Thy glory, and the true welfare of the people of our state and Australia.

Our Father, who art in Heaven: Hallowed be thy name. Thy Kingdom come. Thy will be done on earth, as it is in Heaven. Give us this day our daily bread. And forgive us our trespasses, as we forgive those who trespass against us. And lead us not into temptation; but deliver us from evil: For Thine is the kingdom, and the power, and the glory, for ever and ever, Amen.

(2) The President may nominate another member, or request the Clerk to read the prayers.

Development summary		
1934	Standing order 10A	Prayer
1988-2003	Sessional order	Variation to standing order 10A
2003	Sessional order 28	Prayers
2004	Standing order 28	Prayers

Each day, members and the President recite the Lord's Prayer and the Parliamentary Prayer. SO 28 lays out the terms of the prayers and makes provision for the President to nominate another member or the Clerk to read the prayers in his or her place.

2 Rosemary Laing, *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009), p 187.

Operation

Reading of the prayers

At the beginning of each sitting day, the President, on taking the chair, leads the House in reading the prayers – these comprise the Parliamentary Prayer, followed by the Lord's Prayer.

As a matter of convention immediately following the prayers each sitting Tuesday, the President acknowledges the traditional owners of the land on which the Parliament meets. This practice first originated during the Presidency of the Hon Dr Meredith Burgmann, who acknowledged that the House was meeting on Eora land, however, the practice was not formalised by being recorded in the Minutes of Proceedings. Since 29 May 2007, a formal statement has been made on the first sitting day of each week, and recorded in the minutes, acknowledging the Gadigal clan of the Eora nation and its elders, and thanking them for their custodianship of the land on which the Council meets.[3] This practice commenced during the Presidency of the Hon Peter Primrose and has been continued by each presiding officer to have succeeded him in that role.

On days on which there has been a vacancy in the office of President, the practice for reading of the prayers has varied. Taking the example of recent years, in 2007 the prayers were not read until the day following the election of the President,[4] however, in 2011 the prayers were read immediately following the election of the President.[5] Practice has similarly varied since the prayers were first adopted (discussed further below).

Nomination of a member or the Clerk to read the prayers

Under standing order 28(2), the President may nominate another member or request the Clerk to read the prayers. This provision first appeared from 2003, when the 2004 standing orders were trialled as sessional orders.[6] From the first day on which the new rules applied, the then President, the Hon Dr Meredith Burgmann, utilised the new provision to request that the Clerk read the prayers.[7] This arrangement continued during the remainder of Dr Burgmann's presidency, which concluded in 2007.[8]

Under the same provision, on 11 October 2011, the President, the Hon Don Harwin, nominated Revd the Hon Fred Nile to read the prayers in acknowledgement of the 30th anniversary of Revd Nile's election to the Legislative Council.[9]

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3 *Minutes,* NSW Legislative Council, 29 May 2007, p 68.
4 *Minutes,* NSW Legislative Council, 9 May 2007, p 11.
5 *Minutes,* NSW Legislative Council, 3 May 2011, p 6.
6 *Minutes,* NSW Legislative Council, 14 October 2003, p 324.
7 *Minutes,* NSW Legislative Council, 15 October 2003, p 330.
8 However, the Clerk did not read the prayers when the Acting President or Deputy President was in the chair. For example, see *Minutes,* NSW Legislative Council, 22 March 2005, p 1280; 2 May 2006, p 1968; 3 May 2006, p 1981, 4 May 2006, p 1998.
9 *Minutes*, NSW Legislative Council, 11 October 2011, p 457.

Background and development

Provision for the Parliamentary Prayer

The Parliamentary Prayer, comprising the first paragraph of the current prayer under SO 28, was first adopted as standing order 10A on 31 May 1934.[10]

While the motion was passed as formal business and therefore not debated, it is likely that the standing order was adopted to bring the Council's procedures into line with practice in the Legislative Assembly, which had adopted a new standing order in the same terms on 8 May 1934. According to the Premier, the Hon Bertram Stevens, in speaking in the Assembly, the provision was adopted in order to bring practice in New South Wales into line with that of the Commonwealth Parliament, the Imperial Parliament, the United States of America and all other Australian states (except Victoria). The Premier observed that the form of the prayer closely aligned with that offered in the Commonwealth Parliament, and with that read by the Governor during the opening of various sessions of Parliament. The Premier stated that the terms of the standing order had not been referred to the Legislative Assembly's Standing Orders Committee because he had assumed that there would be an appreciation among all members 'and throughout the world of the dominant need which this motion supplies'.[11]

Nevertheless, the new procedure proved to be controversial. Many members opposed the motion on the grounds of their differing religious views, while others stated that it would be hypocritical to offer a prayer over political proceedings that, in their view, would not incur the blessing of God. During debate in the Assembly, the Opposition Leader and former Premier, the Hon Jack Lang, who strongly opposed the motion, observed that in the British Parliament the prayer was offered up by a clergyman, rather than by members, and that in the Commonwealth Parliament, the Lord's Prayer was read. Mr Lang argued that, in view of these facts, the terms in which the prayer was proposed to be read would be inconsistent with that of both Parliaments, contrary to the assertions given by the Premier. To enable consideration to be given to whether the prayer should instead be read by a clergyman, Mr Lang moved an amendment that the question be referred to the Standing Orders Committee, however this was subsequently defeated.[12] Mr Mark Davidson, who also opposed the motion, moved a further amendment to add after the word 'Australia' the words 'Through Our Lord and Saviour Jesus Christ'.[13] This amendment was also subsequently defeated.[14]

In contrast, those who supported the motion did so because they believed the procedure would raise the dignity of the chamber, or that the Parliament would benefit from God's blessing over its proceedings. Several members also observed that the motion

10 *Minutes,* NSW Legislative Council, 31 May 1934, p 26. The Governor's approval was reported to the House on 13 June 1934 (*Minutes,* NSW Legislative Council, 13 June 1931, p 30).
11 *Hansard,* NSW Legislative Assembly, 8 May 1934, pp 189-190.
12 *Hansard,* NSW Legislative Assembly, 8 May 1934, pp 191-194; 9 May 1934, pp 238-240.
13 *Hansard,* NSW Legislative Assembly, 8 May 1934, pp 199.
14 *Hansard,* NSW Legislative Assembly, 9 May 1934, pp 238-240.

may have been prompted by a recommendation made by the newly appointed Anglican Archbishop of Sydney, Archbishop Mowll.[15]

During the debate in the Assembly, several members observed that the prayer had originally been accepted many years earlier in that House, having been said on 'two or three occasions', during which some members left the chamber or refused to join in. Members further observed that the prayer was then discontinued, before an attempt was made to revive it some years later, which was also ultimately unsuccessful.[16]

The Legislative Council had similarly rejected early attempts to adopt the practice of the reading of a prayer – prior to the adoption of the 1856 standing orders, Captain Lethbridge moved a motion to establish a select committee to consider the propriety of commencing proceedings with prayers. The motion was defeated, with members observing that in a community composed of different religious denominations, it would be impossible to agree on a form of prayer.[17] On two later occasions, in 1887 and 1901, petitions were presented to the Legislative Council calling on the House to consider opening sittings with a prayer.[18] The 1887 petition was subsequently referred to the Standing Orders Committee, which determined that 'this committee is not prepared to recommend that the prayer be adopted'.[19] In subsequent debate on a motion to adopt the report, members echoed the concerns previously expressed in 1856, noting the difficulties that would entail in devising a form of prayer that would meet the requirements of each of the religious denominations represented in the chamber.[20]

Provision for the Lord's Prayer

Provision for the reading of the Lord's Prayer at the conclusion of the Parliamentary Prayer was originally adopted by way of sessional order in 1988. The version of the prayer adopted is referred to as the 'Common Prayer'.

The motion was first adopted as formal business on the motion of the Leader of the Government, following the election of the Greiner Government.[21] While the motion was not debated, the practice reflected that of the Commonwealth Parliament, where the Lord's Prayer had been read since 1901.[22] The sessional order was readopted by the

15 *Hansard,* NSW Legislative Assembly, 8 May 1934, p 200.
16 *Hansard,* NSW Legislative Assembly, 8 May 1934, pp 191 and 200.
17 *Minutes*, NSW Legislative Council, 29 October 1856, p 18; *Sydney Morning Herald,* 30 October 1856, p 5.
18 *Minutes,* NSW Legislative Council, 27 April 1887, p 60; 30 October 1901, p 133.
19 Legislative Council Standing Orders Committee, *Opening sittings of Parliament with prayer*, 29 June 1887, p 3 (*Journal of the Legislative Council*, 1887, pp 179-181).
20 *Hansard,* NSW Legislative Council, 30 June 1887, p 2429.
21 *Minutes,* NSW Legislative Council, 28 April 1988, p 26. The election of the Grenier Government in 1988 signalled a change in government to the Coalition from the Labor Party, which had held office since 1976.
22 Laing, *Annotated Standing Orders of the Australian Senate*, pp 188-189.

Council each session, with a very slight variation in terms from 1996.[23] The provision was formally incorporated into the current standing orders, together with the additional provision under paragraph (2) which enabled the President to nominate another member or the Clerk to read the prayer.

Recent proposals to adopt an alternative to the prayers

An alternative to the prayers has been proposed on two occasions, both by Ms Lee Rhiannon of The Greens. First in 2001 and then in 2003, Ms Rhiannon proposed an amendment in the following terms to provide for silent reflection or prayer in place of the President reading the prayer:

> Upon the President taking the Chair each day, if there is a quorum present as providing by standing order 10, the President will say: 'I ask all members to stand in silence and pray or reflect on your responsibilities to the people of New South Wales'.[24]

In speaking to the motion in 2001, Ms Rhiannon stated that this alternative arrangement would allow all parliamentarians and members of the community to participate, regardless of their belief system.[25] In 2003, Ms Rhiannon additionally observed that similar provisions already operated in parliaments in the Australian Capital Territory, Scotland, Northern Island and South Africa.[26] The proposal was negatived by a considerable margin on both occasions.[27]

Reading of the prayers when a vacancy occurs in the office of President

On occasions where a vacancy has occurred in the office of President, the practice for the reading of the prayers has varied. On two occasions, the prayer has been read by the Clerk,[28] and on one occasion the prayer has been read by the commissioners appointed to open parliament.[29] However, on other occasions the prayers have not been read,[30]

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23 *Minutes,* NSW Legislative Council, 17 April 1996, p 26. The new sessional order amended the prayer by omitting 'Our Father, which art', in favour of 'Our Father, who art'; omitting 'Thy will be done in earth' in favour of 'Thy will be done on earth'; and omitting 'forgive them that trespass' in favour of 'forgive those who trespass'.

24 *Minutes,* NSW Legislative Council, 17 October 2001, pp 1209 and 1211-1212; 2 September 2003, p 260; 16 September 2003, pp 287-289. The motion was similar to an amendment moved by Greens Senator Bob Brown in the Australian Senate in 1997. The motion was referred to the Procedure Committee, which found that that those senators who joined in the prayer considered its retention as important, and those who did not join in the prayer did not have a strong view as to its abolition. Senator Brown's motion was subsequently negatived. (Laing, *Annotated Standing Orders of the Australian Senate*, p 189).

25 *Hansard,* NSW Legislative Council, 17 October 2001, pp 17365-17366.

26 *Hansard,* NSW Legislative Council, 16 September 2003, p 3265.

27 *Minutes,* NSW Legislative Council, 17 October 2001, p 1212; 16 September 2003, p 289.

28 *Minutes,* NSW Legislative Council, 30 April 1946, p 167; 23 April 1964, p 452.

29 *Minutes,* NSW Legislative Council, 18 August 1952, p 1.

30 *Minutes,* NSW Legislative Council, 7 November 1978; 1 May 1984. It is understood that the rationale behind the Clerk not reading the prayer was that the standing order only allows for the prayer to be read on the President taking the chair.

or were read by the President later in the day, following their election to office.[31] On one occasion, the prayers were read by the Deputy President immediately following the election of the President.[32]

The practice followed in 2011 and 2015, where the prayers were read immediately following the election of the President, is likely to become established practice.[33]

29. QUORUM AT COMMENCEMENT OF SITTING

(1) If there is no quorum present when the Chair is taken at the time appointed for a meeting of the House, the bells will again ring for 5 minutes. If there is still no quorum present the President will adjourn the House to the next sitting day.

(2) A member who enters the chamber at or after the time appointed for the meeting of the Council may not withdraw until a quorum is formed or the House is adjourned.

(3) When the House is adjourned for lack of a quorum, the names of the members present will be entered in the Minutes of Proceedings.

Development summary		
1856	Standing order 4	Taking the Chair
1870	Standing order 5	Taking the Chair
1895	Standing order 10	Taking the Chair
1985	Standing order 10	Taking the Chair
2003	Sessional order 29	Quorum at commencement of sitting
2004	Standing order 29	Quorum at commencement of sitting
2007-2016	Sessional order	Quorums

Section 22H of the *Constitution Act 1902* provides that the presence of at least eight members, in addition to the President or other member presiding, is required to constitute a meeting of the Legislative Council for the dispatch of business. If after the bells have been rung for five minutes the Chamber remains without a quorum, the President must adjourn the House. While SO 29 requires that the House must be adjourned until the next sitting day, a sessional order agreed to over successive sessions of parliament also provides the option of adjourning until a later hour that same day. The number of members required for a quorum has changed over time, however the requirement itself has applied since 1856.

31 *Minutes,* NSW Legislative Council, 11 May 1999, p 7; 29 April 2003, p 8.
32 *Hansard,* NSW Legislative Council, 29 June 1998, p 612.
33 *Minutes*, NSW Legislative Council, 3 May 2011, p 6; 5 May 2015, p 6.

Operation

If a quorum is not present when the President (or other member presiding) takes the chair, the President will direct the Usher of the Black Rod to ring the bells for five minutes. If there is still no quorum present at the conclusion of that time, the President must leave the chair and adjourn the House (SO 29(1)) and the names of the members present are entered in the Minutes of Proceedings (SO 29(3)). Since 2007, the House has adopted a sessional order which enables the President to adjourn the House either to the next sitting day (in keeping with SO 29 (1)) or to a later hour of the sitting on that same day, ensuring that business may continue in the event that a quorum is formed later that day.[34] The provisions of the sessional order have not been utilised to date, as the House has not been adjourned for the lack of a quorum at the commencement of the sitting since 1900.[35]

Where the House is adjourned for the lack of a quorum to the next sitting day, and that day is a general or public holiday, the House will stand adjourned to the following sitting day (SO 31 (6)).

Under SO 29(2), a member who enters the chamber at or after the time appointed for the meeting of the Council may not withdraw until a quorum is formed or the House is adjourned. This is a new provision adopted in 2004, in the same terms as Senate SO 51.

Background

The requirement for a quorum to be present at the commencement of proceedings has applied consistently since 1856, though some provisions have varied. 1856 SO 4, which applied until 1870, required that the President take the chair within 30 minutes of the time appointed for the meeting of the House. If no quorum had formed within that time, the President was required to adjourn the House until the next sitting day. In 1870, the standing order was amended to require that after 30 minutes, the Usher of the Black Rod, at the direction of the President, must rung the bells for two minutes, after which the President would proceed to adjourn the House if no quorum had formed (1870 SO 5). The provision was taken from the terms of a sessional order that had been adopted from 1857 to 1870 in regards to the procedure to apply in the event of a lack of a quorum during the sitting (1856 SO 5 – see discussion under SO 30). The terms were readopted in 1895 (SO 10), before being amended in 1985 on the recommendation of the Standing Orders Committee to omit provision for the President to take the chair within half an hour of the time appointed for meeting, and instead extend the period for the ringing of the bells to five minutes.[36] This provision was carried over for the purposes of the 2004 rewrite.

The requirement for the names of members present when the House is adjourned for the lack of a quorum to be entered in the Minutes of Proceedings has applied consistently since 1856.

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34 *Minutes,* NSW Legislative Council, 18 October 2007, pp 281-282; 9 May 2011, pp 73-74; 9 September 2014, pp 9-10; 6 May 2015, pp 56-57.

35 *Minutes,* NSW Legislative Council, 5 December 1900, p 273.

36 *Minutes,* NSW Legislative Council, 20 November 1985, pp 912-913 (report tabled); 21 November 1985, pp 933-936 (report adopted).

As noted above, the requirement for a member who enters the chamber at or after the time appointed for meeting to remain in the chamber until a quorum is formed was first adopted in 2004, taken from the terms of the Senate's equivalent standing order (SO 51).

It was fairly common for the House to adjourn for the lack of a quorum between 1856 and 1900, however the practice fell away after that period.

The number of members required for a quorum has varied over time, from one-third of members in 1856, to one-quarter of all members in 1890, to 12 members in 1978, and ultimately 8 members in 1991. A detailed discussion of the constitutional developments pertaining to the quorum can be found in *New South Wales Legislative Council Practice*.[37]

30. QUORUM DURING SITTING

(1) If it appears, on the report of a division of the House by the tellers, that a quorum is not present, the President will adjourn the House to the next sitting day. No decision of the House will be considered to have been reached by that division.

(2) When the Chair of Committees informs the President that a quorum is not present in committee, the bells will ring for 5 minutes. The President will then count the House, and if a quorum is still not present, will adjourn the House until the next sitting day. However, if a quorum is then present, the President will leave the Chair and the committee resume.

(3) If a member draws attention to the lack of a quorum, the bells will be rung until a quorum is formed but for no longer than 5 minutes. If after 5 minutes a quorum is not present, the President will adjourn the House to the next sitting day.

(4) When the attention of the President, or the Chair of Committees, has been called to the absence of a quorum, a member may not leave until the House or committee has been counted.

(5) The doors of the House will be unlocked while the President is counting the House.

(6) When the House has adjourned for lack of a quorum the names of the members present will be entered in the Minutes of Proceedings.

Development summary		
1856	Standing order 5	Quorum – Adjournment
1857–1870	Sessional order	Counting the House
1870	Standing order 6	Adjournment for want of a quorum
1878	Sessional order	Members present when House counted out

37 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 232.

Development summary		
1883	Sessional order	Attendance of members
1895	Standing order 11	Absence of quorum
	Standing order 12	Member calling attention to be counted
	Standing order 224	Absence of quorum (in committee of the whole)
	Standing order 225	House counted by the President
2003	Sessional order 30	Quorum during sitting
2004	Standing order 30	Quorum during sitting
2007-2015	Sessional order	Quorums

Section 22H of the *Constitution Act 1902* provides that at least eight members, in addition to the President or other member presiding, must be present to constitute a meeting of the Legislative Council. A quorum is required to ensure that votes of the Council reflect at least a minimum proportion of the membership of the House, approximately 20 per cent in practice. If the absence of a quorum is drawn to the President's attention either by a member or the Chair of Committees and a quorum is not formed within five minutes, or if the absence of a quorum is noted as the result of a division, the President must adjourn the House until the next sitting day or, under the terms of a sessional order agreed to since 2007, until a later hour.

Operation

As noted in the previous chapter, at least eight members, in addition to the President or other member presiding, must be present in the chamber to constitute a quorum.[38] SO 30 sets out the correct procedure for the President or the Chair when the absence of a quorum is noted in one of three scenarios:

- *On a division:* If the absence of a quorum is apparent on the report of a division, the President will adjourn the House immediately (SO 30(1)). Where the absence of a quorum is noted as the result of a division in either the House or committee of the whole, no decision is taken to have been arrived at on that question (SO 30(1); SO 176(2)).
- *During proceedings in the House:* If a member draws attention to the lack of a quorum during proceedings, the bells are rung for five minutes. If a quorum has not been formed within that time, the President must adjourn the House (SO 30(3)).
- *During committee of the whole:* If notice is taken of the absence of a quorum in committee of the whole, the Chair will count the committee and then order that the bells be rung for five minutes. If a quorum has not been formed, the Chair must leave the chair and report the absence of a quorum to the House (SO 176(2)). The same requirement applies if the absence of a quorum is noted

38 Section 22H of the *Constitution Act 1902*. Section 22H was last amended in 1991. Between 1978 and 1991, the quorum for the Legislative Council was 12.

during a division in committee. SOs 30(2) and 176(3) concurrently provide that when the Chair makes their report to the President, the bells will be rung for five minutes, in keeping with the procedure for determining the absence of a quorum in the House. The President then counts the House and if a quorum is still not present, will adjourn the House until the next sitting day (or until a later hour, under the terms of the sessional order). However, if a quorum is then present, the President will leave the chair and the committee will resume at the point at which it was interrupted.

The terms of SO 30 require that the House adjourn until the next sitting day, however, since 2007 the House has adopted a sessional order which enables the President to adjourn the House either to the next sitting day or to a later hour of the sitting on that same day.[39] Under SO 31(6), where the House is adjourned for the lack of a quorum to the next sitting day, and that day is a general or public holiday, the House will stand adjourned to the following sitting day.

The bell rung to summons a quorum of members is the same as that rung to summon members during a division. The officer sitting at the Usher of the Black Rod's position at the Table is responsible for ringing the quorum bell, at the direction of the Chair. When the attention of the President or the Chair of Committees has been called to the absence of a quorum, members may not leave until the House or committee has been counted (SO 30(4)). However, unlike the procedure for counting members during a division, the doors of the House remain unlocked while the President is counting the House to ensure that members are not prevented from entering the chamber (SO 30(5)). In 1996, Deputy President Gay ruled that members sitting in the President's Gallery are considered present in the chamber and may not leave the chamber while the quorum bells are ringing.[40]

It is relatively uncommon for the absence of a quorum to be noted, and since the early 1900s a quorum has generally been formed during the time that the bells are rung.[41] This was not the case in the early years of the Council, when, during the 1870s, the House was counted out for the lack of a quorum on almost one-fifth of all sitting days. The requirement for the Clerk to record the names of members present in the Minutes of Proceedings when the House is adjourned for lack of a quorum (SO 30(6)) was first adopted during this period, but has not been utilised in recent years.

39 *Minutes,* NSW Legislative Council, 18 October 2007, pp 281-282; 9 May 2011, pp 73-74; 9 September 2014, pp 9-10; 6 May 2015, pp 56-57.

40 *Hansard,* NSW Legislative Council, 23 April 1996, p 327. While members may informally be counted for the purposes of a quorum while sitting in the gallery, members would not be counted for other purposes, such as during a division on a question.

41 See, for example, *Minutes,* NSW Legislative Council, 9-10 June 2005, p 1464; 12 October 2005, p 1626; 9 November 2005, p 1697; 2 May 2006, p 1977; 15 November 2006, p 355; 10 May 2011, p 88; 2 June 2011, p 180 (x 3); 16 June 2011, p 211 (x 2); 18 September 2012, p 1240; 20 June 2013, p 1844; 26 June 2013, p 1868.

For an explanation of the procedure that applies to items of business interrupted by the House adjourning due to the lack of a quorum, see SOs 106 and 176.

Background

The provisions of SO 30 have developed over time. In 1856, the standing orders simply provided that if notice was taken of the absence of a quorum at any time after the commencement of business, the President was to adjourn the Council until the next sitting day (1856 SO 5).

Between 1857 and 1870, the House agreed to a sessional order which inserted provision for the President to direct the Usher of the Black Rod to ring the bells for two minutes before the President proceeded to count the House.[42] The motion was inspired by a similar resolution adopted by the Assembly, where business was reported to have frequently been prevented by the accidental loss of a quorum, leading to business being 'retarded or delayed'.[43] The 1870 revision of the standing orders incorporated the rule in its amended form,[44] providing that in the absence of a quorum the bells would be rung for one minute before the President would count the House and then adjourn the Council (1870 SO 6). The provision was reported to have worked to the benefit of the other place, and was hoped to have the same effect in the Council, however, during the 1870s the House struggled to maintain a quorum, with the House adjourning on as often as one-fifth of all sitting days in some years.[45]

In 1878, the House agreed to a sessional order providing that whenever the House was counted out for lack of a quorum, the names of members then present would be recorded in the Minutes of Proceedings.[46] This brought the provisions of the standing order into line with those governing the want of a quorum on the President first taking the chair (1870 SO 5). The new provision was first used on the same day that the new sessional order was agreed to.[47]

In 1881, the Standing Orders Committee inquired into steps that may be taken to secure the attendance of members so that proceedings of the House may not be arrested or delayed for want of a quorum.[48] The committee reported that several propositions had been laid before it, including amending the *Constitution Act 1855* to reduce the

42 *Minutes,* NSW Legislative Council, 12 August 1857, p 6; 25 March 1858, p 8; 9 December 1858, p 4; 1 September 1859, p 9; 26 September 1860, p 6; 14 January 1861, p 11; 4 September 1861, p 10; 28 May 1862, p 8; 24 June 1863, p 8; 19 October 1864, p 8; 31 January 1865, p 16; 25 October 1865, p 8; 25 July 1866, p 8; 3 July 1867, p 8; 17 December 1868, p 22; 29 September 1869, p 8; 2 February 1870, p 12; 12 August 1870, p 8.

43 *Sydney Morning Herald*, 13 August 1857, p 4.

44 *Sydney Morning Herald,* 23 September 1870, p 2.

45 David Clune and Gareth Griffith, *Decision and Deliberation: The Parliament of New South Wales, 1856-2003* (Federation Press, 2006), pp 117-118.

46 *Minutes,* NSW Legislative Council, 23 October 1878, p 32.

47 *Minutes,* NSW Legislative Council, 23 October 1878, p 33.

48 *Minutes,* NSW Legislative Council, 1 September 1881, p 55.

number of members required for a quorum, but none of the options presented would be effective, and 'the gravity of the occasion does not seem to be sufficient to justify their recommending that any attempt should be made to meet the evil by legislation'. The committee was particularly of the view that it would not be appropriate to reduce the quorum as the influence of the Council would be impaired if important measures could be decided by a majority of only a few votes. The committee concluded that 'nothing but a sense of duty animating the members individually will protect the House from the evils consequent on irregular attendance; and to this sense of duty we think the House may always safely appeal'.[49]

In 1883, a sessional order was agreed to which required that attendance at both divisions and count-outs would be recorded in the sessional return published in the *Journal of the Minutes of Proceedings*.[50]

From 1890, the requirement for a quorum was altered from one-third of all members to one-quarter. Clune and Griffith note that while the official record suggests that count-outs ceased to be a serious problem in the Council after this point, in reality the practice developed that members rarely took notice of the lack of a quorum.[51]

In 1895, two new standing orders were adopted (SOs 11 and 15), taken from the terms of the Assembly's equivalent standing orders,[52] most of the provisions of which continue to apply today (namely paragraphs 1, 2, 3 and 6 of 2004 SO 30). While provision was originally made for the bells to be rung for one minute, the standing order was amended in 1985 to extend the period to five minutes. Similar amendments were made to the standing orders governing the ringing of a quorum bell in committee of the whole (1895 SO 225) and the ringing of division bells (1895 SO 128).[53] It is understood that these amendments were made to facilitate members' travel to the chamber following the construction of new offices in the 'tower block' at the rear of the original Parliament building, considerable energy having been devoted to precisely measuring the time it would take a member to travel the several floors from their new office to the chamber.

Although the 1895 standing orders were taken from the terms of those adopted in the Assembly, the Council chose not to adopt one of the more notable provisions adopted by that House – that any member calling attention to the absence of a quorum when a quorum is actually present shall be deemed guilty of disorder (Assembly 1894 SO 46).

Paragraphs (4) and (5) of the 2004 standing order are new additions, taken from the terms of Senate SO 52 (Quorum during sitting).

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49 *Standing Orders Committee,* 'Want of a Quorum', 12 October 1881, *Journal of the Legislative Council* 1881, Part 1, p 259.

50 *Minutes,* NSW Legislative Council, 24 January 1883, p 20.

51 Clune and Griffith, *Decision and Deliberation*, p 118.

52 Legislative Assembly 1894 SOs 44, 45 and 47.

53 *Minutes,* NSW Legislative Council, 20 November 1985, pp 910-914; *Minutes,* NSW Legislative Council, 21 November 1985, pp 933-935; *Hansard,* NSW Legislative Council, 21 November 1985, p 10229.

31. ADJOURNMENT OF THE HOUSE

(1) Except where the Standing Orders provide for the President or Clerk to adjourn the House without putting a question, the House can be adjourned only by its own resolution.

(2) The adjournment of the House to terminate the sitting may be moved at any time by a Minister.

(3) The motion for the adjournment of the House to terminate the sitting may not be amended.

(4) On any motion for adjournment to terminate a sitting:

(a) the question will be put no later than 30 minutes after the motion has been moved, or, when a Minister wishes to speak or is then speaking, at the conclusion of the Minister's remarks,

(b) any member may speak for five minutes on matters not relevant to the question, but may not refer to matters which are otherwise not in order.

(5) If, before the days and hours of sitting have been appointed by the House, an adjournment takes place without the day and hour being fixed for meeting, the House will meet on the days and at the hour appointed in the previous session.

(6) Whenever the House is adjourned for lack of a quorum to the next sitting day, and that day is a general holiday or public holiday, the House will stand adjourned to the following sitting day.

Development summary		
1871	Sessional order	Adjournment – Holidays, Thanksgiving, or Fast Days
1895	Standing order 13(d)	Motions for adjournment – Motion to terminate Sitting
1986-2003	Sessional order	Adjournment – Motion for
2003	Sessional order 31	Adjournment of the House
2004	Standing order 31	Adjournment of the House

The initiation of a motion to adjourn a sitting of the House to a future day is, according to practice, the prerogative of the government, and is moved by a minister (or a Parliamentary Secretary acting as a minister under SO 25) at any time of the government's choosing. However, the matter must be determined by a vote of the House, ensuring that the sitting may only conclude with the support of a majority of members – the House can only be adjourned by its own resolution. Since 1986, debate on the motion to adjourn the House has been subject to a time limit.

Operation

The adjournment of the House to terminate the sitting may be moved at any time by a minister (SO 31(2)). The motion for adjournment cannot be amended – members may

only vote either in the affirmative or the negative (SO 31(3)). If the motion is agreed to, the House adjourns until the day appointed by sessional order under SO 35. If an adjournment motion is agreed to before the days and hours of sitting have been fixed for meeting under SO 35, the House will adjourn until the day and hour appointed in the previous session (SO 31(5)). If the motion for adjournment is negatived, the sitting will continue and the President will call on the next item of business listed for that day.[54]

Debate on the motion to adjourn the House is subject to an overall limit of 30 minutes, and each member speaking to the motion may speak for no more than five minutes, or, when a minister wishes to speak or is then speaking, at the conclusion of the minister's remarks (SO 31(4)). The minister's contribution is not subject to a time limit. Rulings of the President have suggested that when a minister speaks to the adjournment debate, the question will be put at the end of those remarks, regardless of whether other members have first been afforded the opportunity to speak to the debate. Similarly, if a parliamentary secretary wishes to speak to the debate, they must ensure that they are not the parliamentary secretary who moved the adjournment motion, and a minister or another parliamentary secretary must also be present in the chamber to allow them to speak in their capacity as a private member.[55]

Unlike some other parliamentary chambers which pose restrictions on the breadth of subjects that may be debated on the adjournment motion, members of the Legislative Council may speak to any matter on the adjournment, and to more than one matter, provided that their contribution does not exceed five minutes.[56] In view of this rule, the adjournment debate could provide an opportunity for members to make a personal explanation in response to a matter for which they may otherwise not receive leave were they to use the provision available under SO 88, which requires the agreement of all members present.

The order in which members speak to the motion is determined informally according to a roster system managed by the Government Whip.

The adjournment motion is moved at the conclusion of the day when the most urgent matters of business have been dealt with by the House. However, unlike most other motions provided for under the standing orders, the motion to adjourn the House has also been moved as a dilatory motion – that is, when there is a question already before the House, to supersede the matter already under debate.[57]

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54 For example, *Minutes*, NSW Legislative Council, 23 August 1978, pp 66-68.

55 Ruling: Deputy President Saffin, *Hansard*, NSW Legislative Council, 29 August 2000, p 8469; Ruling: President Primrose, *Hansard,* NSW Legislative Council, 13 May 2008, p 7416; Ruling: President Harwin, *Hansard,* NSW Legislative Council, 27 March 2012, p 9829

56 Ruling: Deputy President Gay, *Hansard*, NSW Legislative Council, 10 March 1993, p 555; Ruling: President Burgmann, *Hansard*, NSW Legislative Council, 5 September 2000, p 8652; Ruling: President Burgmann, *Hansard*, NSW Legislative Council, 15 November 2006, p 147.

57 For example, *Minutes,* NSW Legislative Council, 20 September 2005, p 1584, when the adjournment motion was moved to supersede debate on an urgent motion moved under SO 201.

Under SOs 29, 30 and 176, in the event that there is an absence of a quorum[58] of members in the House, the President will adjourn the House immediately until the next sitting day. Where such an adjournment occurs, no question is put and there is no debate. Under SO 31(6), where the House is adjourned for the lack of a quorum to the next sitting day, and that day is a general or public holiday, the House will stand adjourned to the following sitting day. The adjournment of the House for the want of a quorum is discussed further under SO 29 and SO 30.

Interruption for adjournment

Under SO 32, the House may appoint a regular time at which proceedings will be interrupted to permit a motion for adjournment to be moved to terminate the sitting, if a minister so wishes. This procedure is discussed further under SO 32.

Special adjournment

Under SO 74(4)(a), a motion may be moved without notice by a minister for a special adjournment of the House. The special adjournment is used when the minister seeks to adjourn the House to a day or time beyond that previously resolved by sessional order or resolution of the House. The special adjournment was routinely moved on Thursdays to resolve that the House, at its rising later that day, will next sit on Tuesday, rather than on Friday in accordance with the sessional order for sitting days, but is also moved at other times when it is necessary to vary the time for meeting. However, on Thursday 10 March 2016, the President made a statement that as a result of the House adopting a sitting calendar for 2016, there was no requirement for a special adjournment to be agreed to each sitting Thursday, but only when the sitting calendar was being modified, or when the House was to adjourn for a several weeks.[59]

Special long adjournment

At the termination of a session, and on some occasions when the House rises for a period of some weeks, the motion for the adjournment has been put in the form:

> That the House at its rising today, do adjourn until [date] at [time] unless the President, or if the President is unable to act on account of illness or other cause, the Deputy President, prior to that date, by communication addressed to each member of the House, fixes an alternative day or hour of meeting.

This type of special adjournment was first used when the House rose for a period of five weeks in 1932, in lieu of a prorogation owing to the recession. The original terms of the motion proposed at that time provided for members to be notified three clear days prior to the date fixed for meeting. Although members protested that this was insufficient time for notification, the minister did not agree. The President explained that three clear

58 Under s 22H of the *Constitution Act 1902*, at least eight members, in addition to the President or other member presiding, must be present in order for the House to continue sitting.

59 *Minutes*, NSW Legislative Council, 10 March 2016, p 717.

days meant in substance five days – a telegram would be sent one day, three days must intervene, and the sitting take place after that.[60]

Similar motions were made in subsequent sessions, however, from the 1936-37 session the reference to three clear days was omitted. A variation appeared in the 1941-42 session when a proviso was inserted 'that if the Premier informs the President of urgency shorter notice may be given'.[61] Reference to the sending of a telegram continued to be made until 26 May 1949,[62] after which the House adopted the open-ended terms still favoured today which leave the period and means of notification to the discretion of the presiding officer.[63]

(SO 36 also provides for the President to recall the House during a period of adjournment, however, under SO 36 the President must act at the request of an absolute majority of members. In contrast, the practice referred to above enables the President to recall the House without the support of a majority of members.)

On occasion, the special adjournment has been used as an opportunity to debate other special matters, such as the valedictory speech of a resigning member[64] or seasonal felicitations.[65]

Background

The House has adjourned on the motion of a representative of the government as a matter of practice since 1856.

The motion to adjourn the House was first formalised in the standing orders in 1895. SO 13 provided for the House to 'adjourn' to debate an urgency motion, however, paragraph (d) of the standing order stated that:

> Nothing contained in this rule shall apply to the usual motion of adjournment by a member of the Government to terminate the sitting of the House.

In the years following the adoption of SO 13, and particularly during the 1920s, a practice developed informally of the adjournment being used for the purpose of ministers responding to comments made during the adjournment debate, or during a previous adjournment debate. On occasion, members would also use the adjournment to ask questions without notice of ministers, who then either gave a brief answer or undertook to take the matter up with the relevant minister or department.[66]

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60 *Minutes,* NSW Legislative Council, 18 March 1932, p 502; *Hansard*, NSW Legislative Council, 18 March 1932, p 8787.

61 *Minutes*, NSW Legislative Council, 13 January 1942, p 142; 25 February 1942, p 147; 27 May 1942, p 207; 17 June 1942, p 225.

62 *Minutes*, NSW Legislative Council, 26 May 1949, p 126.

63 This new form of words was first adopted in *Minutes*, NSW Legislative Council, 30 June 1949, p 160.

64 *Minutes*, NSW Legislative Council, 23 June 2004, p 889; 20 September 2006, p 206.

65 For example, *Minutes,* NSW Legislative Council, 13-14 December 2001, p 1409; 9 December 2004, p 1212; 23 November 2006, p 437.

66 For example, *Hansard,* NSW Legislative Council, 11 November 1942, pp 863-864; 2 May 1950, p 6351; 1 October 1952, pp 1037-1038.

Provision for debate on the adjournment motion was first formalised in 1986. On 19 March 1986, the Leader of the Government in the Legislative Council, moved pursuant to notice that during the present session and unless otherwise ordered, on any motion for adjournment to terminate a sitting:

- the question shall be put no later than 15 minutes after the motion had been moved, or, when a minister desires to speak or is then speaking, at the conclusion of the minister's remarks
- any member may speak for five minutes on a matter not relevant to the motion,
- proceedings be interrupted at a designated time on Thursdays to enable the adjournment to be moved.[67]

In speaking to the motion, the Leader of the Government stated that in the previous two years the Government had clearly signalled its intention to overhaul the proceedings of the House by looking to the model of other chambers. As members had been restricted in their capacity to raise matters on the adjournment and put questions to ministers, the Government proposed that the House adopt similar provisions for an adjournment debate to those operating in the Legislative Assembly. The Leader of the Government stated that as there were fewer members in the Council and recent adjournment debates had been limited to a maximum period of 15 minutes, it was appropriate that there should be provision for only three speeches of not more than five minutes and for the minister to reply to matters raised if they so wished.[68] The President would determine who spoke on the adjournment debate and would apply the time limits for speaking.[69]

The Opposition supported the motion, but moved an amendment to omit the provision for members to speak to 'a matter' not relevant to the motion, and insert instead provision for members to speak to 'matters' not relevant to the motion, with a view to clarifying that a member could raise more than one matter during the debate and ensuring that the strictures[70] applied to debate in the past were formally set aside.[71] The question on the amendment of the Opposition was agreed to, and the motion amended agreed to as amended.[72]

The sessional order was readopted over following sessions, with amendment. The time for debate was extended to 30 minutes from 1995,[73] and other minor variations were

67 *Minutes*, NSW Legislative Council, 19 March 1986, pp 89-90.
68 *Hansard,* NSW Legislative Council, 19 March 1986, pp 1138-1139.
69 *Hansard,* NSW Legislative Council, 19 March 1986, p 1143.
70 The Leader of the Opposition observed that Presidents had required that matter raised in the adjournment debate be of major importance; be suddenly arising; be capable of resolution by ministerial action rather than by Parliament; and not be of a continuing nature (*Hansard,* NSW Legislative Council, 19 March 1986, p 1140).
71 *Hansard,* NSW Legislative Council, 19 March 1986, p 1139.
72 *Minutes,* NSW Legislative Council, 19 March 1986, pp 89-90.
73 *Minutes,* NSW Legislative Council, 24 May 1995, p 33.

progressively made to the terms. The sessional order was then ultimately incorporated as SO 31 in the 2004 rewrite of the standing orders.

Provision for practice to be followed where the House is adjourned for the lack of a quorum to a day that is a general holiday or public holiday under SO 31(6) was first adopted in 1871. Following the House being adjourned for the lack of a quorum and members and officers being forced to attend again the following day – a public holiday[74] – the House agreed to a sessional order, readopted thereafter each session, providing that where the House was adjourned for the want of a quorum to a day that was a holiday, thanksgiving or fast day, the House would stand adjourned to the next succeeding day.[75] The provision was then incorporated into 1895 SO 15, and carried over in the 2004 standing order.

32. INTERRUPTION FOR ADJOURNMENT

(1) The House may appoint the time that proceedings will be interrupted on Thursdays and Fridays to permit a motion for adjournment to be moved, if a Minister so wishes, to terminate the sitting.

(2) If, at the time of interruption:

(a) a division is in progress, the division will be completed and the result announced,

(b) the House is in committee of the whole, the Chair will report progress and seek leave to sit again.

(3) When any business under discussion, if not disposed of, is interrupted by the operation of this standing order, the debate will stand adjourned and be made an order of the day for the next sitting day at the end of government or general business, as the case may be, fixed for that day, unless a motion is moved without amendment or debate for the adjournment of the debate to another day (to be stated).

Development summary		
1856	Standing order 32 Standing order 38	Precedence of motions Lapsing of notices, &c.
1870	Standing order 42 Standing order 47	Precedence of motions Lapsing of notices, &c.
1895	Standing order 66	Remanets
1986-2004	Sessional order	Adjournment/Motion for Adjournment/ Adjournment of the House
2003	Sessional order 32	Interruption for adjournment
2004	Standing order 32	Interruption for adjournment
2004-2015	Sessional order	Motion for the adjournment

74 *Minutes*, NSW Legislative Council, 2 June 1871, p 200; 6 June 1871, p 201.

75 *Minutes*, NSW Legislative Council, 8 June 1871, p 206; *Sydney Morning Herald,* 9 June 1871, p 2.

Each sitting day, business is interrupted at an agreed time to provide a minister with the opportunity to move the motion: 'That this House do now adjourn'. The interruption provides a convenient break in proceedings, however, the minister is not obliged to move the adjournment if the government would prefer that the House continue to sit beyond that time.

Operation

Each session, the House nominates a time at which proceedings will be interrupted on certain sitting days to provide a minister with an opportunity to move the motion to adjourn the House. In practice, at the time appointed, the Chair announces: 'Order! It being [time], proceedings are now interrupted to permit the minister to move the adjournment motion, if desired.'

The minister is not obliged to move the adjournment motion at that time if the government determines that there is further business to be considered by the House; the interruption simply works to provide a convenient break in proceedings. While the standing order requires that a time for the interruption be appointed only for Thursdays and Fridays, in practice the House has also appointed a time for interruption of business on Mondays, Tuesdays and Wednesdays since 2011. (This provides members and others with a general guide as to possible sitting times on each sitting day, while retaining the government's discretion to move to terminate the sitting either earlier or later than the time for the interruption for adjournment.)

If at the time for the interruption a division is in progress, the division will be completed and the result announced before the presiding officer interrupts business (SO 32(2)(a)). If the House is in committee of the whole at the time for the interruption and the minister indicates that he or she does wish to move the adjournment motion, the Chair must leave the chair, report progress and seek leave for the committee to sit again (SO 32(2)(b)). Once the question on that motion has been determined, the minister can then move the adjournment. Under the terms of the standing order, the Chair must report progress regardless of whether the House then subsequently adjourns, however, under the terms of the sessional order for the motion for adjournment varied since 2011 the Chair is required only to inquire if the minister wishes to move that the Chair report progress and seek leave to sit again.[76] If the minister indicates that they do not wish to move the adjournment motion at that time, proceedings in committee continue, however, the interruption is recorded in the Minutes of Proceedings.

Any business still under discussion at the time of the interruption and subsequent adjournment of the House is set down as an order of the day for the next sitting day. SO 32(3) requires that the item be listed at the end of government or general business fixed for that day, as applicable. In practice, this means that items will remain in

76 See paragraph (2) of the sessional order for the motion for adjournment commencing, *Minutes*, NSW Legislative Council, 23 November 2011, p 611.

the same order in which they were listed the previous day, unless another item has previously been afforded priority for the following day. Under SO 32(3), a member may move a motion for the item to be set down for a future day. Unlike a motion to adjourn debate moved in most other circumstances (under SO 101), the motion cannot be amended or debated.

A member speaking when proceedings are interrupted may continue speaking when proceedings are resumed. While SO 32 is silent in this regard, SO 46(3), which provides the equivalent procedure to be followed if business is interrupted by any other rule or order of the House, makes this principle clear.

Background

The standing orders have provided that items interrupted by adjournment would be set down on the Notice Paper for the next sitting day after items already set down since 1856. However, provision for proceedings to be interrupted to move the adjournment motion originated in a sessional order first adopted in 1984 to provide that proceedings be interrupted at 4.15 pm on Thursday to permit a motion to be moved for termination of the sitting.

Under the terms of the sessional order the question on the motion for adjournment was to be put no later than 15 minutes after the motion had been moved. The resolution was agreed to as formal business without debate.[77] The provision for the question to be put within 15 minutes operated in a number of different ways in practice – on some days a 'question of urgency' was put to a minister following the interruption;[78] on others, additional business such as a message from the Assembly was reported before the question was put;[79] and on others, the question on the adjournment was put immediately.[80]

When the sessional order was readopted in subsequent sessions, the provision was amended to provide for a regular opportunity for debate on the adjournment motion – this aspect of the sessional order is discussed further under SO 31. Other variations were also incorporated as the sessional order was readopted over time.[81] From 1986, much of the terms of paragraph (3) of the current standing order, excepting the last three lines (which were not adopted until 1988 – see below), were adopted, specifying that business interrupted by the sessional order would be set down as an order of the day for the

77 *Minutes,* NSW Legislative Council, 16 August 1984, p 36.

78 *Minutes,* NSW Legislative Council, 16 August 1984, pp 216-217.

79 *Hansard,* NSW Legislative Council, 25 October 1984, p 2567.

80 *Hansard,* NSW Legislative Council, 11 October 1984, p 1773.

81 For example, the sessional order was temporarily lifted for specified periods – e.g. *Minutes,* NSW Legislative Council, 20 November 1985, p 909; 19 November 1986, p 496. From 1987, the terms were amended to provide for the adjournment to be moved 'if a minister shall think fit', making clear that the time for adjourning the House should remain at the discretion of the government – *Minutes,* NSW Legislative Council, 13 October 1987, pp 1110-1111.

next sitting day.[82] While this provision replicated the provisions of 1895 SO 66 (which continued the 1856 provisions), it was likely adopted to ensure that where proceedings were interrupted for the adjournment but the House did not subsequently adjourn (that is, the minister declined to move adjournment or the motion for adjournment was resolved in the negative), the item interrupted would still be set down on the Notice Paper rather than lapse (because 1895 SO 66 only applied to items that were interrupted by adjournment of the House).

From May 1988 the sessional order provided a time for business to be interrupted on both Thursdays and Fridays and inserted the procedure to be followed if a division was in progress or the House was in committee of the whole at the time for interruption – now incorporated within paragraph (2) of SO 32.[83] From August 1988 the terms were further altered to provide in paragraph (3) that items interrupted would be set down on the Notice Paper for the next sitting day 'unless a motion is moved without amendment or debate for the adjournment of the debate to another day (to be stated)'.[84]

In 1990, the Hon Elisabeth Kirkby (Australian Democrats) sought to introduce an amended form of the sessional order which would require the President to interrupt proceedings at 10.30 pm to put the question: 'That the House continue to sit'. If the question was resolved in the negative, the minister would be obliged to move the adjournment motion forthwith. Ms Kirkby explained that her motivation for moving the sessional order was to prevent the government from continuing to 'use and abuse the good will of the staff of this Parliament' by forcing the Legislative Council to sit late into the evening without requisite compensation.[85] The motion was ultimately negatived on division.[86]

The terms of the 1988 sessional order were readopted each session until incorporated into SO 32 in 2004.

Between 2004 and 2010, the sessional order adopted under the requirements of SO 32 nominated a time at which proceedings would be interrupted on Thursdays and Fridays only. Since 2011, the sessional order has gone beyond the requirements of the standing order and nominated a time for the interruption of business every sitting day. As noted earlier, the sessional order adopted since 2011 has also altered the terms of SO 32(2)(b) to provide that if the House is in committee of the whole, the Chair is obliged to inquire if the minister wishes to move that the Chair report progress and seek leave to sit again. If the minister responds in the negative, proceedings may continue.

33. MINISTERIAL REPLY TO ADJOURNMENT MATTERS

A Minister may, before the House proceeds to the business of the day, make a statement in relation to any matter raised on the adjournment at a previous sitting.

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82 *Minutes,* NSW Legislative Council, 19 March 1986, pp 89-90.
83 *Minutes,* NSW Legislative Council, 24 May 1988, pp 48-49.
84 *Minutes,* NSW Legislative Council, 18 August 1988, p 26.
85 *Hansard,* NSW Legislative Council, 22 August 1990, pp 6062-6066.
86 *Minutes,* NSW Legislative Council, 11 September 1990, pp 400-401.

Development summary		
1988-2003	Sessional order	Ministerial reply to adjournment matters
2003	Sessional order 33	Ministerial reply to adjournment matters
2004	Standing order 33	Ministerial reply to adjournment matters

At the conclusion of formalities and before the House proceeds to the consideration of business on the Notice Paper, a minister may make a statement in relation to any matter raised on the adjournment at a previous sitting. The provision has not been used since the adoption of the 2004 standing orders, with ministers more often inclined to utilise the provisions of SO 31(4) which afford them the opportunity to speak at the conclusion of the adjournment debate, before the question is put.

Operation

Proceedings in the House are considered and disposed of in the order laid out under the Routine of Business (SO 38). The bulk of the matters itemised in the standing order relate to what is colloquially referred to as 'formalities' – matters of business that are required to proceed in a certain order or at a certain time under various standing orders. At the conclusion of formalities, the House proceeds to business on the Notice Paper. Both SO 33 and SO 38 provide that, at the conclusion of all other formalities and before the House proceeds to business on the Notice Paper, a minister may make a statement in relation to matters raised on the adjournment. No time limit applies to the statement, and the standing orders do not provide for a right of reply from another member (that right being available via other procedural mechanisms such as a substantive motion or a further contribution on a subsequent motion for adjournment).

The provision has only been used once since first adopted in 1988, during the time that the rule applied as a sessional order. On 19 September 1996, the Hon Michael Egan, Leader of the Government, replied to a matter concerning Port Stephens Council raised by Mr Ian Cohen (Greens) during the adjournment debate on Monday 17 June 1996.[87]

Background

In 1988, the House adopted a new sessional order providing that a minister may, before the House proceeds to the business of the day, make a reply in relation to a matter raised on the adjournment at a previous sitting.[88] The motion was adopted as formal business without debate, however, the provision was likely prompted by another sessional order recently adopted which, for the first time, made provision for members to speak on the motion to adjournment (see discussion under SO 31 – Adjournment of the House). The Legislative Assembly had also recently adopted provision for members to debate

87 *Minutes,* NSW Legislative Council, 19 September 1996, p 334.

88 *Minutes,* NSW Legislative Council, 24 May 1988, p 49.

the adjournment motion, however, that House did not make provision for ministers to speak to matters raised.

The sessional ordered was readopted in the same terms each session before being incorporated as new SO 33.[89] As noted above, the provision was used once during the operation of the sessional order, and has not been used since the adoption of the standing order, with ministers more often inclined to utilise the provisions of SO 31(4) which afford them the opportunity to speak at the conclusion of the adjournment debate, before the question is put.

34. MINISTER TO BE PRESENT IN THE HOUSE

The House will not meet unless a Minister is present in the House.

Development summary		
2003	Sessional order 34	Minister to be present in the House
2004	Standing order 34	Minister to be present in the House

Standing order 34 requires that a minister, or a parliamentary secretary acting on a minister's behalf, be present in the House at all times. While this is a longstanding convention in the Legislative Council, the principle first received expression in the standing orders in 2004.

Operation

The requirement for a minister to be present in the House at all times has proved to be surprisingly onerous in a House that, on average, counts only three ministers among its members, though this has varied across different sessions.[90] The provisions of SO 25, which permit a parliamentary secretary to act as a minister in the House in all respects (except in relation to answering questions), therefore assist the government to comply with the requirements of the standing order, and in practice a roster is maintained to ensure that a minister or parliamentary secretary is present at all times.

Standing order 34 is the formal expression of a longstanding convention that a member of the Executive is present both to ensure the smooth progress of the government's agenda, and also to answer questions and provide clarification on matters in a House of review. Where a minister (or a parliamentary secretary acting on their behalf) is not present when the House meets, or where a member calls attention to the absence of a minister during the sitting, the President must leave the chair until a later hour.

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89 *Minutes,* NSW Legislative Council, 18 August 1988, p 26; 22 February 1990, p 25; 21 February 1991, p 25; 2 July 1991, p 18; 4 March 1992, p 23; 2 March 1993, p 25; 2 March 1994, p 29; 24 May 1995, p 26; 17 April 1996, p 28; 7 September 1997, p 38; 12 May 1999, p 45; 8 September 1999, p 26; 12 March 2002, p 36; 30 April 2003, p 47.

90 The number of ministers in the Council peaked at seven in the Carr ministry appointed in 2003. *Minutes*, NSW Legislative Council, 29 April 2003, pp 15-17.

Since the adoption of the standing order, the rule has been called into effect on three occasions. In two of these instances, on notice being taken that there was no minister present, the minister or a parliamentary secretary returned shortly thereafter, though the practice in each case varied, in the first being the result of the bells being rung (contrary to the terms of the standing order) and in the second following the President leaving the chair for several minutes.[91] However, in 2009, on it becoming apparent that the Government did not have the support of the House for one of its legislative proposals, the last minister remaining in the House that day left the chamber. The President left the chair and suspended the sitting.[92] The suspended sitting continued for a period of over two months,[93] leading to concerns that the standing order was being abused in order to prevent the House from sitting, contrary to its purpose, and contrary to the principle that while the government may set the legislative agenda, the Council will determine its own sittings.

Background

Since responsible government, the Vice-President of the Executive Council has been a member of the Legislative Council. This officer is ordinarily also a member of the ministry, however, on some occasions the officer has been the sole representative where no minister has been appointed from among the membership of the Council. In the early years of the Council, the House on occasion adjourned early or the President left the chair for a period of time, in some cases immediately after meeting, owing to the absence of the Vice-President of the Executive Council.[94] On several other occasions the President did not leave the chair.[95]

In the ensuing years, practice also varied. On one occasion the President did not leave the chair in the absence of a minister,[96] on other occasions a point of order was taken and a minister returned,[97] and on others, the President (or Deputy President) left the chair

91 *Minutes*, NSW Legislative Council, 16 September 2004, p 998; 21 June 2005, p 1476.

92 *Minutes*, NSW Legislative Council, 24 June 2009, p 1282.

93 The House resumed on the date originally set as the first day of the Spring sitting period. The minister had left the chamber during debate on a motion for the special adjournment. When the House resumed, the motion was amended by the Leader of the Opposition to require that the House adjourn until '15 minutes after the question on the motion for the adjournment of the House has been put and passed' (*Minutes*, NSW Legislative Council, 24 June, 25 June, 1 September 2009, p 1283). The House adjourned, and 15 minutes later met to commence a new sitting day (*Minutes*, NSW Legislative Council, 1 September 2009, p 1287).

94 For example, *Minutes*, NSW Legislative Council, 28 September 1859, pp 18-19; 5 October 1859, p 20; 6 October 1859, p 21; 30 April 1931, p 131; *Hansard*, NSW Legislative Council, 30 April 1931, pp 2110 and 2420. Also see discussion of the issue in Clune and Griffith, *Decision and Deliberation*, pp 73-74.

95 *Minutes*, NSW Legislative Council, 31 March 1916, pp 304-305; 9 August 1916, p 25.

96 For an example of a second reading continuing during the absence of a minister, see *Hansard*, NSW Legislative Council, 1 December 1976, pp 3939, 3951 and 3957.

97 *Hansard,* NSW Legislative Council, 31 March 1977, p 6121; *Minutes,* NSW Legislative Council, 15 December 1995, p 474.

owing to the absence of a minister.[98] SO 34 has therefore had the effect of clarifying the correct procedure to apply when attention is drawn to the absence of a minister.

Prior to the adoption of SO 34, the last occurrence of the President leaving the chair occurred in 2001, when, owing to the blockade of the Parliament building for the purposes of an industrial relations protest, ministers were unable to enter the chamber. On that occasion, the Deputy President left the chair until the ringing of a long bell several hours later that day, when ministers were then in attendance.[99]

98 *Minutes,* NSW Legislative Council, 14 April 1981, p 457; 7 April 1982, p 439; 20 September 1983, p 134; 13 October 1998, p 751; 19 June 2001, p 1028.

99 *Minutes,* NSW Legislative Council, 19 June 2001, p 1028.

CHAPTER 7

TIMES OF SITTING AND ROUTINE OF BUSINESS

35. TIMES OF MEETING

The days and times of meeting of the House in each sitting week will be determined by the House from time to time.

Development summary		
1895	Standing order 9	Days and hours of meeting
2003	Sessional order 35	Times of meeting
2004	Standing order 35	Times of meeting

Chapter 7, SOs 35 to 48, provide for the times of meeting and the routine and precedence of business.

The right to determine when the House will meet reflects the principle that the House controls its own business and procedure. The Council appoints the days and times for its meetings by sessional order, which can be varied by resolution.

By convention, the Executive Government determines a pattern for the sittings each year within the parameters set by sessional order.

Operation

SO 35 requires the House to appoint the days and times it will meet. Under the standing order, at the beginning of each session of Parliament the House considers a motion on notice for a sessional order setting the times at which the House will meet each day. The sessional order continues until amended or repealed.

The sessional order adopted under SO 35 has provided the times for the House to meet each day from Monday to Friday. However, in practice the House normally only sits on Tuesday, Wednesday and Thursday, according to a schedule adopted by the House.[1]

1 See, for example, *Minutes,* NSW Legislative Council, 23 September 2009, p 1387; 12 November 2015, p 578.

Traditionally, in order to proceed from a Thursday to the next Tuesday, the House passed a 'special adjournment' motion providing that the House not meet until the next Tuesday at 2.30 pm or to a future Tuesday in accordance with the sitting pattern.[2] The special adjournment motion may appoint a different time for the next meeting to that stipulated in the sessional order.[3]

On Thursday 10 March 2016, the President made a statement that as a result of the House adopting a sitting calendar for 2016, there was no requirement for a special adjournment to be agreed to each sitting Thursday, but only when the sitting calendar was being modified, or when the House was to adjourn for several weeks.[4] In the latter case, the 'special long adjournment' is moved, which provides for the President, or if the President is unable to act on account of illness or other cause, the Deputy President, to fix an alternative day or hour of meeting.[5] (See SO 31 for further details).

After prorogation of the House, the Council meets according to proclamation of the Governor calling the House together. If a sessional order is not adopted that day or on subsequent days, the House continues to meet according to special adjournment until a sessional order is adopted. The times for meeting have been fairly consistent, apart from periods on which different sitting patterns have been trialled, as outlined below. In addition, the sessional orders have sometimes been varied by motion on notice.[6]

Unlike some Houses, the Council does not fix the time at which each sitting is to end. The time at which a sitting concludes is, according to practice, the prerogative of the government, with SO 31 providing that the adjournment of the House may only be moved by a minister (or by a Parliamentary Secretary acting as a minister under the authority of SO 25) at any time the government chooses when there is no business under consideration.

However, SO 32 allows the House to appoint a time for proceedings to be interrupted on Thursdays and Fridays to permit the adjournment motion to be moved if desired, although recently the sessional order has also included a time for interruption on Tuesdays and Wednesdays.

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2 Under SO 74 a motion may be moved without notice by a minister for a special adjournment of the House and such a motion takes precedence of all other motions or orders for that day.

3 For example, on 24 September 1985, 23 September 1986 and 19 September 1989, the Council met at 8.00 pm according to adjournment to table the budget papers and commence a take note debate on the budget estimates.

4 *Minutes,* NSW Legislative Council, 10 March 2016, p 717.

5 See, for example, *Minutes* NSW Legislative Council, 25 June 2015, pp 246-247.

6 See, for example, *Minutes,* NSW Legislative Council, 19 March 2013, p 1549. (The House varied the usual meeting days and times as well as the time for questions without notice and government and other business to allow for a Monday to Wednesday sitting week in the lead-up to Easter 2013).

Background and development

Until 1895 the standing orders were silent in relation to the appointment of meeting days and times. However, a sessional order usually provided for the House to meet on Wednesdays and Thursdays at 4.00 pm[7] reflecting the then part-time nature of the role of members and the Council. However, the House often needed to pass resolutions appointing additional days beyond those appointed by the sessional order.[8] These practices continued following the adoption of SO 9 in 1895, which provided that: 'The House shall from time to time appoint the days and the hour of each day on which it will meet for the despatch of business…'.

From the mid 1930s the sessional order generally provided for the House to meet at 4.00 pm on Monday, Tuesday, Wednesday, Thursday and Friday,[9] thus avoiding the need for additional resolutions appointing extra days. However, there was considerable variation in the days on which the House actually sat until the 1960s when it became the norm to sit on Tuesdays, Wednesdays and Thursdays. After 1978, when the Council became popularly elected and membership became a full-time occupation, earlier meeting times became more common. Between 1988 and 1994 the sessional order usually provided for the House to meet at 10.30 am on Monday, Thursday and Friday and at 2.30 pm on Tuesday and Wednesday. From 1994 the usual times were 11.00 am on Monday, Wednesday, Thursday and Friday and 2.30 pm on Tuesday.

From 2004 to 2011 the sessional order provided for the House to meet at 11.00 am on Mondays, Wednesdays, Thursdays and Fridays and at 2.30 pm on Tuesdays except for a brief period in 2005 when temporary sessional orders were adopted providing for earlier meeting times.[10] In September 2005, the House referred an inquiry to the Procedure Committee in relation to sitting times but the Committee did not report before the end of the session.[11]

At the start of the 55th Parliament in May 2011, a new sitting pattern was introduced which provided for the House to sit in two-week blocks to run from Tuesday to Friday on the first week and from Monday to Thursday on the second. To accommodate this arrangement, the sessional order under SO 35 provided for the House to sit at 2.30 pm on the first sitting day of the week, 11.00 am on the second and third sitting days, and 9.30 am on the fourth and fifth sitting days of the week.[12]

In June 2011, the Procedure Committee examined the impact of the sitting pattern on members' ability to undertake their parliamentary duties such as constituency and committee activities and recommended that consideration be given to a more

7 See, for example, *Minutes,* NSW Legislative Council, 9 December 1858, p 3; 29 September 1869, p 8; 17 January 1883, p 14.

8 See, for example, *Minutes,* NSW Legislative Council, 13 January 1862, p 114 (by motion on notice); 22 April 1870, p 76 (according to adjournment).

9 See, for example, *Minutes,* NSW Legislative Council, 24 March 1925, p 11; 24 June 1932, p 12.

10 *Minutes,* NSW Legislative Council, 6 May 2005, pp 1372-1373.

11 *Minutes,* NSW Legislative Council, 22 September 2005, p 1595.

12 *Minutes,* NSW Legislative Council, 9 May 2011, p 71.

regular four-day sitting week from Tuesday to Friday.[13] In a Ministerial Statement, the Government subsequently announced that the House would sit from Tuesday to Friday each week until the end of the session.[14] In response to this change, the sessional order was amended to provide for the House to meet on Monday at 11.00 am, Tuesday at 2.30 pm, Wednesday at 11.00 am, Thursday at 9.30 am and Friday at 11.00 am.[15] In 2012, the House returned to the practice of sitting on three fixed days a week, according to a resolution of the House,[16] while the sessional order under SO 35 remained unchanged. In 2016, the sessional order for the times for meeting of the House was again varied to provide that on Thursdays the House would meet at 10.00 am.[17]

36. RECALL OF HOUSE

(1) The President, at the request of an absolute majority of members that the House meet at a certain time, must fix a time of meeting in accordance with that request, and the time of meeting must be notified to each member.

(2) A request by the leader or the deputy leader of a party in the Council is deemed to be a request by every member of that party.

(3) A request may be made to the President by delivery to the Clerk, who must notify the President as soon as practicable.

(4) If the President is unavailable, the Clerk must notify the Deputy President, or, if the Deputy President is unavailable, any one of the Temporary Chairs of Committees, who must summon the Council on behalf of the President, in accordance with this standing order.

Development summary		
1990, 1996-2003	Resolution	Special adjournment
2003	Sessional order 36	Recall of House
2004	Standing order 36	Recall of House

The Council's sitting pattern is separated by adjournments of one or two weeks between sitting blocks, and longer adjournments of up to two or three months during summer and winter. If the House is required to consider urgent business during one of these adjournments it may be recalled, either under the provisions of SO 36, under which the House is recalled by the President if requested by an absolute majority of members, or according to a special adjournment agreed to before a winter or a summer recess.

13 Procedure Committee, NSW Legislative Council, *Report relating to private members' business and the sitting pattern* (June 2011), pp 14-18.

14 *Hansard,* NSW Legislative Council, 2 August 2011, p 3341. *Minutes,* NSW Legislative Council, 2 August 2011, p 292.

15 *Minutes,* NSW Legislative Council, 23 November 2011, p 610.

16 *Minutes,* NSW Legislative Council, 24 November 2011, p 651; 14 November 2012, pp 1367-1368; 12 November 2013, p 2161.

17 *Minutes,* NSW Legislative Council, 24 February 2016, p 653.

The special adjournment allows the President, or, if the President is unable to act, the Deputy President, to fix an alternative date or hour for the meeting of the House by communication addressed to each member of the House.

Unlike the special adjournment motion, the procedure under SO 36 allows the House to be recalled by a majority of members. In a House where the government does not hold a majority, this provision therefore provides for the House to be able to be recalled against the wishes of the government.

Operation

SO 36 provides a mechanism for the recall of the House by a majority of members, instead of at the prerogative of the President or the Deputy President, who are often members of the government party. The procedure has its origins in an amendment moved to the special adjournment motion in 1990 (discussed below).

Under SO 36, on receipt of a request from an absolute majority of members, being 22 members,[18] the President must fix a time of meeting in accordance with that request, and the time of meeting must be notified to each member. Unlike the procedure under the special adjournment motion, the President has no discretion in relation to the matter. As the Government traditionally lacks a majority in the Council, the procedure can be used by the majority to force a recall against the Government's wishes, although in the only precedent under the current standing orders the request was supported by the Government and Opposition alike. On 13 December 2005, the House was recalled by the President in accordance with a request by Labor and Coalition members[19] to consider the Law Enforcement Legislation Amendment (Public Safety) Bill, following public disturbances in Cronulla and other parts of Sydney. The House met pursuant to the recall notice on 15 December 2005.[20]

The Council cannot be recalled following the expiry of the term of the Assembly as the Council is not competent to transact business in that period.[21] Similarly, if Parliament were prorogued after the recall notice had been issued, the Council would not be able to meet at the time specified in the notice and would only be able to meet on the day appointed by proclamation of the Governor for meeting in the next session of Parliament.

Recall under the special adjournment motion

In contrast to the procedure under SO 36, the special adjournment motion moved before a winter or a summer recess since the 1930s has included a provision which allows the

18 While SO 36 requires an absolute majority of members, most votes of the House require only a majority of members – that is, a majority of the members then present.

19 Memorandum from the President to members of the Council, 'Recall of the House', 13 December 2005, recalling the House following receipt of correspondence from the Leader of the Government and the Acting Leader of the Opposition representing an absolute majority of members.

20 *Minutes*, NSW Legislative Council, 15 December 2005, p 1818.

21 *Constitution Act 1902*, section 22F.

President, or, if the President is unable to act, the Deputy President, to fix an alternative date and/or hour for the meeting of the House by communication addressed to each member of the House. The special adjournment motion does not include provision for recall at the request of a majority of members, and is usually used at the request of the Leader of the Government. The House has been recalled under the special adjournment motion for various reasons, including to deal with urgent legislation,[22] to hold a joint sitting to fill a vacancy in Senate,[23] or the Council,[24] and to allow for the tabling and consideration of a report of the Independent Commission Against Corruption which led to the resignation of the Premier.[25]

Background and development

The House was recalled at the request of a majority of members on two occasions prior to the adoption of SO 36. On one occasion the recall was successful and the House met; on the other the Governor prorogued the Parliament prior to the date nominated for recall.

The first recall provision was agreed to as an amendment to the motion for the special adjournment moved prior to the winter recess. On 13 June 1990, the Leader of the Opposition, Mr Egan, moved an amendment to the motion to include the following:

> (1) Notwithstanding the above, the President, on receipt of a request by an absolute majority of the Members of the House that the House meet at an earlier time, shall fix by communication addressed to each Member of the House, a day and hour of meeting in accordance with the request.
>
> (2) For the purpose of paragraph (1), a request by the Leader of any recognised party or group shall be deemed to be a request by each Member of that party or group.
>
> (3) A request may be made to the President by delivery to the Clerk of the House, who shall notify the President as soon as practicable.
>
> (4) In the event of the absence of the President, the Clerk shall notify the Deputy President, or if the Deputy President be absent, any one of the Temporary Chairman of Committees, who shall summon the House on behalf of the President, in accordance with this resolution.[26]

22 *Minutes*, NSW Legislative Council, 7 October 1976, pp 101-102; 20 October 1976, p 105; 24 May 1984, p 230, 12 June 1984, p 239; 27 November 2013, p 2284, 30 January 2014, p 2289.

23 *Minutes*, NSW Legislative Council, 4 December 1986, pp 635-636; 11 February 1987, p 643.

24 *Minutes*, NSW Legislative Council, 4 July 2001, pp 1120-1121; 6 September 2001, pp 1125-1126.

25 *Minutes*, NSW Legislative Council, 7 May 1992, p 192; 30 June 1992, pp 193, 195-197, 203-205 and 208.

26 *Minutes*, NSW Legislative Council, 13 June 1990, pp 315-318.

These provisions, which were later adopted as SO 36, were based on Senate SO 55(2)-(5), adopted by the Senate in 1989.[27] In support of the amendment, Mr Egan argued that during a recess important reports may be tabled or other significant issues may arise which warrant the House being reconvened so that they can be discussed while they are still topical. He also referred to *Odgers' Australian Senate Practice* where the procedure was described as having opened 'a new era for the Senate in maintaining a continuing surveillance of the Executive's administration and regulation-making powers'. He concluded:

> It needs to be emphasised that this House is the master of its own destiny, and that the Government is answerable to the Parliament and to the House. We are not the property of the Government; the Parliament is supreme.[28]

During consideration of the amendment, a crossbench member asked the Chair whether, if a date were to be chosen by the majority of members without consulting the Governor or without the government's co-operation and the Leader of the House and all ministers were unavailable as they were overseas, the House would assemble without the ministers and conduct business in the usual way. The Chair advised that there would be nothing to prevent the House assembling in accordance with such a motion but that the nature and type of business that could be transacted in the absence of a minister or a representative of the government was another issue.[29] This could not occur today, as SO 34 provides that the House will not meet unless a minister is present in the House, although the House may still assemble and meet at the appointed time before the President leaves the chair.

Following the House agreeing to the amended special adjournment motion, the provision was utilised just one week later. On 21 June 1990, the House was recalled at the request of an absolute majority of members, evidenced by correspondence from the Leader of the Opposition, Leader of the Australian Democrats and another crossbench member,[30] to consider a motion of confidence in the Minister for Police and Emergency Services. When the House met on 26 June 1990, a point of order was taken concerning the appropriateness of the President being included as one of the members represented by the request from the Leader of the Opposition of which party the President was a member. However, the President ruled that there was no point of order noting that the recall procedure was different to the procedure for voting in division in the House where the President has a casting vote.[31]

In December 1995, the House agreed to the special adjournment providing for the President to recall the House and setting the next sitting day as 5 February 1996. On 15 January 1996, the President advised members that according to the special

27 Rosemary Laing, *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009), pp 203-208.

28 *Hansard*, NSW Legislative Council, 13 June 1990, p 5542.

29 *Hansard*, NSW Legislative Council, 13 June 1990, p 5546 (Deputy President, Mr Willis).

30 Letters to the President dated 21 June 1990 from the Leader of the Opposition, Mr Hallam, the Leader of the Australian Democrats, Ms Kirkby, and another Crossbench member, Ms Bignold.

31 *Hansard*, NSW Legislative Council, 26 June 1990, pp 5557-5565.

adjournment, and at the request of the Leader of the Government, the House would not meet until 16 April 1996.

On 25 January 1996 the President again wrote to each member of the House advising that he had received written requests representing a majority of members that the House be recalled earlier than 16 April. Although there was no provision for the President to recall parliament according to a request by a majority of members, he felt duty bound to do so and fixed the next sitting of the House as 13 February 1996. However, on 27 January the Council and the Assembly were prorogued and the next meeting of the Council was fixed as 16 April by proclamation of the Governor.[32]

Later that year, the motion for the special adjournment before the summer recess was again amended to include provision for the House to be recalled at the request of a majority of members, although in this case the amendment referred to a request by a 'majority' rather than an 'absolute majority'.[33]

The 1996 amendment was adopted prior to each summer and winter recess until October 2003 when the current standing orders were adopted as sessional orders, although there was one attempt at varying its terms. Prior to the summer recess in 1999, the Leader of the Opposition in the Council moved a further amendment to the special adjournment motion to add:

> That in the event of any prorogation of the Parliament before its scheduled resumption on Tuesday 4 April 2000 this House requests:
>
> (a) that such prorogation be left until the last practicable moment so that any committees of the Parliament can continue to function, and
>
> (b) that 14 days' notice be given in writing to all Members of the House of such prorogation.

However, the Leader of the Government raised a point of order that the amendment was not relevant to the subject of the motion which concerned the term of the adjournment. The point of order was upheld by the President and the amendment ruled out of order.[34]

37. CONDUCT OF BUSINESS

A Minister may move a motion connected with the conduct of government business at any time without notice.

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32 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice*, (Federation Press, 2008), p 246.

33 *Minutes*, NSW Legislative Council, 5 December 1996, pp 565-566.

34 *Minutes*, NSW Legislative Council, 7 December 1999, p 326; *Hansard*, NSW Legislative Council, 7 December 1999, pp 3948-3949.

Development summary		
2003	Sessional order 37	Conduct of business
2004	Standing order 38	Conduct of business
2015	Sessional order	Conduct of business – variation to standing order 37

Standing order 37 was adopted as a sessional order in 2003 and as a standing order in 2004. There is no predecessor to SO 37.

The standing order provides the government with the ability to move a motion at any time, without notice, connected with the conduct of government business. Such a motion can only be moved when there is no other business before the House.

Operation

Under SO 37, a minister may move a motion without notice 'connected with the conduct of government business'. The scope of 'a motion connected with' is not defined by the standing order.

Prior to the adoption of SO 37, government business was usually reordered, or given precedence, by postponing individual or multiple items or by suspending standing orders, moved on contingent notice or by leave, to allow a motion to be moved forthwith to vary the precedence of government business.[35]

After 2003, despite the adoption of SO 37, the Government continued with the practice of postponing items of business or suspending standing orders on contingent notice to rearrange its business.

In 2015, at the beginning of the 56th Parliament, the House adopted a number of sessional orders in place of contingent notices which had been regularly used to rearrange the order of business. One of the sessional orders varied SO 37 by adding a provision for a private member to move a motion without notice for the suspension of standing orders to allow the moving of a motion forthwith relating to the conduct of the business of the House.[36]

The sessional order, while leaving the provisions of SO 37 unchanged, was intended to provide greater flexibility for the House to rearrange the order in which business, both government and general business, would be taken and obviate the need for suspending standing orders on contingent notice. The adoption of the sessional order also recognised that all members were routinely giving a number of contingent notices, including for a motion concerning the conduct of business, to meet the requirement for notice, thereby virtually nullifying the practice prescribed by standing order.[37] The Government first used the provisions under sessional order on 2 June 2015 to give government business

35 See, for example, *Minutes,* NSW Legislative Council, 9 September 2014, p 6.

36 *Minutes,* NSW Legislative Council, 6 May 2015, p 62.

37 See SO 198 for more detail.

precedence over committee reports and to allow a number of Government motions to be moved in globo (that is, together on one motion).[38]

On 4 June 2015, the Government Whip used the provisions of the sessional order to move a motion for the order of private members business to be conducted that day, a practice which has been used on each private members' day since.[39]

Background and development

The standing order has no predecessor and is likely based on the Senate standing order 57 which concerns business of the Senate rather than government business.[40] According to the *Annotated Standing Orders of the Australian Senate,* that standing order allows ministers the flexibility to move motions that are necessary for the efficient conduct of business of the Senate, such as allowing business on the Notice Paper to be rearranged or to specify the order in which the Senate deals with business, to postpone an item of business, or to move the adjournment of a debate or suspension of the sitting.

38. ROUTINE OF BUSINESS

The House is to proceed each day with business in the following routine:

Formal business under standing order 44

Presentation of papers

Presentation of petitions

Notices of motions

Matters of public interest

Ministerial statements

Ministerial replies to matters raised on the motion for adjournment

Motions and orders of the day, or vice versa, as set down on the Notice Paper.

Development summary		
1988-2003	Sessional order	Routine of business
2003	Sessional order 38	Routine of business
2004	Standing order 38	Routine of business

SO 38 sets out the order in which business is called over in the House by the President each sitting day. While the final item in the list refers to matters set down on the Notice Paper, it should be noted that matters of public interest, which are referred to as a separate item under SO 38, are also listed on the Notice Paper, but are afforded a

38 *Minutes,* NSW Legislative Council, 2 June 2015, p 158.
39 *Minutes,* NSW Legislative Council, 4 June 2015, p 191.
40 Harry Evans (ed), *Odgers' Australian Senate Practice (*Department of the Senate, 13th ed, 2012), p 207.

higher priority in the order of consideration than other business on the paper, as are many other categories of business on the paper. For this reason, SO 38 is not an exclusive list of all the types of business which arise on sitting days – other standing orders make provision for additional categories of business, some of which are afforded a higher priority in the order of business than general motions and orders of the day. These are discussed in greater detail below.

Operation

SO 38 provides guidance as to the order in which items of business that come before the consideration of the House must be considered. In some cases, this takes into consideration other provisions of the standing orders. For example, SO 71 requires that notices of motions be given before the House proceeds to the consideration of business on the Notice Paper. In others, such as the presentation of papers, business is accorded priority in accordance with longstanding practice of the House. Within each category, additional orders of priority may apply. For example, when papers are presented, they are reported to the House first by the President, then ministers, then Chairs of Committees, then the Clerk.

SO 38 is not an exclusive list of all the types of business which arise on a sitting day. Other categories of business which do not require notice include matters of privilege suddenly arising (SO 77), messages from the Governor (SO 122) and messages from the Assembly (SO 126), urgency motions (SO 201), and sessional orders fixing particular times for debate on committee reports (required under SO 41) and budget estimates.[41] Other categories of business are afforded priority, but require notice, such as motions for the disallowance of statutory rules and instruments (SO 78), business of the House (SO 39), matters of privilege (SO 77) and government and general business (SO 40).

Taking account of the additional types of business not referred to in SO 38, the usual order in which formal business is dealt with at the beginning of each sitting day is as follows:

- Messages from the Governor
- Messages from the Legislative Assembly
- Reports tabled by the President
- Formal business under SO 44
- Presentation of papers by ministers, Chairs of Committees and the Clerk
- Petitions
- Notices of motions
- Postponements

41 For example, *Minutes*, NSW Legislative Council, 21 June 2007, p 143; 17 June 2008, pp 654-655; 12 November 2008, p 882; 17 June 2009, p 1226; 10 June 2010, p 1918; 13 June 2012, p 1053; 18 October 2012, p 1290; 26 June 2013, p 1867; 12 August 2014, pp 2647-2648; 9 September 2014, p 12.

- Urgency motion under SO 201
- Ministerial statements
- Ministerial replies to matters raised on the adjournment.

The standing orders also provide that a number of these items of business can also be taken at other times, including: messages from the Governor;[42] messages from the Assembly;[43] presentation of papers;[44] matters concerning the privileges of the House under SO 77; and ministerial statements.[45]

Once the House proceeds to items on the Notice Paper, the order is as follows:

- Matters concerning the privileges of the House under SO 77
- Items of business of the House under SO 39, including motions for the disallowance of statutory rules under SO 78
- Matters of public interest under SO 200
- Motions and orders of the day of government or general business
- Debate on committee reports and budget estimates.

The House then proceeds to consider motions and orders of the day on the Notice Paper – other items of business such as the giving of notices of motions and petitions may not be dealt with 'except by leave of the House',[46] or upon the suspension of standing orders by resolution of the House.[47]

Background and development

The House first adopted a sessional order to provide a routine for the consideration of business on 18 August 1988, in the following terms:

> That, during the present Session and unless otherwise ordered, the House shall proceed each day with its ordinary business in the following routine:
>
> (1) Formal Business under Standing Order 57.
>
> (2) Presentation of Petitions.

42 Under SO 122, messages from the Governor must be reported to the House 'as soon as practicable after receipt'.

43 Under SO 126, messages from the Assembly must be reported to the House 'as soon as practicable, without interrupting any business before the House'.

44 Under SO 54, the President, ministers or the Clerk may table documents 'at any time when there is no other business before the House'. Other members may table documents by leave.

45 Under SO 48, a minister may make a statement regarding government policy 'at any time when there is no other business before the House'.

46 SOs 71(6), 68(8).

47 However, there are some circumstances in which the standing orders specifically allow for a motion to be moved without notice (e.g. SO 125).

(3) Any proposal under Standing Order 13.

(4) Ministerial Statements.

(5) Ministerial replies to matters raised on the Adjournment.

(6) Motions and Orders of the Day, or vice versa, as set down on the Notice Paper.[48]

Prior to the adoption of the sessional order, the only requirements dictating the consideration of business under the standing orders related to precedence being given to a message received from the Governor or the Assembly (1895 SOs 137 and 142), provision for messages and papers to be presented at any time when there was no other business before the House (1895 SO 21), provision for consideration of items as formal business (1895 SO 57), and precedence given to motions regarding privilege or business of the House (1895 SO 55). SOs 47A and 54A, adopted in 1935, provided that petitions and notices could not be presented after the House had proceeded to items on the Notice Paper, but did not provide the order in which they should be presented. In practice, the House had usually considered these matters in the order provided for in the new routine of business sessional order – that is, the sessional order formalised the practice that had generally been followed to date, though with some variation.

A significant provision of the sessional order was the formal allocation of a place in the routine of business for ministerial statements. Although in practice ministerial statements had often been made after the presentation of notices of motions, there was no reference made to ministerial statements in the standing orders. A sessional order providing for a right of reply to ministerial statements, first adopted in 1988,[49] had been the only formal acknowledgement of ministerial statements made in the rules of the House. The new sessional order gave further prominence to their place and significance within the order of business.

The sessional order was readopted in the following two sessions,[50] before being amended in 1991 to provide for the presentation of notices of motions after petitions.[51]

The sessional order was readopted in the same terms each subsequent session[52] until its incorporation in the 2003 revision of the standing orders as SO 38, with the additional provision of time allocated for the consideration of matters of public interest.

The sessional order for the routine of business was never debated, having always been agreed to either as formal business or in globo with other sessional orders without comment. The rule was adopted following the election of the Greiner Government

48 *Minutes*, NSW Legislative Assembly, 18 August 1988, p 28.

49 *Minutes,* NSW Legislative Council, 24 May 1988, p 49.

50 *Minutes*, NSW Legislative Assembly, 22 February 1990, p 27; 21 February 1991, p 27.

51 *Minutes*, NSW Legislative Assembly, 2 February 1991, p 20.

52 *Minutes*, NSW Legislative Assembly, 4 March 1992, p 25; 2 March 1993, p 27; 2 March 1994, p 31; 24 May 1995, p 27; 17 April 1996, p 31; 17 September 1997, p 40; 12 May 1999, p 47; 8 September 1999, p 28; 12 March 2002, p 38; 30 April 2003, p 39.

earlier in 1988, and followed the adoption of SO 74 for the routine of business in the Legislative Assembly in 1976.[53] The rule also echoes a provision of the Australian Senate's standing orders (SO 57). While the Senate has provided for the routine of business since 1903, its standing orders were substantially revised in 1989.

39. BUSINESS OF THE HOUSE

The following business is to be placed on the Notice Paper as business of the House, and will take precedence of government and general business for the day on which it is set down for consideration:

(a) a motion for leave of absence to a member,

(b) a motion concerning the qualification of a member,

(c) a motion concerning the operations of the chamber.

Development summary		
2003	Sessional order 39	Business of the House
2004	Standing order 39	Business of the House

Business of the House refers to notices of motion or orders of the day on the Notice Paper, sponsored by ministers or private members, which have precedence of government and general business (SO 74(3)). Such items usually concern internal matters of the House, such as the conduct of the proceedings, rather than policy matters which are the focus of government and general business. Before 2004, the standing orders recognised that business of the House had precedence of other items but did not identify which particular matters were included within the category of business of the House. SO 39 specifies that a motion concerning leave of absence, the qualification of a member or the operations of the chamber is business of the House.

Operation

The order in which business on the Notice Paper is taken is subject to a number of standing orders and resolutions of the House. The categories of business on the Notice Paper each sitting day are rearranged to reflect the order determined by the standing orders. Business of the House has precedence over matters of public interest under SO 200, government and general business and debates on committee reports and the budget estimates, but not over matter concerning the privileges of the House under SO 77.

SO 39 is not an exhaustive list of the matters which constitute business of the House. The House has also given precedence to motions for the disallowance of statutory instruments under SO 78(1) and the adoption of reports by the Privileges Committee on

53 *Hansard*, NSW Legislative Assembly, 30 March 1976, p 4937.

citizens' rights of reply under SO 203(7), by requiring such motions to be placed on the Notice Paper as business of the House.

The House may also decide that a particular matter which is not specifically referred to in the standing orders is to be dealt with as business of the House if it is sought to give the item precedence. For example, in 2003 the House adopted procedures for handling material which had been seized from a member's office under a search warrant, which included a requirement that consideration of any material subject to a disputed claim of privilege was to be set down on the Notice Paper as business of the House for the next sitting day.[54] Other items which have been treated as business of the House include motions to remove the President[55] or appoint the Chairman of Committees.[56]

A motion for leave of absence to a member

Section 13A(1)(a) of the *Constitution Act 1902* provides for the vacation of a member's seat if the member fails to attend for one whole session 'unless excused in that behalf by the permission of that House entered upon its journals'. Such permission may be obtained by a motion on notice for leave of absence under SO 63 which has precedence under SO 39(a).

A motion concerning the qualification of a member

Every person enrolled as an elector is qualified to be nominated for a periodic Council election unless disqualified under the *Parliamentary Electorates and Elections Act 1912* or the *Constitution Act 1902*.[57] Disqualifications include the holding of a contract for or on account of the public service,[58] the holding of an office of profit or a pension from the Crown,[59] membership of the Assembly,[60] and membership of the Commonwealth Parliament.[61]

Under section 175(H)(1) of the *Parliamentary Electorates and Elections Act 1912,* the House may refer a 'question respecting the qualification of a member of the Legislative Council or respecting a vacancy in the Legislative Council' to the Court of Disputed Returns. Under SO 39(b) a motion to refer a question to the Court in relation to the qualification of a member could be set down on the Notice Paper as business of the House, but a question which relates to a vacancy, rather than qualifications, may not necessarily have precedence under SO 39(b). However, in 1940 a motion to refer a question to the Court of

54 *Minutes*, NSW Legislative Council, 4 December 2003, pp 493-495.
55 *Minutes*, NSW Legislative Council, 27 April 1988, p 16; *Notice Paper*, NSW Legislative Council, 3 July 1991, p 11.
56 *Notice Paper*, NSW Legislative Council, 3 July 1991, p 5; *Minutes*, NSW Legislative Council, 11 March 1969, p 381.
57 *Parliamentary Electorates and Elections Act 1912*, section 81B(1).
58 *Constitution Act 1902*, section 13(1).
59 *Constitution Act 1902*, Section 13B(1).
60 *Constitution Act 1902*, section 13C.
61 *Parliamentary Electorates and Elections Act 1912*, section 81E.

Disputed Returns as to whether a member's seat had become vacant under the forerunner to section 13A of the *Constitution Act 1902* was listed as business of the House.[62]

Questions of interpretation may arise as to whether a motion concerning the qualifications of a member should have precedence over other business under SO 39(b). Any member could dispute, by way of a point of order, the precedence given under SO 39 on which point of order the President would then be required to rule. However, the following list contains the categories of matters that could be expected to be given precedence under SO 39(b):

- a motion declaring a person's election void for holding a disqualifying contract with the public service under section 14(1) of the *Constitution Act 1902*
- a motion declaring that an elected candidate or sitting member no longer holds an office of profit under the Crown under section 13B(1) of the *Constitution Act 1902*
- a motion to refer to the Court of Disputed Returns a question concerning a possible vacancy in the seat of an elected member
- a motion to refer a question concerning the qualification or disqualification of a member to a committee of the House for inquiry and report
- a motion concerning a member's suitability for election unrelated to their qualification under the *Parliamentary Electorates and Elections Act 1912*.

A motion concerning the operations of the chamber

Precedence is given to motions concerning the operations of the chamber. The 'operations of the chamber' is not defined by standing order, but has generally been interpreted to include matters which affect the operations of the chamber as a whole, rather than those which relate to public policy or legislative proposals.

While a similar Senate provision gives precedence to 'business of the Senate', it does not specify that motions concerning the operations of the chamber have precedence under the standing order. According to the *Annotated Standing Orders of the Australian Senate*, business which has precedence under Senate SO 58 is determined by the subject matter of the motion or order of the day, not by the status of the mover.[63]

In the Council, motions given precedence as they concerned the operations of the chamber have included motions for:

- the adoption of standing orders[64]
- the adoption or variation of sessional orders[65]

62 *Journal of the Legislative Council*, 22 May 1940, p 380; 23 May 1940, pp 383-384.
63 Laing, *Annotated Standing Orders of the Australian Senate,* p 216.
64 *Notice Paper*, NSW Legislative Council, 5 May 2004, p 1526.
65 *Notice Paper,* NSW Legislative Council, 6 May 2015, pp 2-10; 14 October 2015, p 2054.

- variations to the precedence of government business[66] or general business[67]
- the restoration of orders interrupted by the close of the previous session[68]
- a special meeting of the House to debate the Mini Budget[69]
- the tabling of certain reports with the President if the House is not sitting.[70]

While the Senate provisions give precedence to a motion referring a matter to a standing committee as business of the House, in the absence of such a provision in the Council, motions establishing or referring matters to committees have usually been treated as government or general business depending on whether they are proposed by a minister or private member. However, motions to refer a special report to the Privileges Committee have usually been set down as business of the House,[71] but have also been set down as general business.[72]

Orders of the day for the resumption of an adjourned debate on motions to suspend standing and sessional orders moved on contingent notice have been placed on the Notice Paper as business of the House.[73]

Background and development

Before 2004 there was no standing order which defined the items to be treated as business of the House. The 1895 standing orders recognised that a motion relating to the business of the House took precedence of other motions and orders (SO 55) but did not define which motions this applied to. SO 39, adopted in 2004, broadly reflects Senate SO 58, which provides for certain types of motions to be placed on the Notice Paper as business of the Senate, including a motion for leave of absence and a motion concerning the qualification of a senator.

Prior to the adoption of SO 39, precedence given to motions now covered by SO 39 was inconsistent. For example:

- motions concerning the adoption, amendment or repeal of standing orders could be listed as general business[74] or business of the House[75]

66 *Notice Paper*, NSW Legislative Council, 28 June 2007, p 390.
67 *Notice Paper*, NSW Legislative Council, 14 September 2005, p 5990.
68 *Notice Paper*, NSW Legislative Council, 24 May 2006, p 4.
69 *Notice Paper*, NSW Legislative Council, 12 November 2008, p 3710.
70 *Notice Paper*, NSW Legislative Council, 23 November 2006, p 2120.
71 *Notice Paper*, NSW Legislative Council, 28 June 2001, p 3884; 29 April 1998, p 738.
72 *Notice Paper*, NSW Legislative Council, 19 June 1996, p 412.
73 *Notice Paper*, NSW Legislative Council, 25 May 2006, p 64; 26 November 2013, p 11364; 16 September 2014, p 216.
74 See, for example, *Minutes*, NSW Legislative Council, 2 November 1870, p 63.
75 *Minutes*, NSW Legislative Council, 14 November 1895, p 113.

- motions to adopt sessional orders proposed by ministers were listed on the Notice Paper as government business,[76] or were not allocated to any particular category,[77] before given precedence as business of the House[78]
- motions for leave of absence were listed as general business[79] or government business[80] or were moved without notice by consent[81] before being given precedence as business of the House.[82]

Conversely, some items which were formerly given precedence as business of the House when notice was given by a minister are now listed as government business. These have included motions to appoint sessional committees[83] and to appoint Trustees of the Parliamentary Contributory Superannuation Fund.[84]

40. GOVERNMENT AND GENERAL BUSINESS

The House must appoint the days or times on which government business and general business is to take precedence.

Development summary		
1856	Standing order 32	Precedence of motions
1870	Standing order 42	Precedence of motions; Formal business
1890	Standing order 42	Precedence of motions; Formal business
1895	Standing order 9	Days and hour of meeting
2003	Sessional order 40	Government and general business
2004	Standing order 40	Government and general business

Before 1895 the House usually appointed, by sessional order, a day each week when government business would take precedence. From 1895 the sessional order appointed the times when government and general business respectively were to take precedence. The times appointed have shown considerable consistency over the years, with Thursday usually being the day for general business, but there have been variations in line with changes in the Council's role and procedures.

76 See, for example, *Minutes*, NSW Legislative Council, 3 March 1914, p 4; 23 September 1947, pp 10-11; 12 August 1953, pp 12-13.
77 *Minutes*, NSW Legislative Council, 22 May 1956, p 8; 10 April 1962, p 14.
78 *Minutes,* NSW Legislative Council, 8 November 1978, p 16; 28 October 1981, p 11.
79 See, for example, *Minutes*, NSW Legislative Council, 12 June 1918, p 7; 26 August 1925, p 12.
80 See, for example, *Minutes,* NSW Legislative Council, 26 November 1930, p 13.
81 See, for example, *Minutes*, NSW Legislative Council, 28 June 1933, p 23.
82 *Minutes*, NSW Legislative Council, 16 August 1983, p 28; 19 September 1989, p 898.
83 See, for example, *Minutes,* NSW Legislative Council, 21 November 1978, p 46 (business of the House); *Notice Paper,* NSW Legislative Council, 23 April 1996, p 39 (government business).
84 See, for example, *Minutes,* NSW Legislative Council, 23 February 1972, p 302 (business of the House); *Notice Paper*, NSW Legislative Council, 23 June 2011, p 849 (government business).

Government business refers to notices of motion and orders of the day on the Notice Paper sponsored by ministers and listed on the paper as government business. General business refers to notices of motions and orders of the day sponsored by other members and listed as general business.

Operation

The House considers items on the Notice Paper according to an order of precedence established according to a number of different standing orders, sessional orders and temporary resolutions of the House. A sessional order adopted under SO 40 usually provides for government business to take precedence of general business on Monday, Tuesday, Wednesday, Friday, and after a specified time on Thursday, and for general business to take precedence on Thursday until the specified time.[85] Following routine business conducted under SO 38, including messages, formal business and the giving of notices, government or general business usually begins, and resumes after Question Time subject to other sessional orders which fix the time for debate on committee reports and the budget estimates. However, items classified as business of the House (SO 74) or matters of privilege (SO 77) take precedence of both government and general business.

The usual precedence of business may be varied by motion on notice or following the suspension of standing and sessional orders. For example, the House has agreed on motion to give government business precedence of general business on Thursday,[86] government business to take precedence of debate on committee reports this day,[87] general business to take precedence of government business on a government day,[88] or for an item of private members' business to take precedence of all other business on the Notice Paper on a government day after debate on committee reports.[89]

Usually the precedence of business is varied on the motion of a minister, but also occasionally on the motion of a private member. For example, the House has agreed to a motion on contingent notice by a parliamentary secretary in her capacity as a private member that consideration of a private member's bill take precedence of other business on the Notice Paper until concluded on a government day.[90] In another case, when debate on the budget estimates was to have precedence according to sessional order, the House agreed to a motion that an item of private member's business be called on forthwith and that at the conclusion of debate on the motion, debate on the budget estimates take precedence until 5.00 pm.[91]

In addition to such cases, it is not uncommon for items of private members' business to be brought on for consideration following the suspension of standing and sessional

85 See, for example, *Minutes*, NSW Legislative Council 6 May 2015, p 56.
86 *Minutes*, NSW Legislative Council, 19 June 2013, p 1832; 20 June 2012, p 1084.
87 *Minutes*, NSW Legislative Council, 17 June 2014, p 2576.
88 *Minutes*, NSW Legislative Council, 4 September 2012, p 1181.
89 *Minutes*, NSW Legislative Council, 25 March 2014, p 2405.
90 *Minutes*, NSW Legislative Council, 7 September 2010, pp 2027-2028.
91 *Minutes*, NSW Legislative Council, 1 September 2010, p 2008.

orders at times when government business has precedence. There have been attempts to reduce the number of private members' items brought on when other business has precedence by enhancing the flexibility of the system of private members' business (see Chapter 29). However, there remains a culture for private members to take the opportunity, when available to them, and where the timeliness of particular issues presses, to have their items considered notwithstanding the order of precedence established by the sessional orders.

Variations of sessional orders under SO 40

When the current standing orders were adopted in 2004, the sessional orders provided for government business to take precedence of general business on Monday, Tuesday, Wednesday and Friday and after 5.00 pm on Thursday, and general business to take precedence until 5.00 pm on Thursday.

During the autumn sittings in 2005, following a review of the sitting pattern including measures to promote 'family-friendly' hours, temporary sessional orders were adopted concerning the sitting times and precedence of business, which included provision for private members' business to take precedence for a period on each sitting day.[92] It was anticipated that the new arrangements would result in fewer disruptions to government business by private members since there would be an opportunity each sitting day for such business to be called on. However, while there was a reduction in the number of suspensions to deal with unscheduled business, the changes did not prevent the practice of private members seeking to deal with private members' business in government business time. The sessional orders applied until the adjournment of the House for the winter recess, a total of nine sitting days, and were not readopted in the next spring sitting.

At the start of the 55th Parliament in 2011, a new sitting pattern was introduced which provided for the House to sit in two-week blocks. To accommodate this, the sessional order under SO 40 provided for government business to have precedence on the first, second, third and fifth sitting days each week and after 3.30 pm on the fourth sitting day and for general business to have precedence on the fourth sitting day until 2.30 pm.[93] Subsequently, following an inquiry by the Procedure Committee, the sitting pattern was revised to provide for the House to sit on four fixed days per week from Tuesday to Friday.[94] In response, the sessional order under SO 40 was amended to provide for government business to take precedence on Monday, Tuesday, Wednesday and Friday and after 3.30 pm on Thursday and for general business to take precedence on Thursday until 3.30 pm.[95] In 2012, the House returned to sitting three fixed days a week while the sessional order on the precedence of business remained unchanged.

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92 *Minutes,* NSW Legislative Council, 6 May 2005, pp 1372-1373.

93 *Minutes,* NSW Legislative Council, 9 May 2011, pp 71-74.

94 On 2 August 2011, the Deputy Leader of the Government and Leader of the House, Mr Gay, announced that the House would sit from Tuesday to Thursday each sitting week until the end of the session: *Hansard,* NSW Legislative Council, 2 August 2011, p 3341.

95 *Minutes,* NSW Legislative Council, 23 November 2011, pp 610-611.

Background and development

SO 32 adopted in 1856 provided that motions were to have precedence of orders of the day and were to be moved in the order in which they stand on the Notice Paper. However, the standing orders did not include any provision concerning the precedence of government and general business. Despite this, it was common for the sessional orders to provide for government business to take precedence of all other business on Wednesdays,[96] for the House to appoint additional sitting days for government business as required,[97] and for particular items of government business to be adjourned or postponed until the next day or a future day with precedence over other business.[98]

In 1870, SO 32, concerning the precedence of motions and orders, was expanded and renumbered SO 42. In 1890, following an inquiry by the Standing Orders Committee,[99] a new SO 42 was adopted which provided in part that 'General Business shall take precedence on days not fixed for Government Business, to be termed private days, and on every alternate private day motions shall take precedence of orders of the day, and be moved in the order in which they stand on the Notice Paper…'[100]

In 1895, former SO 42 was replaced by SO 57, without the former provisions concerning the precedence of government and general business. At the same time, SO 9 was adopted in the following terms:

> The House shall from time to time appoint the days and the hour of each day on which it will meet for the despatch of business, and the day or days to be set apart for Government and General business. On days fixed for the consideration of Government business, matters relating thereto shall take precedence of all other business, and General business shall take precedence on days not fixed for Government business to be termed Private Days*.
>
> *Except as provided by Standing Order 55.[101]

Following the adoption of this provision, the sessional orders usually provided for government business to take precedence of general business on Wednesday and general business to take precedence on Thursday.[102] The earlier practices of appointing additional sitting days for government business[103] and giving precedence to particular bills as required[104] also continued.

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96 New South Wales Legislative Council, *Consolidated Index to the Minutes of the Proceedings and Printed Papers*, 1856-1874, vol 1, pp 784-785; New South Wales Legislative Council, *Consolidated Index to the Minutes of the Proceedings and Printed Papers*, 1874-1893, vol 2, pp 907 and 1133; New South Wales Legislative Council, *Consolidated Index to the Minutes of the Proceedings and Printed Papers*, 1894-1913, vol 3, p 703.

97 *Consolidated Index*, 1856-1874, vol 1, pp 784 and 994-995; *Consolidated Index*, 1874-1893, vol 2, p 907.

98 *Consolidated Index*, 1856-1874, vol 1, pp 783-784; *Consolidated Index*, 1874-1893, vol 2, pp 904-906.

99 *Minutes*, NSW Legislative Council, 22 May 1890, p 37.

100 *Minutes*, NSW Legislative Council, 28 May 1890, p 42; 29 May 1890, p 45.

101 SO 55 provided: 'A Motion for a special adjournment or which relates to the Privileges or Business of the House shall take precedence of all other Motions or Orders of the Day'.

102 *Consolidated Index*, 1894-1913, vol 3, p 703.

103 *Consolidated Index*, 1894-1913, vol 3, p 702.

104 *Consolidated Index*, 1894-1913, vol 3, pp 701-702.

From the mid 1930s the sessional orders usually provided for government business to take precedence of general business on Monday, Tuesday, Wednesday and Friday and for general business to take precedence on Thursday.[105] From 1992, the sessional order began to specify a particular time on Thursday at which general business would cease to have precedence and government business would take precedence. Originally this was 4.15 pm,[106] but from 1999 became 5.00 pm[107] after the Crossbench negotiated a change to the time when proceedings were to be interrupted to permit the minister to move the adjournment of the House if desired.[108]

The usual arrangements for the precedence of business were often varied towards the end of a sitting period to allow government business to take precedence for a specified period, such as until a particular date,[109] for the remainder of the session,[110] until the winter recess[111] or until the Christmas recess,[112] to deal with a large volume of legislation. The government would usually agree to precedence of private members' business in the next session in return for the time afforded to the government in the previous session. This practice has also been adopted in recent years.[113]

41. REPORTS OF COMMITTEES – PRECEDENCE

The House must appoint the day and time on which motions for the consideration or adoption of reports of committees of the House and any government responses on such reports are to take precedence.

Development summary		
1988–2003	Resolution	Standing committees
2003	Sessional order	Debate on committee reports
2003	Sessional order 41	Reports of committees- precedence
2004	Sessional order 41	Reports of committees- precedence

105 See, for example, *Minutes*, NSW Legislative Council, 28 April 1988, p 26.

106 *Minutes*, NSW Legislative Council, 16 September 1992, p 246; 31 March 1993, p 71.

107 *Minutes*, NSW Legislative Council, 12 May 1999, p 48; *Hansard*, NSW Legislative Council, 12 May 1999, pp 65-66.

108 *Minutes*, NSW Legislative Council, 12 May 1999, pp 43-44; *Hansard*, NSW Legislative Council, 12 May 1999, pp 62-64.

109 *Minutes*, NSW Legislative Council, 21 November 1979, p 262; 26 March 1980, p 467; 20 November 1980, p 228; 25 November 1981, p 40; 1 July 1982, p 22.

110 *Minutes*, NSW Legislative Council, 31 March 1982, p 330; 20 November 1985, p 909.

111 *Minutes*, NSW Legislative Council, 10 April 1991, p 117.

112 *Minutes*, NSW Legislative Council, 19 November 1987, p 1325.

113 *Minutes*, NSW Legislative Council, 24 June 2010, p 1968 (For example, government business given precedence of general business at the conclusion of the 2010 autumn sitting period); 1 September 2010, p 2005 (general business then given precedence of government business on the second day of the 2010 spring sitting period).

Before 1988, motions relating to committee reports were relatively rare and were usually treated as general business. In 1988, the resolutions appointing the Council's first policy-oriented standing committees specified a time each week when debate on motions to take note of the reports of those committees would have precedence.[114] By 2003, the time for debate on 'take note' motions was set by sessional order.[115] SO 41 adopted in 2004 entrenched this practice and extended precedence to cover motions for the adoption of reports and the consideration of government responses, however, the time at which reports are considered continues to be set by sessional order.

Operation

The House appoints the time for debate on committee reports by sessional order. The sessional order adopted since the adoption of SO 41 in 2004 has given precedence to 'debate on committee' reports without specifying the form of the motion to be debated. The usual motion on a committee report is a motion to 'take note' of the report under SO 232, which provides a means for the House to debate a report without requiring any conclusion to be reached. Motions to adopt reports are rare, apart from reports of the Privileges Committee recommending a citizen's right of reply, which are governed by SO 207(7). The Council has yet to consider a motion relating to a government response, although motions to take note of responses are not uncommon in the Senate.[116]

From 2004 to 2011 the sessional order provided for debate on committee reports to take precedence after questions on Wednesdays. Since 2011 the sessional order has generally given precedence to debate on reports on Tuesdays after questions until 6.30 pm.[117] As Question Time on Tuesdays usually finishes at 5.00 pm the sessional order results in debate extending for an hour and a half, contrary to SO 232(4), which provides for debate to be interrupted after one hour. To take account of this inconsistency, the sessional order is adopted with the proviso 'notwithstanding anything contained in the standing orders'.

Under SO 232, a motion to take note of a committee report can be moved immediately after the report is tabled and ordered to be printed on whichever day the report is received. At the conclusion of the mover's speech, the debate must be adjourned until 'the next day on which committee reports have been given precedence' (SO 232(2)), which allows the Chair to give their speech on the day of tabling and other members to prepare for the debate on a subsequent day.[118] In practice, the mover of the motion usually adjourns debate immediately or after making short comments on the report and when the debate resumes the mover finishes their speech and debate ensues. There can be numerous reports set down for consideration on the Notice Paper and it may take some time before the debate resumes.

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114 *Minutes,* NSW Legislative Council, 9 June 1988, p 185.

115 *Minutes*, NSW Legislative Council, 21 May 2003, p 98.

116 *Odgers' Australian Senate Practice*, 13th ed, p 524.

117 *Minutes,* NSW Legislative Council, 9 May 2011, p 72 (on the first sitting day of each week); 23 November 2011, p 611 (on Tuesdays); 9 September 2014, p 7 (on Tuesdays).

118 The minutes usually record that debate is adjourned to the 'next sitting day', it being understood that this refers to the next day on which debate on committee reports has precedence.

As the sessional order is expressed to apply 'unless otherwise ordered' the House may appoint a different time for debate on a particular report if necessary. In one case, the House resolved that on the Chair of a particular committee moving a motion to take note of the Committee's report on a specified inquiry, debate on the motion was to take precedence of all other business on the Notice Paper for that day until adjourned or concluded.[119] It is conceivable that a report could also be set down for consideration at an alternative time under SO 57.

According to SO 232, at the conclusion of the speech of the mover of a take note motion, the debate is to be adjourned to the next day on which committee reports have been given precedence. It is not uncommon for debate to be adjourned to a 'later hour of the sitting' rather than to the next sitting day.[120] In 2012, President Harwin ruled that debate on a motion to take note of a committee report moved on the tabling of the report earlier during the sitting day could resume during the time set aside for debate on committee reports later that day, even though it was not on the Notice Paper, and would be called over in the order in which they had been moved.[121]

Reports of joint committees have also been set down for consideration under SO 41.[122]

Background and operation

Before 1988 the appointment of a committee in the Council was infrequent and committee reports were often tabled and ordered to be printed without any consideration by the House. Where motions were moved to adopt,[123] receive[124] or take note of[125] a report, they were usually treated as general business and agreed to without debate,[126] although there is an example of a motion to adopt a report being amended to decline to adopt the report.[127] General business had precedence on every alternate Thursday and individual items of general business were dealt with in accordance with the system of 'remanets' (see SO 184). In the early years of the Council, reports of the Standing Orders Committee were often considered in committee of the whole.[128]

In 1988, in the 49th Parliament, the Council established its first standing committees with a policy oversight role, the Standing Committees on Social Issues and State Development. The resolution establishing these committees provided that a motion to take note of a

119 *Minutes,* NSW Legislative Council, 5 November 2014, p 234.
120 See, for example, *Minutes,* NSW Legislative Council, 6 May 2014, p 2457.
121 *Hansard, N*SW Legislative Council, 14 February 2012, p 8061.
122 See, for example, *Minutes*, NSW Legislative Council, 24 October 2013, p 2111; 29 October 2013, p 2121.
123 See, for example, *Minutes*, NSW Legislative Council, 28 October 1920, p 82; 11 November 1920, p 98; 2 December 1920, p 126; 22 December 1920, p 174; 21 December 1921, p 104.
124 *Minutes*, NSW Legislative Council, 9 May 1962, p 44; 13 November 1969, p 149.
125 *Minutes*, NSW Legislative Council, 29 October 1987, p 1221.
126 Although there are exceptions where debate occurred, for example, *Minutes*, NSW Legislative Council, 13 November 1969, p 149; 29 October 1987, p 1221.
127 *Minutes*, NSW Legislative Council, 26 March 1874, pp 143-144
128 For example, *Minutes,* NSW Legislative Council, 16 March 1881, p 43; 7 July 1897, p 70; 3 November 1909, p 103; 22 November 1927, p 41.

report from the committee could be moved without notice following the tabling of the report, that the debate was to be adjourned at the conclusion of the mover's speech until the next Thursday on which general business had precedence, and that the resumption of the debate was to have precedence of all other general business on that day.[129] The same procedures were adopted in 1991 in the 50th Parliament.[130]

In 1995, a third policy committee, the Standing Committee on Law and Justice, was established and the same provisions concerning take note motions were applied to the three committees except that debate on such motions was to have precedence on Wednesday after Question Time instead of on Thursday.[131] The same provisions were also included in the resolution re-establishing the three committees in the 52nd Parliament.[132]

In the 53rd Parliament the provisions concerning the moving and debate of take note motions were included in a sessional order rather than in a resolution appointing particular committees.[133] Later in the same Parliament, a trial of the current standing orders commenced and much of the sessional order concerning take note motions was discontinued as the provisions had been absorbed into the trial standing orders.[134] However, the time for debate on committee reports continued to be set by a sessional order.[135]

While after 1988 the usual motion concerning a committee report was to take note of the report, in the case of the Privileges Committee there were instances where motions were moved to adopt findings, conclusions or recommendations. Such motions were not dealt with under the regime for debate on committee reports but were treated as private members' business,[136] as a matter of privilege,[137] or were moved as an amendment to the take note motion.[138] These types of motions could have precedence under SO 41 and the sessional order for debate on committee reports, but would not be subject to the provisions of SO 232 which relate only to take note motions.

42. PRESENTATION OF DOCUMENTS

(1) Documents ordered to be presented, returns, reports of committees, papers and statutory instruments may be presented when no business is before the House.

(2) Private members may only table documents by leave of the House.

129 *Minutes,* NSW Legislative Council, 9 June 1988, p 185.
130 *Minutes,* NSW Legislative Council, 2 July 1991, p 29.
131 *Minutes*, NSW Legislative Council, 24 May 1995, p 41.
132 *Minutes*, NSW Legislative Council, 25 May 1999, p 81.
133 *Minutes*, NSW Legislative Council, 21 May 2003, p 98.
134 *Minutes*, NSW Legislative Council, 14 October 2003, p 324.
135 *Minutes*, NSW Legislative Council, 1 June 2004, p 809.
136 *Notice Paper*, NSW Legislative Council, 6 December 2001, item no 100, pp 5180-5181; *Minutes*, NSW Legislative Council, 6 December 2001, p 1351.
137 *Notice Paper*, NSW Legislative Council, 1 April 2004, p 1434; *Minutes*, NSW Legislative Council, 1 April 2004, p 650.
138 *Minutes*, NSW Legislative Council, 12 November 2002, p 466.

Development summary		
1895	Standing order 21	Presentation of messages, papers, and returns
2003	Sessional order 42	Presentation of documents
2004	Standing order 42	Presentation of documents

SO 42(1) is chiefly concerned with the time at which certain items may be tabled rather than authority to table them. Authority to table is provided by SO 52 relating to returns to orders, SOs 54 and 55 for documents tabled by the President, ministers or the Clerk, SOs 231 and 232 for the tabling of committee reports, and relevant statutory provisions.[139]

Operation

Under the routine of business followed each sitting day (see SO 38) reports are usually tabled by the President after prayers and following messages from the Governor or the Assembly, while documents are tabled by ministers and the Clerk, and committees reports are tabled by the Chair, after formal business under SO 44.

Standing order 42 provides that documents ordered to be presented, returns, reports of committees, papers and statutory instruments may also be presented when there is no business before the House.

The standing orders do not provide for documents to be tabled during debate, or during other business of the House, and members must be given leave in order to do so. Leave has been granted to table documents during debate on a bill[140], following a ministerial statement and prior to the response by the Opposition,[141] during Question Time,[142] and during the adjournment debate.[143] However, on occasion, the adjournment debate has been interrupted without seeking leave to allow the President to table urgent papers before the House adjourned, after which the adjournment debate resumed. [144]

Unlike the President and ministers, private members may only table documents by leave (SOs 42(2), 54(4)). This rule applies whether the tabling is sought to occur during debate or when there is no other business before the House. To overcome the need for leave, which requires all members present to agree, members have sought leave to table on motion[145].

139 For example, the President is required to table reports under the *Ombudsman Act 1974* and the *Independent Commission Against Corruption Act 1988*, ministers are required to table reports under annual reporting legislation, and ministers or the Clerk are required to table statutory rules under the *Interpretation Act 1987*.

140 See, for example, *Minutes,* NSW Legislative Council, 19 November 2013, p 2223.

141 *Minutes,* NSW Legislative Council, 4 May 2006, p 2000.

142 *Minutes,* NSW Legislative Council, 14 November 2007, p 349.

143 *Minutes*, NSW Legislative Council, 1 July 1999, p 198.

144 *Minutes,* NSW Legislative Council, 29 October 2015, pp 536-537.

145 See, for example, *Minutes,* NSW Legislative Council, 21 October 1997, pp 123-126; 3 September 2003, pp 263-264; 26 February 2004, p 561 (motion not determined).

Leave is sometimes denied to table a document, such as where the document is already in the public domain or the House is unaware of its contents.[146] Documents tabled by private members are only available for inspection by members of the House unless authorised by the House to be made public (SO 54(4)).

Documents cannot be tabled in committee of the whole by leave or otherwise.

Background and development

The 1895 standing orders provided that papers and returns could be tabled when there was no other business before the House. 'Papers' referred to documents tabled by the President, ministers or the Clerk, as private members could only table documents by leave.

SO 21, adopted in 1895, provided that:

> Messages from the Governor or Legislative Assembly, Papers, and Returns may be presented or laid upon the Table at any time when other business is not before the House.

Other standing orders provided that messages from the Governor were to be reported forthwith,[147] which extended the provision of SO 21, and that messages from the Assembly were to be reported without interrupting the business then proceeding, which essentially confirmed the rule in SO 21.[148] Under the current standing orders, the time at which messages are to be reported is exclusively addressed in provisions dealing with messages[149] and not referred to in the procedure for the tabling of documents.

SO 42, adopted in 2004, expanded the 1895 provision to include committee reports and statutory instruments and codified the practice for tabling by private members.

The time for the tabling of statutory instruments and committee reports was not addressed in the standing orders prior to the adoption of SO 42. Such documents were usually tabled in accordance with the routine of business or later in the day when there was no other business before the House. Similarly, there was no standing order regulating the tabling of documents by private members. By longstanding practice such members could only table documents by leave.

43. GOVERNMENT BUSINESS ON NOTICE PAPER

Ministers may arrange the order of their notices of motions and orders of the day on the Notice Paper.

146 *Minutes,* NSW Legislative Council, 7 June 2005, p 1427; 28 September 2006, p 248.
147 SOs 137-138 of 1895.
148 SO 142 of 1895.
149 SOs 122 and 126.

Development summary		
1895	Standing order 67	Ministers may arrange government business on government days
2003	Sessional order 43	Government business on Notice Paper
2004	Standing order 43	Government business on Notice Paper

SO 43 authorises ministers to arrange the order of their notices and orders of the day on the Notice Paper, though in practice this is subject to limitations.

Operation

SO 43 gives ministers the power to arrange the order of government business on the notice paper to enable them to manage the flow of business. Any changes to the order are usually communicated to the Clerk by the office of the Leader of the House or the office of the Government Whip the day before the Notice Paper is published. If notices are given or messages received from the Assembly throughout the day, the minister may order those items on the Notice Paper produced that evening for the following day, or may arrange for the President to call on those items in a preferred order throughout the day, provided that standing orders have been suspended to allow the bill to be considered through all stages in one sitting.

However, where an item is listed on the Notice Paper for that day, it must be called on in the order printed, or otherwise postponed under SO 45 (Postponement of business). The government may also vary the order of business under SO 37 (Conduct of business). Motions for postponement are moved as a matter of routine. Motions concerning the conduct of business usually relate to changes to the category of business to be given precedence (for example, giving debate on government business precedence over debate on committee reports), however the motion can be used to give priority to a particular item. In a recent example, the Government chose to afford priority to a particular bill by affording the item precedence under the procedure for the suspension of standing orders (SO 198).[150]

Background and development

SO 67, adopted in 1895, provided that Her Majesty's ministers may place any notices of motion or orders of the day, relating to government business, upon the business paper in the rotation in which they desire them to be taken. Prior to 1895, the standing orders did not specify the rules for the consideration of government business, though in practice items were considered according to the order in which they were printed on the Notice Paper, subject to motions for postponement, which were moved by leave. In some cases, the House adjourned early in order to facilitate the government's legislative agenda, or postpone consideration of bills until the Vice-President of the Executive Council

150 *Minutes*, NSW Legislative Council, 2 June 2011, pp 177-178.

was present (in his capacity as the representative of the government in the Legislative Council).[151]

SO 43, adopted in 2004, is in similar terms to former SO 67, without the limitation in the heading which confined the application of the former provision to days on which government business had precedence.

44. FORMAL MOTIONS

(1) Before the House proceeds to the business on the Notice Paper each day, the President will ask whether there is any objection to notices of motions or orders of the day for the third reading of a bill being taken as a formal motion, without amendment or debate. If no objection is taken by any member, the motion is to be taken as a formal motion.

(2) Formal motions are to take precedence of all other motions and orders of the day and will be disposed of in the order in which they stand on the Notice Paper.

(3) The question of a formal motion must be put and determined without amendment or debate.

(4) An order of the day for the third reading of bills may be dealt with as a formal motion.

Development summary		
1870	Standing order 42	Precedence of motions
1895	Standing order 57	Precedence of Motions – Formal Business
1935	Standing order 57	Precedence of Motions – Formal Business
2003	Sessional order 44	Formal motions
2004	Standing order 44	Formal motions
2007-2015	Sessional order	Formal motions

SO 44 provides an opportunity for notices of motions and the third readings of bills on the Notice Paper to be dealt with as 'formal business' – that is, without amendment or debate. For this reason, the items most commonly dealt with as formal business are uncontroversial in nature, such as motions congratulating a sporting team or acknowledging a commemorative event. In practice, the third reading of a bill is usually only set down for a future day and dealt with as formal business where amendments have been made to a Council bill and the second print of the bill will not be received from the Parliamentary Counsel until the following day.

151 For example, *Minutes*, NSW Legislative Council, 28 September 1859, pp 18-19; 5 October 1859, p 20; 6 October 1859, p 21; 30 April 1931, p 131; *Hansard*, NSW Legislative Council, 30 April 1931, pp 2110 and 2420.

Formal business provides an expedient mechanism for the House to dispose of a large volume of business in a relatively short amount of time. For this reason, the number of items dealt with as formal business has increased considerably since the mid-2000s. It is not uncommon for the House to consider 20 items per day, and on some occasions over 30 items have been called over.

Operation

Each sitting of the House proceeds in accordance with a 'routine of business' set out under SO 38. The routine divides the business of the day into two broad categories – items dealt with during formalities, at the commencement of the sitting, and items dealt with in accordance with the agenda listed on the Notice Paper. Under SO 44, before the House proceeds to business on the Notice Paper each day, the President will ask whether there is any objection to notices of motions, or to orders of the day for the third reading of a bill being taken as a formal motion – that is, without amendment or debate.

Under SO 44(2), the President is to call over each item in the order in which it is listed on the Notice Paper, however, due to the large volume of items listed on the Notice Paper (particularly items of private members' business which routinely run into the hundreds), practice has developed over time to enable the President to comply with the standing order in the most expedient manner possible (discussed further below under 'Background'). Since 2007, the House has agreed to a sessional order requiring members to lodge a written request with the Clerk to have an item dealt with as formal business on the following day.[152] The President then only calls over those items requested as formal business that day.

At the time for formal business, the President will ask whether there is any objection to the particular item being taken as formal business. All members present must agree – one objection is sufficient to prevent the item being considered. If objection is taken, the item remains on the Notice Paper for a future day. If no objection is taken, the member moves the item. The standing order requires that the question be determined without amendment or debate (SO 44(3), however, in recent years a practice has developed of members seeking leave to amend the motion before moving it as formal business.[153] Members may divide on a question on a motion dealt with as formal business, however the practice is rare.[154]

Under SO 44(4), an order of the day for the third reading of a bill may be dealt with as formal business. This procedure is utilised when a Council bill has been amended and a

152 *Minutes,* NSW Legislative Council, 5 June 2007, p 102; 9 May 2011, p 73; 21 June 2011, p 232; 15 February 2012, p 684; 9 September 2014, pp 7-8; 6 May 2015, p 56.

153 For example, *Minutes,* NSW Legislative Council, 11 March 2010, p 1696; 23 November 2011, p 604; 24 May 2012, p 976; 21 November 2013, p 2245; 25 August 2015, p 311.

154 For example, *Minutes,* NSW Legislative Council, 11 November 2009, pp 1497-1498; 19 October 2010, p 2089; 27 May 2015, p 129.

second print is required for the bill to be forwarded to the Assembly for concurrence.[155] Prior to the closure of the Government Printing Office in the late 1980s, it was also common for the third reading of Assembly bills amended by the Council to be made an order of the day for the next sitting day and agreed to as formal business to facilitate the printing of a second or third print of the bill showing the amendments made by the Council (amendments omitting words were struck through, and amendments inserting words were in bold). Both Houses now notify the other House of amendments made by simply forwarding a message accompanied by a schedule of the amendments agreed to for concurrence.

On occasion, a member has been absent from the House on a day on which they had requested to have an item considered as formal business. In most cases, another member from the same party will move the motion on the member's behalf,[156] however, on one recent occasion, the President informed the House that, if no member objected, three motions requested by a member would be called over to the following day as the member was absent.[157]

Debate on an item considered as formal business

On 17 June 2011, several members spoke, by leave, to a Government motion moved as formal business concerning the removal of a judicial officer. In view of members' comments, the minister moved, by leave, that debate be adjourned until a later hour. Later that day, during the time allocated to government business, the item was called on, an amendment moved and agreed to, and the matter then disposed of.[158]

Background

Provision for motions to be dealt with as formal business was first made in the 1870 rewrite of the standing orders (1870 SO 42). Regrettably, there is no record of the origins of the new procedure – the Standing Orders Committee did not advise of the origins of the new rule, and while the record of debate in the chamber at the time, the *Sydney Morning Herald,* recorded the deliberations in committee of the whole on a number of other procedures adopted in the 1870 revision, the newspaper's only reference to the consideration of formal business was that the committee of the whole had considered 'precedence of Orders of the Day', among a lengthy list of other procedures considered that day (the majority of the column space being devoted to debate in the Assembly

155 For example, *Minutes,* NSW Legislative Council, 12 May 1880, p 162; 19 September 1990, p 433; 20 October 2004, p 1048; 24 November 2009, p 1553; 10 June 2010, p 1918; 11 September 2013, p 1971.

156 For example, *Minutes,* NSW Legislative Council, 12 December 1878, p 75; 4 December 2003, p 488; 8 May 2012, p 944.

157 *Hansard,* NSW Legislative Council, 13 March 2012, p 9355.

158 *Minutes,* NSW Legislative Council, 17 June 2011, pp 214-215 and 218-219.

on the Treasurer's financial statement).[159] The rule was readopted in 1895 (SO 57), but was amended in 1935 to reflect a consequential amendment required on the adoption of 1895 SOs 47A and 54A. The terms of 1895 SO 57 at the time had stated that in proceeding with an order of the day as formal business, the House shall not be held to have proceeded to the orders of the day (on the Notice Paper), as to do so would prevent members from presenting petitions or giving notices of motion. The new SOs 47A and 54A provided that once the House had proceeded to orders of the day on the Notice Paper, petitions and notices could only be presented by leave – that is, by consent of the House. A consequential amendment was therefore made to SO 57 to clarify that in proceeding with an order of the day as formal business, the House shall not be held to have proceeded to the orders of the day in the sense that would preclude, '*except by the consent of the House*', the presentation of petitions or the giving of notices of motions (emphasis denotes the amended terms).[160]

Provision for formal business was made again in the 2004 standing orders. SO 44 is in different terms to those previously adopted, though the substance of the rule is the same.

Until 2007, members informally advised the Clerk of items that they wished to be dealt with as formal business. As the list of private members' notices became particularly lengthy over the years, in practice the President would call over a group of notices that the Clerk knew would *not* be considered as formal business, and then separated any items for which a request *had* been made (for example, items 1 to 47, then 48, then 49 to 150).

In June 2007, the House adopted a sessional order to vary the procedure under standing order 44 by providing that the President only inquire whether there was any objection to an item on the Notice Paper proceeding as a formal motion where the member had made a request in writing the previous sitting day, handed to a Clerk-at-the-Table during the sitting of the House. During debate on the motion, the mover, Ms Lee Rhiannon (The Greens) observed that the procedure was modelled on the procedure used in the Senate.[161] The procedure also aimed to address concerns expressed by members that they were often unaware of which items on the Notice Paper would be called on as formal business until immediately prior to proceedings that day, preventing proper consideration of the matter. The sessional order was agreed to, however, during the debate on the motion the Leader of the Government and the Opposition Whip observed that the operation of the new procedure should be considered by the Standing Orders Committee.[162]

The matter was not considered by the Standing Orders Committee during that session, but was considered on three occasions in the following parliament, first in June 2011, then in November 2011, and finally in June 2012. A deadline for the lodgment of written

159 *Sydney Morning Herald*, 3 November 1870, p 2. Unfortunately, some journalists appear to have taken a greater interest in procedural debates than others, as some of the newspaper's records of debate on new standing orders are far more comprehensive.

160 *Minutes*, NSW Legislative Council, 5 April 1935, pp 353-354.

161 *Hansard,* NSW Legislative Council, 5 June 2007, pp 684-685.

162 *Hansard,* NSW Legislative Council, 5 June 2007, p 685.

advice was agreed to on 21 June 2011,[163] and later varied from 2.30 pm to 3.30 pm on 15 February 2012.[164] In 2015, the deadline was again varied to 4.00 pm, to ensure that members had sufficient time to lodge requests on Tuesdays.

45. POSTPONEMENT OF BUSINESS

(1) After the formal motions are disposed of and before the business of the day is proceeded with, the President will ask whether any member wishes to postpone any notice of motion or order of the day of which the member is in charge on the Notice Paper for that day. A notice of motion or order of the day may be postponed to a later hour on the same day or a subsequent day, on motion. The question must be put and determined without amendment or debate.

(2) Business may also be postponed, on motion, at the time when it is called on.

Development summary		
1856	Standing order 32	Precedence of motions
1870	Standing order 42	Precedence of motions
1895	Standing order 57 Standing order 63	Precedence of motions – Formal Business May be discharged or postponed
2003	Sessional order 45	Postponement of business
2004	Standing order 45	Postponement of business

The postponement provision allows a member to defer an item standing in their name on the Notice Paper from being considered by the House for a specified period. While provision for members to postpone items has been made in various forms in the standing orders since 1856, prior to 2004 members could only postpone an item when it was called on. The adoption of SO 45 provides an additional opportunity within the routine of business for members to move motions for postponement at the beginning of the sitting day, prior to the consideration of business listed on the Notice Paper.

Operation

Under SO 45(1), the President calls for postponements at the conclusion of formalities, prior to moving to items on the Notice Paper. Items may be postponed to a later hour on the same day or to a subsequent day. Items may alternatively be postponed until consideration of another item of business has concluded or the item has been disposed of.[165] The motion to postpone is moved without previous notice, and is

163 *Minutes,* NSW Legislative Council, 21 June 2011, p 232.

164 *Minutes,* NSW Legislative Council, 15 February 2012, p 685.

165 *Minutes,* NSW Legislative Council, 23 September 1862, pp 82 and 83; 12 March 1874, p 128; 9 March 1978, p 902; 27 November 1985, p 995; 24 March 1987, p 709; 29 March 2006, p 1921; 4 June 2009, p 1206.

determined without amendment or debate.[166] It is not uncommon for there to be a division on the question for an item to be postponed.[167]

Postponing an item of business when it is called on

While SO 45(1) provides an opportunity to postpone business at the commencement of each sitting day, SO 45(2) provides that a member can move for postponement at the time at which an item is called on, that is, when the President calls on the Clerk to read the order of the day or calls on the member to move their notice of motion.[168]

In a procedural technicality, once the Clerk reads the order of the day for resumption of an adjourned or interrupted debate, debate on the item is taken to have resumed, and can no longer be postponed.[169] Consequently, if a member wishes to postpone an order of the day when it is called on they must do so after the President calls on the Clerk to read the order of the day and before the Clerk does so. This is usually achieved simply by members speaking to the Clerk before their item is reached in the course of business so that the Clerk will pause before reading the order of the day, allowing the member to seek the call and move the postponement. Once the Clerk has read the order of the day, and the debate has resumed, further consideration can be deferred by the debate being adjourned. This rule does not apply to notices of motions or orders of the day for the second or third reading of a bill as debate on these motions have not yet commenced.

Postponing an item on behalf of another member

Standing order 45 does not specifically provide for a member to move a postponement on behalf of another member. However, SO 81 which provides for the disposal of orders of the day, states that 'an order of the day may be moved or postponed by any other member in the absence of the member in charge of it or at the request of that member'. Where this occurs, there is an expectation that the member moving the motion has the agreement of the member in whose name the item stands. Members who move a postponement for another usually represent the same party and, in the case of the major parties, the motion is usually moved by the party Whip. Members of minor parties usually move motions on behalf of other members from minor parties.

It is accepted practice that private members' items are postponed by another private member, and government items are only postponed by a minister, reflecting the understanding that the government maintains control of its business. There is only one

166 In a precedent to the contrary, a member spoke to the two motions to postpone items of private members' business to explain that he was doing so on behalf of and with the agreement of the two members in whose names the items were listed on the Notice Paper. *Minutes,* NSW Legislative Council, 30 March 2006, p 1933.

167 For example, *Minutes,* NSW Legislative Council, 3 May 2006, p 1987; 2 June 2011, pp 175-176; 11 August 2011, pp 340-341.

168 *Minutes,* NSW Legislative Council, 31 May 2007, p 95.

169 This practice has been inconsistent over time. Prior to 2004, the minutes refer to postponements being moved 'on the order of the day being read'.

recent precedent to the contrary, when in 2012 the Government Whip (being a private member) postponed a Government order of the day on behalf of a minister.[170]

Other provisions for postponement

As noted above, a number of standing orders, other than SO 45, make provision for postponement to be moved. In some cases, the provision varies the practice provided for under SO 45.

- SO 81 outlines the procedure for disposing of orders of the day. SO 81(3) provides that an order of the day may be moved or postponed by any other member in the absence of the member in charge of it or at the request of that member.
- SO 140 outlines the procedure for the second reading of a bill. SO 140(1)(b) provides that on the order of the day being read for the second reading of a bill, the question may be proposed that the order be postponed, or discharged.
- SO 188, regarding postponement of items of private members' business, provides that an item postponed for a third time will be removed from the order of precedence. This provision has been varied by sessional order.[171]

Background and development

Prior to the adoption of standing order 45, there was no provision for the postponement of notices of motions or orders of the day within the routine of business at the commencement of proceedings. However, the standing orders did make varying provisions for members to postpone items that they did not wish to proceed with immediately.

1856 SO 32, 1870 SO 42 and 1895 SO 57 provided that a motion not moved when called on would lapse unless it was postponed by leave of the Council, in keeping with the current provisions of SO 45(1). However, from 1895, SO 63 additionally provided for orders of the day to be discharged or postponed on motion, at any time, though the standing order did not make reference to notices of motions. 1895 SO 172 provided that on the order of the day for further consideration of a bill in committee of the whole being read the President would leave the chair without a question being put, but before the order is read it may be postponed to a future day. When it was intended to defer consideration in committee, this procedure provided for the House to postpone committee of the whole and avoid the need for the President to leave the chair only for the committee of the whole to then report progress and seek leave to sit again at a later time, a procedure now provided for under SO 45(2).

170 *Minutes,* NSW Legislative Council, 5 September 2012, p 1193.

171 *Minutes*, NSW Legislative Council, 21 June 2011, p 232. Examples of the operation of this amended standing order can be found in, *Minutes,* NSW Legislative Council, 16 September, 2011, p 453; 31 May 2012, p 1033; 20 March 2014, p 2392.

The form in which the motion for postponement was moved varied as the other standing orders governing business changed over time. Between 1856 and 1870, motions were moved either on notice or by leave. From 1895, when provision was made for orders of the day to be postponed on motion, such motions were moved without notice.

Prior to 2003, it was not uncommon for motions for postponement to be debated as the rule prohibiting debate under SO 45(1) did not then apply.

46. INTERRUPTION OF BUSINESS

(1) If any business before the House or a committee of the whole is interrupted by the operation of any standing or other order of the House, the business may be dealt with at a later hour of the same day, or will be set down on the Notice Paper for the next sitting day at the end of business already set down.

(2) When an order of the House specifies a time for the consideration of a matter, at the specified time:

(a) if a question is before the House, the President is to interrupt proceedings, and resumption of debate on that question is to be made an order of the day for a later hour of the day without any question being put,

(b) if the House is in committee, the Chair is to interrupt proceedings and report progress to the House. The President is to fix further consideration of the business before the committee as an order of the day for a later hour of the sitting without any question being put, or

(c) if a vote is being taken, the vote will be completed and the procedures in paragraph (a) and (b) then followed as appropriate.

(3) A member speaking when proceedings are interrupted may continue speaking when proceedings are resumed.

Development summary		
2003	Sessional order 46	Interruption of business
2004	Standing order 46	Interruption of business

SO 46 requires that items of business interrupted by the operation of a standing or sessional order can be resumed at a later hour, or must be set down for resumption on the Notice Paper without a question being put to that effect. The standing order also regulates the manner in which the interruption of different types of business will proceed.

Operation

Each session, the House adopts a series of resolutions and sessional orders to afford certain categories of business precedence over other business at certain times in each

sitting day. For example, SO 40, relating to government and general business, requires that the House appoint days and times on which government business and general business takes precedence, and SO 47, relating to Questions, requires that the House appoint the time that Question Time will be taken each day.

SO 46 sets out the procedure to apply when business before the House is interrupted by the operation of any such standing or sessional order, or any other resolution of the House. The standing order replicates many of the provisions of SO 32, which outlines the corresponding procedure to apply when business is interrupted to enable a minister to move a motion to adjourn the House. While the specific terms of the two standing orders vary, their procedural effect is the same, except:

- SO 32 requires that items interrupted by the adjournment be set down for next sitting day (unless a motion is moved for the item to be set down for another day), whereas items interrupted by SO 46 are to be made an order of the day for a later hour.
- SO 46 specifies that a member speaking when proceedings are interrupted may continue speaking when proceedings are resumed. A similar practice applies for items interrupted under SO 32, however, the practice is not formalised under the standing order.

Under paragraph (1) of the standing order, the matter may be dealt with at a later hour of the same day, and if not resumed again that day, will be set down on the Notice Paper for the next sitting day. The standing order requires that the item be set down 'at the end of business already set down on the Notice Paper for the next sitting day' – this is a reference to the remanet system, a practice of ensuring that business allocated to be considered on a particular day is considered in the order in which it is set down. The remanet system is discussed in further detail under SO 81 (Disposal of orders), however, the general rule is that items interrupted will be set down in the order the items previously appeared on the Notice Paper, unless another item has already been set down for the following day, in which case that item would have precedence.

If the interruption occurs when a question (that is, business) is before the House, proceedings are interrupted by the President, who announces the item or category of business that will instead have precedence. The item interrupted is set down as an order of the day for a later hour without any question being put (SO 46(2)(a)).

Under paragraph (2)(b) of the standing order, if the House is in committee of the whole at the time of interruption, the Chair is required to interrupt proceedings and report progress to the House. The President is to fix further consideration of the business before the committee as an order of the day for a later hour of the sitting without any question being put, which obviates the need for the Chair to seek leave to sit again – leave is automatically granted under the authority of the standing order. In other circumstances, if the Chair reported progress without seeking leave to sit again, the matter would lapse and drop from the Notice Paper. However, when a lunch break precedes Question Time, the committee will generally go through the process of reporting progress and seeking

leave to sit again prior to the lunch break to obviate the need for the Chair to take the chair after lunch, only to then leave the chair when the sessional order for Questions takes effect.

If a vote is being taken at the time of the interruption – either on the voices or as a division – paragraph (2)(c) provides that the vote must be completed and the procedures in paragraph 2 (a) or (b) then followed, according to whether the vote is taking place in the House or in committee of the whole. If a series of questions are then before the House, for example, a series of amendments to a motion, it is common practice for the series of questions to be put and resolved before the House acknowledges the interruption of business.

Paragraph (3) of the standing order provides that a member speaking when proceedings are interrupted may continue speaking when proceedings are resumed.

Background

SO 46 was first adopted in 2004, but reflects the practice that was followed prior to that date. With the exception of paragraph (3), the terms of SO 46 are taken from Senate SO 68 (for the Interruption of Business), however, the principle embodied in the standing order – that items interrupted by a rule or order of the House be automatically set down on the Notice Paper for further consideration – has its origin in the procedure for items interrupted by the adjournment motion (discussed under SO 32).

47. QUESTIONS

(1) The House is to appoint the time when questions without notice will be taken each sitting day.

(2) Until a time is appointed by the House, questions will be taken at the time and day last appointed by the House.

Development summary		
1984–2004	Sessional order	Questions
2003	Sessional order 47	Questions – Time for questions without notice
2004	Standing order 47	Questions – Time for questions without notice

Each sitting day, business is interrupted at an agreed time to enable members to put questions to ministers, without previous notice. Questions may relate to public affairs with which the minister is officially connected, proceedings pending in the House, or to any matter of administration for which the minister is responsible. Questions may also be put to other members relating to business on the Notice Paper of which the member has charge.

Operation

Under SO 47, at the beginning of each session the House nominates a time at which proceedings will be interrupted each sitting day for Question Time. No prior notice is required to be given of the questions asked during Question Time, however questions on notice, which are handed to a Clerk-at-the-Table during the sitting of the House, are published on a Questions and Answers Paper under SO 67.

By convention, Question Time proceeds for one hour, however, the time for questions is determined at the discretion of the ministers present in the chamber. The minister may conclude questions before one hour or after one hour by stating to the House that further questions be placed on notice.[172]

Question Time is only set aside in rare circumstances: because the House is adjourned prior to the time allocated for questions;[173] following a resolution of the House to that effect;[174] following a resolution of the House to nominate an alternative time for questions;[175] or due to the operation of a standing order that would supersede the provision. For example, SO 34 provides that a minister must be present in the House at all times in order for the House to continue its meeting.

At the time allocated for questions, any business then under consideration is interrupted. SO 46 outlines the manner in which business interrupted by Question Time must be resolved (e.g. if a division is in progress), or set down for future consideration on the Notice Paper.

The rules that apply to questions without notice are the same as those for questions on notice. These are discussed under SO 65. The time limits that apply during Question Time are set by SO 64, and are discussed in Chapter 11.

Background

SO 47 finds its origins in a sessional order first adopted in 1984.

Prior to 1984, questions were published in the Notice Paper, therefore Question Time commenced according to practice at the point in the day at which questions were reached in the order of business listed on the Notice Paper (usually after notices),[176] although in

172 Ruling of President Harwin, *Hansard,* NSW Legislative Council, 21 February 2013, p 17795.

173 For example, *Minutes,* NSW Legislative Council, 24 September 1986, p 297*; Hansard,* NSW Legislative Council, 24 September 1986, p 3825; *Minutes*, NSW Legislative Council, 28 August 2008, p 750; *Hansard,* NSW Legislative Council, 28 August 2008, p 9582.

174 For example, *Minutes*, NSW Legislative Council, 3 May 2011, p 7; 30 January 2014, p 2305; May 2015, p 7. Such resolutions are most often passed for the purpose of an opening of Parliament, however, resolutions have also been agreed to for the purposes of affording priority to an urgent item of business.

175 For example, *Minutes*, NSW Legislative Council, 25 August 2011, p 368.

176 See, for example, *Minutes*, NSW Legislative Council, 25 September 1979, p 85; 16 August 1984, p 39.

the earlier years of the Council it was commonplace for members to ask questions of ministers during the debate on the motion to adjourn the House.[177]

Between 1984 and April 1988, the House adopted a sessional order appointing a time at which business would be interrupted for questions each sitting day.[178] The sessional order was not debated, but it is understood that the new rule was prompted by the desire of the then Leader of the Government for Council Question Time to commence after the Assembly's Question Time. The sessional order also followed the House agreeing to publish written questions, on notice, on a separate Questions and Answers Paper in place of the Notice Paper.[179]

From the commencement of the second session of the 49th Parliament in August 1988, a sessional order set the same time for Questions as that adopted in April of that year, but also included provision for the procedure to be followed in the event that the House was in committee of the whole, or a division was in progress, at the time appointed for Questions. Under the new terms, any business then under discussion, if not disposed of, would be set down on the Notice Paper for a later hour of the sitting. The terms of the provision were similar to those included in the Assembly's sessional order relating to interruption of business for the adjournment.[180] These terms were incorporated into SO 46 in the 2004 revision of the standing orders.

Between 1988 and 2000, the sessional order was readopted each session, setting the same time for Questions, with some variation. In 1999, the periodic election saw a record 13 crossbench members elected to the Legislative Council, significantly altering the dynamic in the House. When the Government moved the usual sessional order to set the time for Questions that year, Mr Richard Jones spoke to the crossbench's concerns that ministers were using lengthy answers to occupy a large proportion of Question Time, making what amounted to ministerial statements. Mr Jones stated that the Crossbench had approached the Government and Opposition to propose that either a minimum of 21 questions be answered during Question Time, or that the House follow the Senate practice of limiting the time for answers, but neither side had accepted the proposals.[181] The issue was redressed the next session when the House adopted new rules for questions, including times limits for questions and answers (see SO 64 and 65).

In 2000, the time for Questions was varied, however the terms of sessional order adopted were otherwise unaltered.[182]

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177 See, for example, *Hansard*, NSW Legislative Council, 6 October 1915, pp 2369-2370; 8 March 1927, p 2064; 2 May 1950, pp 6351-6353.

178 *Minutes*, NSW Legislative Council, 16 August 1984, p 36; 20 February 1986, p 26; 28 April 1988, p 27. Under the sessional order, Questions commenced at 5.30 pm on Mon-Wed and 2.30 pm on Thurs to Fri until April 1988, when the motion was amended to 4.00 pm on Mon-Wed and 12 noon on Thurs and Fri.

179 *Minutes*, NSW Legislative Council, 15 August 1984, p 27.

180 *Hansard*, NSW Legislative Assembly, 20 February 1985, p 3519. Similar provisions had previously been included in the Assembly's SO 123A relating to the interruption of business, adopted in 1976.

181 *Hansard*, NSW Legislative Council, 12 May 1999, pp 61-62.

182 *Minutes*, NSW Legislative Council, 5 April 2000, p 354.

On 30 May 2001, the sessional order was again amended on motion of the Leader of the Opposition to alter the time for Questions and also insert a new provision that, whenever the House adjourns to a day and time later than the time appointed for the interruption of business for Questions, Questions would instead commence 30 minutes after the time appointed for the meeting of the House. During debate on the motion, the Leader of the Opposition stated that under the current arrangement for Questions to take place between 4.00 pm and 5.00 pm, members had limited opportunity to raise matters with the media prior to finalisation of their stories for the day or discuss matters with their constituencies. It was hoped that moving the time for Questions to 12 noon on Wednesdays and Thursdays would address this issue.[183]

The Leader of the Government sought to further amend the motion to cause Questions to commence after prayers at the commencement of the day on Tuesdays, however, this was opposed by the Opposition and crossbench as it would have the effect of scheduling the Council's Question Time at the same time as that of the Assembly, effectively 'overshadowing' the Council.[184]

The sessional order has been readopted in the same terms in each subsequent session, however, from 2011 the time at which Questions would take precedence was altered. The 2011 periodic election occasioned a change in government, which in turn saw the House move to an altered sitting pattern, sitting Tuesday to Friday of the first week and Monday to Thursday of the second week, necessitating a change in the time for Questions.[185] The time was set at the same as that of the Legislative Assembly, prompting The Greens to move an amendment to alter the time in an effort to address the same concern expressed in May 2001 that the Council's proceedings would be overshadowed by the Assembly, reducing the accountability of Council ministers.[186] The amendment was not successful. Later that year, in response to a review of the efficacy of the new sitting pattern by the Procedure Committee,[187] the time for Questions on the last sitting day of the week was moved to an earlier time to accommodate the needs of country and regional members.[188] In November 2011, the sessional order was further amended in response to a second report by the Procedure Committee,[189] which had recommended a return to a three-day sitting pattern, necessitating consequential amendments to the

183 *Minutes*, NSW Legislative Council, 30 May 2001, pp 13892-13893.

184 *Hansard*, NSW Legislative Council, 30 May 2001, pp 13894-13895.

185 *Minutes*, NSW Legislative Council, 9 May 2011, pp 74-75. Questions would commence at 4.00 pm on the first sitting day, and 2.30 pm on the second, third, fourth and fifth sitting days of each week.

186 *Hansard*, NSW Legislative Council, 9 May 2011, pp 399-400.

187 Procedure Committee, NSW Legislative Council, *Report relating to private members' business and the sitting pattern*, Report No. 5 (June 2011).

188 *Minutes*, NSW Legislative Council, 3 August 2011, pp 299-300. Questions would commence at 4.00 pm on the 1st sitting day, 2.30 pm on the second and third sitting days, and 2.00 pm on the fourth and fifth sitting days.

189 Procedure Committee, NSW Legislative Council, *Report relating to private members' business, the sitting pattern, Question Time and petitions*, Report No. 6 (November 2011).

time for Questions.[190] The time for Questions has been adopted in the same form in each subsequent session to date.[191]

48. MINISTERIAL STATEMENTS

(1) A Minister may make a statement regarding government policy at any time when there is no other business before the House.

(2) The Leader of the Opposition, or a member nominated by the Leader of the Opposition, may speak to a ministerial statement, not exceeding the time taken by the Minister in making the statement.

Development summary		
1988–1997	Sessional order	Right of reply to ministerial statements
1999–2003	Sessional order	Right of reply to ministerial statements
2003	Sessional order 48	Ministerial statements
2004	Sessional order 48	Ministerial statements

SO 48 makes provision for a minister to make a statement regarding government policy or a matter of other state significance and for the Leader of the Opposition to make a statement in response.

Operation

A minister may make a statement on a matter of government policy at any time when there is no other business before the House (SO 48). An additional opportunity is also provided for ministers to make a statement at the commencement of the day under SO 38, which lays out the routine of business for formalities at the commencement of each sitting day. This opportunity occurs following notices of motions and matters of public interest, but prior to the opportunity for ministerial replies to matters raised on the adjournment and the consideration of business listed on the Notice Paper.

When a minister wishes to make a statement, they rise and seek the call from the President. In practice, ministers are likely to have consulted the President prior to making a statement to advise of the need to interrupt the agenda of business for that day. It is also considered a courtesy for a minister to advise the Leader of the Opposition of the subject matter of the statement to be made in order that a response can be prepared.

While SO 48 states that a ministerial statement made must relate to matters of 'government policy', in practice, this provision has been interpreted widely. For example, in recent years statements have canvassed matters such as the passing of a Prime Minister

190 *Minutes*, NSW Legislative Council, 23 November 2011, pp 610-611.
191 *Minutes*, NSW Legislative Council, 9 September 2014, p 7; 6 May 2015, p 55.

or other prominent person;[192] a judgement made in a court case regarding the power of the House to order the production of documents;[193] the anniversary of a mining tragedy at Northparks Mine;[194] a mining tragedy that had occurred in New Zealand;[195] the death of a police officer;[196] and the 60th anniversary of the Geneva Convention.[197]

Under SO 48(2), the Leader of the Opposition, or another member nominated by the Leader of the Opposition to speak on their behalf, may speak in reply to the ministerial statement for a time not exceeding the time taken by the minister. On occasion, members of the crossbench have also addressed the House, by leave.[198] In such cases, the member may only speak to the statement if leave is granted, and no other debate may ensue.[199] In all other cases, members wishing to speak to the matter the subject of the statement must do so by way of a substantive motion.

Background and development

Ministerial statements have been a commonplace occurrence throughout the history of the Legislative Council, however, no formal reference was made to such statements in the standing orders until the adoption of SO 48 in 2004. Some of the more notable ministerial statements made during the early years of the Council related to matters such as the event of an adverse vote in the Assembly and subsequent resignation of the Premier or dissolution of the Assembly;[200] a request that members assist in a recruiting campaign for World War I;[201] night sittings of the Legislative Council during a period

192 *Minutes*, NSW Legislative Council, 21 October 2014, p 174; 11 May 2011, p 94; 18 March 2014, p 2368.

193 *Minutes*, NSW Legislative Council, 3 December 1996, p 529.

194 *Minutes*, NSW Legislative Council, 24 November 2009, p 1541.

195 *Minutes*, NSW Legislative Council, 25 November 2010, p 2267.

196 *Minutes*, NSW Legislative Council, 9 September 2010, p 2047; 7 March 2012, p 769.

197 *Minutes*, NSW Legislative Council, 24 September 2009, p 1406.

198 *Minutes*, NSW Legislative Council, 28 June 2004, p 915; 10 September 2009, p 1368. For an example of a member being refused leave, see *Minutes*, NSW Legislative Council, 28 June 2004, p 915; 18 November 2004, p 1153; 26 November 2008, p 923. For an example of the President also addressing the House, see *Minutes*, NSW Legislative Council, 11 May 2011, p 94. For examples of other members of the House speaking to a ministerial statement prior to the adoption of SO 48, see *Minutes*, NSW Legislative Council, 3 May 1994, p 152; 21 September 1995, p 181; 18 June 1996, p 224; 3 December 1996, p 529, 31 October 2000, p 678.

199 President's ruling, Deputy President Griffin, *Minutes*, NSW Legislative Council, 18 November 2004, p 13138.

200 *Minutes,* NSW Legislative Council, 31 October 1860, p 28; 3 November 1864, p 13; 30 January 1865, p 13; 31 January 1865, p 17; 20 October 1869, pp 8 and 9; 31 January 1872, p 40; 29 January 1875, p 9; 14 March 1877, p 58; 15 March 1877, p 61; 9 August 1877, p 143; 5 December 1877, p 12; 11 December 1878, p 73; 18 December 1878; p 77; 19 December 1878, p 79; 16 December 1885, p 25; 17 February 1886, p 45; 18 February 1886, p 47; 10 October 1888, pp 59 and 76.

201 *Minutes,* NSW Legislative Council, 21 July 1915, p 34.

of blackout arrangements owing to World War II;[202] and a need to adjourn the House owing to the indisposition of Hansard following lengthy sittings of the Assembly.[203]

In keeping with contemporary practice today, statements were made at any time where there was no other question before the House. Rulings made by former Presidents state that while ministers were encouraged to refrain from canvassing controversial matters, ministers were allowed considerable latitude in making statements.[204] Prior to 2004, no response was permitted to be made to a ministerial statement.[205]

From 1988 until 1997, provision was made under a sessional order for the Leader of the Opposition, the leader of any other party or group where such leadership had previously been announced to the House, or a member nominated by the leader, to reply to a ministerial statement for a period not exceeding the time taken by the minister in making the statement.[206] Provision for a reply to ministerial statements was made in the Legislative Assembly in 1994 (SO 103 and 104).[207] From 1999, the sessional order was amended to make provision only for the Leader of the Opposition, or a member nominated by the Leader of the Opposition, to reply to a ministerial statement.[208] The sessional order was readopted each session until being incorporated in the 2004 rewrite of the standing orders as new SO 48(2).

202 *Minutes,* NSW Legislative Council, 28 April 1942, p 157.

203 *Minutes,* NSW Legislative Council, 7 December 1916, p 219; 18 December 1918, p 57.

204 *Hansard,* NSW Legislative Council, 30 November 1904, p 1942; 15 September 1915, p 1808.

205 *Hansard,* NSW Legislative Council, 11 April 1930, p 4769.

206 *Minutes,* NSW Legislative Council, 24 May 1988, p 48; 18 August 1988, p 25; 22 February 1990, p 24; 21 February 1991, p 24; 2 July 1991, p 17; 4 March 1992, p 22; 2 March 1993, p 24; 2 March 1994, p 28; 24 May 1995, p 26; 17 April 1996, p 27; 17 September 1997, p 37.

207 As in the Council, it had been commonplace for statements to be made, however, *NSW Legislative Assembly Practice, Procedure and Privilege* notes that such replies had historically been 'vague, imprecise and contain[ed] many anomalies'. Russell D Grove (ed), *New South Wales Legislative Assembly Practice, Procedure and Privilege* (NSW Legislative Assembly, 2007), p 127.

208 *Minutes,* NSW Legislative Council, 12 May 1999, p 43; 8 September 1999, p 25; 12 March 2002, p 35; 30 April 2003, p 46.

CHAPTER 8

JOURNALS AND RECORDS OF THE HOUSE

49. JOURNALS

(1) All proceedings of the House are to be recorded by the Clerk and published in the Minutes of Proceedings, signed by the Clerk.

(2) A business paper containing notices of motions and orders of the day is to be published by the Clerk.

(3) Publication, in written or electronic form, of the Minutes of Proceedings, Questions and Answers Paper and Notice Paper is authorised under this Standing Order.

Development summary		
1856	Standing order 22	Council Minutes
1870	Standing order 25	Council Minutes
1895	Standing order 16 Standing order 65	Minutes of Proceedings Business Paper
2003	Sessional order 49	Journals
2004	Standing order 49	Journals

This standing order requires the Clerk to publish the Minutes of Proceedings of the House, the record of the votes and proceedings for that day, and a business paper referred to as the 'Notice Paper', which is the agenda of business before the House and contains notices of motions and orders of the day.[1] Additionally, a Questions and Answers Paper containing written questions received and the corresponding answers is required to be published under SO 67. The proceedings of the House are compiled by the Clerk in the Journals of the Legislative Council.

1 The Notice Paper additionally contains the details of 'Bills discharged, laid aside, negatived and withdrawn' and 'Bills referred to select or standing committees'.

Operation

While SO 49(1) requires that all proceedings be recorded in the minutes, several standing orders specify particular information that must be included in the Clerk's record, including: the names of members present when the House is adjourned for lack of a quorum (SOs 29, 30); reports or documents lodged out of session with the Clerk (SOs 55, 231, 233); a record of the attendance of members (SO 62); the name of a member who is the only member to call for a division, at the request of that member (SO 112); records of divisions and pairs (SO 115); reasons given by the Chair in the event of a casting vote (SO 116); every message received from the Assembly, together with any answer given (SO 127); and any protest received against the passing of a bill (SO 161).

SO 49(3) authorises the publication of the records of the House in written or electronic form. As noted in the commentary below, this is a recent addition to the standing orders adopted in 2004 in order to resolve ambiguities as to the privilege attaching to the publication by the Parliament of the business papers and Hansard in electronic form.

At the conclusion of each session, each House Paper is published in the form of a bound journal. The *Journal of the Legislative Council Minutes of Proceedings* contains a comprehensive index to proceedings for that session, an index to papers tabled, the Minutes of Proceedings, and a series of sessional returns summarising key aspects of business. These include: the proclamation convening the new session of parliament; a register of Addresses and orders for papers; a register of separate and joint Addresses not being for papers; registers of the passage of bills; committees appointed; an abstract of petitions received;[2] a list of members who took the pledge of loyalty or oath of allegiance; a sessional list of all members and the duration of their service; and a list of the attendance of all members both in the House and in divisions.

Until the 54th Parliament (ending early 2011), the *Journal of the Legislative Council Questions and Answers* was bound in two formats: a 'full set' journal comprised of a copy of each Questions and Answers Paper for the session; and a 'composite' journal, which included an index to all questions asked and answers provided during the session and a list of all questions and answers in a composite, summary form. The *Journal of the Legislative Council Notice Paper*, also published to the 54th Parliament, contained a set of each Notice Paper for the session, but did not include an index to the contents. From the 55th Parliament (commencing May 2011), the Questions and Answers Paper and Notice Paper moved to online publication only.

Each House paper is signed by the Clerk or, in the absence of the Clerk, by the next most senior parliamentary officer, usually the Acting Clerk or the Deputy Clerk.

2 Until 2004, the abstract of petitions was required under standing order. From 2004, the standing orders omitted any reference to the abstract of petitions, however, the abstract continues to be maintained and published in the journals for each session. This is also discussed under standing order 68.

Background and development

Provision for the composition of journals was first made in the standing orders in 1856 at a time when the Minutes of Proceedings was the only House Paper published – notices of motions given that day were printed at the end of the minutes, together with questions received for the following day. The standing order stated that the minutes, as printed by the Government Printer, would be taken as the Journal of the proceedings of the House:

> The Minutes of Proceedings of this Council, printed by the Government Printer, shall constitute, and be taken to be, the Journals of this House (1856 SO 22).

The standing order was readopted in the same terms in 1870 (SO 25).

Provisions for the journals were significantly revised in 1895 (SOs 16 and 65) based on the terms of the equivalent new provisions adopted by the Legislative Assembly (Assembly 1894 SOs 52 and 122). For the first time, provision was made for the publication of a separate Business Paper containing notices of questions, motions and orders of the day for the next sitting day (1895 SO 65). The new standing order also required that the paper be printed and circulated with the Minutes of Proceedings – in practice, the document was published at the end of the minutes each day, the two papers being separated by a simple black line. While 1895 SO 16, which revised the terms of the requirement for the publication of the Minutes of Proceedings, was based on the Assembly's equivalent new standing order, the provision differed in several key respects. The Assembly's new standing order provided that the Votes and Proceedings must be 'first perused by the Speaker' before being printed, and then countersigned by both the Speaker and the Clerk. In contrast, the Council's standing order placed sole responsibility for the record of proceedings in the hand of the Clerk:

> Every Vote of Proceeding of the House shall be recorded by the Clerk, and the Minutes of the Votes and Proceedings, signed by the Clerk, shall be printed by the Government Printer, and shall be the Journals of the House (1895 SO 16).

The provisions of the 1895 standing orders remained in place until 2004, however, practice pertaining to the House Papers continued to develop during that time. From 15 August 1984, a separate Questions and Answers Paper was published[3] (see also discussion under SO 67), and from 21 February 1990, the notices of motions and orders of the day were published as a separate paper.[4] In a statement made on 22 February 1990, the President informed the House that he had authorised the publication of notices of motions and orders of the day separately to the Minutes of Proceedings to streamline preparation and printing and to enable members and other users of the publication to have easier access to information on the business of the House.[5] From 30 April 2003, the notices of motions and orders of the day were published under the title of the 'Notice Paper'.[6]

3 *Minutes,* NSW Legislative Council, 15 August 1984, p 27.
4 *Minutes,* NSW Legislative Council, 21 February 1990, p 19.
5 *Hansard,* NSW Legislative Council, 22 February 1990, p 19.
6 *Notice Paper*, NSW Legislative Council, 30 April 2003.

In 2004, SO 49 was adopted, and formalised the publication of the three separate House Papers. When first adopted as a trial sessional order in 2003, SO 49 did not contain paragraph (3), which authorises the publication of the Minutes of Proceedings, Questions and Answers Paper and Notice Paper, in written or electronic form. The addition of this paragraph was recommended by the Procedure Committee in May 2004, in its second report on the proposed new standing orders.[7] The committee's minutes note that the additional provision, together with a corresponding paragraph inserted into SO 51 (regarding Hansard), were adopted in order to resolve ambiguities as to the privilege attaching to the publication by the Parliament of the business papers and Hansard in electronic form.[8] The additional paragraph was then included in the final standing orders adopted by the House on 5 May 2004.[9]

Changes to the bound journals and sessional returns

Each House Paper has been published in the form of a bound journal at the conclusion of each parliamentary session since 1856.[10] In addition to the sessional returns published in the *Journal of the Legislative Council Minutes of Proceedings* already discussed above, two additional sessional returns were also included in the publication during the Council's history.

A 'Report of Divisions in Committee of the Whole House' was included in the Journal between 1856 and 2003, although production of the report was only a requirement of the standing orders between the years 1895 and 2003 (1895 SO 226). The report was dispensed with following the adoption of the new 2004 standing orders in their trial form as sessional orders in 2003, which omitted any reference to the document. The 2004 standing orders also omitted the requirement for the production of an abstract of petitions presented each session, however the abstract has continued to be maintained and published in the journals.

Between 1856 and 2003, the sessional returns also incorporated reports from the Printing Committee. The Printing Committee was routinely established by sessional order at the commencement of each session. Between 1895 and 2003 this resolution was passed under the authority of 1895 SO 281,[11] however, the committee was also appointed in the years preceding any requirement being made for the committee in the standing orders. Under the sessional order, the role of the committee was to consider and report on any document tabled but not ordered to be printed in the House and to make recommendations as to whether each document ought to be printed, either in full or in abstract. Documents ordered to be printed were subsequently included in the Parliamentary Papers Series. From 2004, the Printing Committee was abolished following the adoption of new SO 59,

7 Procedure Committee, NSW Legislative Council, *Proposed New Standing Rules and Orders: Second Report*, Report No. 2 (May 2004), p iii.

8 Procedure Committee, NSW Legislative Council, *Proposed New Standing Rules and Orders: Second Report*, Report No. 2, p viii.

9 *Minutes,* NSW Legislative Council, 5 May 2004, p 676.

10 The journals of the Legislative Council date back to 1823, prior to bicameralism, however, the journals of the Legislative Council in its current form date from 1856.

11 Later SO 280, following the rescission of SO 210 in 1895.

which requires that a list of all papers tabled and not ordered to be printed in the previous month be tabled by the minister on the first sitting day of each month. Under SO 59, on tabling, a motion may be moved without notice that certain papers on the list be printed.

In addition to these sessional returns, from 1856 until 1904 the Journal contained the printed parliamentary papers.[12] Commencing with the first session of the 20th Parliament in 1904, parliamentary papers were published in separate volumes called the 'Joint Volumes of Parliamentary Papers' (being joint with the Legislative Assembly). The Parliamentary Papers Series continued until 2006, when it was discontinued, largely due to the costs of printing and binding of the volumes and the availability of many annual reports in electronic form on the internet.

50. CUSTODY OF RECORDS

(1) The Clerk is to have custody of the journals, records and all documents tabled in the House. They may only be taken from the office of the Clerk by a resolution of the House, or if the House is adjourned for more than two weeks, by approval of the President.

(2) The House is to be notified at its next sitting whenever approval is given by the President for any such removal.

Development summary		
1856	Standing order 24	Custody of papers
1870	Standing order 27	Custody of papers
1895	Standing order 17	Custody of records
2003	Sessional order 50	Custody of records
2004	Standing order 50	Custody of records

SO 50 denotes the Clerk as custodian of the records and journals of the House. Records of the House may only be removed from the office of the Clerk following a resolution to that effect being agreed to by the House or, if the House is adjourned for more than two weeks, with the approval of the President.

Operation

The Clerk is the custodian of all journals, records and documents tabled in the House. Documents form the 'Tabled Papers' series, which is comprised of a hard copy of every document tabled in the House. While the Clerk is the official custodian, in practice the management, registration and collation of documents is managed on the Clerk's behalf by the Procedure Office.

12 That is, all documents ordered to be printed by the House, such as reports of committees, annual reports of departments and statutory authorities, and returns to orders.

Under SO 50, the President can approve the removal of documents from the office of the Clerk if the House is adjourned for more than two weeks. Where the President provides such approval, the House is to be notified at its next sitting. This provision has not been utilised to date.

Agreement with the State Records Authority

The *State Records Act 1998* provides for exempt public offices, including the Houses of Parliament, to enter into agreements with the State Records Authority for the application, with or without specified authorisations, of any of the provisions of the Act to their records. On 23 November 2006, the Council passed a resolution authorising the Clerk to enter into a memorandum of agreement with the Authority for the transfer of records of the House to the care, but not control, of the Authority. The resolution also expressly authorised the Clerk, under standing order 50, to transfer to the Authority from time to time as occasion may require the records of the House not currently in use. The resolution has continuing effect until rescinded or amended by the House.[13] This is the only incidence of the House authorising the ongoing relocation of documents from the Parliamentary Precincts. In all other cases (discussed below), arrangements have been made on a temporary basis, or the House has authorised the return of original documents provided in response to an order of the House to the government department from which they originated. Further details regarding the arrangements made under the *State Records Act 1998* can be found in *New South Wales Legislative Council Practice*.[14]

Release of documents, authorised by the House

Clerk granted leave to return papers provided in response to an order of the House

On several occasions, the House has authorised the return to the originating government department of documents provided in response to an order of the House:

- On 25 May 1943, the House granted leave to the Clerk to return to the Department of Road Transport and Tramways papers relating to the case of Mr G Sargeant. The department had advised that the return of the papers in question was a matter of some urgency in view of a resolution passed by the House on 13 May 1943 which requested that the Minister for Transport initiate an independent inquiry into the circumstances in which Mr G Sargeant had been regressed from the position of Chief Traffic Manager, and whether that regression was justified.[15]
- On 19 October 1948, the House granted leave to the Clerk to return to the Department of the Attorney General and of Justice papers relating to the release

13 *Minutes,* NSW Legislative Council, 23 November 2006, pp 431-432.

14 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 466.

15 *Minutes,* NSW Legislative Council, 25 May 1943, p 140; *Hansard,* NSW Legislative Council, 25 May 1943, p 3532; *Minutes,* NSW Legislative Council, 13 May 1943, p 126.

of prisoner Clifford Tasman Thompson, to enable the department to present the papers to the Legislative Assembly, in compliance with a request made by that House for the same papers.[16]

- On 2 October 1924, the House granted leave to the Clerk to return to the Department of Agriculture papers relating to the importation of goats.[17]
- On 29 November 2001, the House agreed to a resolution authorising the Clerk to return to the Premier's Department documents tabled in return to an order and made public, 12 months after the tabling of those documents.[18] The resolution was not implemented as the session expired shortly thereafter.

Clerk granted leave for temporary removal of papers for the purposes of microfilming

On 22 May 1956, the House authorised the Clerk of the Parliaments to arrange for the records of the House to be temporarily removed to the Trustees of the Public Library of New South Wales from time to time 'to enable records of great historical value to be microfilmed and permanently retained'.[19]

Clerk granted leave to release a petition for display at several museums

On 1 November 2000, the House authorised the Clerk of the Parliaments to release a petition received in 1861 from Hu Foo, Kylong and others regarding an incident at Lambing Flat into the custody of Art Exhibitions Australia for display in the National Museum of Australia and the Museum of Victoria for the Centenary of Federation.[20]

Use of documents for the purposes of legal proceedings

There have been a number of instances of the House authorising the use of documents for the purposes of legal proceedings. Motions authorising the use of the documents for such purposes go beyond the simple authority to physically remove the documents and speak instead to matters of privilege that would otherwise prevent the documents forming a part of the proceedings of the courts.

New South Wales Legislative Council Practice notes that prior to 1995, it was usual practice in the Council for parties in legal proceedings to petition the Council to obtain leave from the Parliament to adduce official parliamentary records, such as Hansard or the minutes, into

16 *Minutes,* NSW Legislative Council, 19 October 1948, p 6; *Hansard,* NSW Legislative Council, 19 October 1948, p 6.

17 *Minutes,* NSW Legislative Council, 2 October 1924, p 97. The text of the motion moved did not provide any context to the request, and the motion was agreed to without debate.

18 *Minutes*, NSW Legislative Council, 29 November 2001, pp 1311-1312. The resolution was passed as an amendment to a motion that originally sought to authorise the Clerk to give the documents to State Records.

19 *Minutes,* NSW Legislative Council, 22 May 1956, p 6; *Hansard,* NSW Legislative Council, 22 May 1956, p 5.

20 *Minutes*, NSW Legislative Council, 1 November 2000, p 685.

evidence in a court, or the attendance of parliamentary officers. Following the enactment of the *Evidence Act 1995*, in particular section 155, the requirement for parties to petition the Parliament for such leave was obviated, as official parliamentary records became admissible as evidence. However, for abundant caution, in matters of a particularly serious or sensitive nature, the Council has continued to receive petitions seeking the production of documents. In such circumstances, the House authorises the Clerk, or the Clerk's representative, to attend court to produce the documents.[21] Key instances in which the House has authorised the use of records of the House, or the attendance of officers of the House, for these such purposes, both prior to and following the introduction of the *Evidence Act 1995*, have included:

- *The House authorises the Clerk to comply with a subpoena to produce certain records to the Supreme Court:* On 11 July 1906, the President informed the House that the Clerk had been subpoenaed to attend at the Supreme Court in the case *Charles Launcelot Garland v James Leslie Williams*, and produce certain records. The President advised that the Clerk could not comply with the subpoena without leave of the House and subsequently put the question: 'That the Clerk have leave to comply with such subpoena personally, or by one of the officers of his Department, as may be most convenient to the Business of this House'. The question was agreed to without debate.[22]

- *Petition to request that the House authorise the production of documents and attendance of members of the Parliamentary Reporting Staff:* On 19 October 1982, Mr Lange presented a petition from solicitors acting on behalf of Mr J M Mason, defendant in an action brought by Mr B J Hetherington, praying that leave be granted by the Council to: (a) issue and serve a subpoena for the production of certain official records, (b) present the said records as evidence, (c) request the attendance of officers of the Legislature to present the records, and (d) issue and serve subpoenas for the attendance of members of the parliamentary reporting staff.

  Later that day, Mr Landa moved by leave that, in response to the petition presented that day, the House grant leave: (a) to the petitioner and the defendant to issue and serve subpoenas for the production of the relevant official records of the proceedings of the Legislative Council as described in the Second Schedule, (b) to the petitioner and the defendant to adduce the said official records of the proceedings as evidence of what was in fact said in the Legislative Council, (c) to an appropriate officer or officers of the Legislature to attend in court and to produce the said official records of the proceedings and to give evidence in relation to the recording of proceedings provided that such officer or officers should not be require to attend at any time which would prevent the performance of their duties in the Parliament, and (d) to the petitioner and the defendant to interview and obtain proofs of evidence

21 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, pp 470-471.
22 *Minutes,* NSW Legislative Council, 11 July 1906, p 13.

from the said officers of the Parliamentary reporting staff and the principal and assistant parliamentary reporters and to issue and serve subpoenas for their attendance on the trial of the said action. Debate on the motion, which was subsequently agreed to, canvassed the merits of the application of parliamentary privilege in the case.[23]

- *Petition to request that questions on notice and answers be tendered as evidence:* On 15 May 1990, Mr Pickering presented a petition from the Crown Solicitor, acting on behalf of New South Wales and the Maritime Services Board, praying that the House grant leave to adduce in evidence in court proceedings a certified copy of an extract of questions on notice asked by the Hon Richard Jones on 9 November 1988, and related answers, as evidence only of the questions having been asked and the answers having been given.[24]

  Later that day, Mr Pickering, by leave, moved a motion to give effect to the request. Under the terms of the motion, leave was granted to the petitioner and the defendants to adduce in evidence a certified copy of an extract of questions on notice asked by Mr Jones to the minister representing the Deputy Premier, Minister for State Development and Minister for Public Works, and the answers to those questions. The motion was agreed to without debate.[25]

- *Petition to request leave for the production of certain records in court proceedings in Egan v Willis and Cahill:* On 26 June 1996, Mr Hannaford, by leave, presented a petition from Gerald Ingram Raftesath, acting on behalf of the President of the Legislative Council and Usher of the Black Rod, defendants in an action brought by the Hon Michael Egan in the Supreme Court. The petition requested that the House: (a) grant leave to adduce in evidence a certified copy of extracts of the official records particularised in an annexure to the petition, and (b) allow the reception into evidence of those certified copies as evidence only of certain facts, as listed in the petition. Immediately following presentation of the petition, Mr Hannaford, by leave and as a matter of necessity without previous notice, suspended standing orders to move a motion to give effect to the terms of the petition. Mr Hannaford did not speak to the motion;[26] Mr Egan stated only that he looked forward to his day in court. The motion was agreed to on voices.[27]

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23 *Minutes,* NSW Legislative Council, 19 October 1982, pp 163-164; *Hansard,* NSW Legislative Council, 19 October 1982, pp 1717-1720.

24 The questions appear to have related to a property development, however, the specific case was not identified.

25 *Minutes,* NSW Legislative Council, 15 May 1990, pp 157-158; *Questions and Answers Paper*, NSW Legislative Council, 9 November 1988, pp 218-220 (there was no Hansard debate).

26 Nor did Mr Hannaford comment on the need to move the motion, in view of the provisions of the newly adopted *Evidence Act 1995*.

27 *Minutes,* NSW Legislative Council, 26 June 1996, pp 284-285; *Hansard,* NSW Legislative Council, 26 June 1996, p 3735. The *Egan* case related to non-tabling of documents ordered by the House – see SO 52.

- A further petition regarding the *Egan* case was presented and a related motion agreed to in 1997.[28]

- *Petition to request leave to produce official records in a court case ('the NutraSweet case'); notice given by a private member to move a related motion:* On 2 July 1998, the Hon Patricia Forsythe, a private member and member of the Liberal Party, presented a petition from a solicitor acting on behalf of The NutraSweet Company and other companies, the defendants in certain proceedings in the Supreme Court of New South Wales, praying that the House grant leave to adduce in evidence a certified copy of the extract of the official records particularised in an answer to the petition, and allow the records to be tendered as evidence only of the words said in the course of debate in the Council.[29]

  During the call for notices, Mrs Forsythe gave notice of motion that would give effect to the terms of the request made in the petition. Following the notice being presented a point of order was taken, questioning whether the petition would have the effect of subpoenaing all Hansard staff. The President advised that the petition and the contents of its requests would be a matter for the House to determine at the time at which the member's motion was debated.

  Later that day, Mrs Forsythe sought the leave of the House to move a motion to suspend standing orders to allow consideration of the motion, notice of which had been given that day. Objection was taken. On the next sitting day, Mrs Forsythe withdrew the notice from the Notice Paper. The matter was not revisited.[30]

  On 22 June 2000, Mr Richard Jones presented a petition from a solicitor acting on behalf of individuals in the 'Copper 7 litigation', being the NutraSweet case, then being heard by the Court of Appeal. The petition requested that the House grant leave to adduce in evidence certified copies of Hansard debates regarding the removal of Justice Vince Bruce as evidence only of the words said in the course of debate in the Council. The next day, the House agreed to a motion, without debate, moved by Mr Jones, giving effect to the terms of the petition.[31]

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28 *Minutes,* NSW Legislative Council, 2 December 1997, p 26; 3 December 1997, p 282 (there was no Hansard debate).

29 Although the petition does not make reference to the substance of the case in question, Hansard states that the presentation of the petition related to the conduct of Justice Vince Bruce, who had been the subject of an inquiry by the Conduct Division of the Judicial Commission of NSW. The report included a finding of incapacity to perform judicial duties based on circumstances involving unreasonable delay in the provision of judgements. A subsequent motion for Justice Bruce's removal had been moved in the Council, but negatived on division during a conscience vote (see Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, pp 590-592).

30 *Minutes,* NSW Legislative Council, 2 July 1998, pp 641 and 657-658; 8 September 1998, p 673; *Notice Paper*, NSW Legislative Council, 8 September 1998, p 1369; *Hansard,* NSW Legislative Council, 2 July 1998, pp 6931 and 7038. Justice Bruce announced his resignation from the bench on 22 February 1999 amid speculation that further action by the Parliament for his removal was likely (see Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, p 591).

31 *Minutes,* NSW Legislative Council, 22 June 2000, p 536; 23 June 2000, p 554; *Notice Paper*, NSW Legislative Council, 23 June 2000, p 1497.

In 1997, the House also authorised the Clerk to provide to the *Special Commission of Inquiry into claims made by the Hon. Franca Arena*, and to the Commissioner of Police, copies of documents tabled by Mrs Arena regarding claims made by her in the Legislative Council on 17 September 1997 regarding paedophilia.[32]

Background and development

The standing orders have vested the Clerk with the custodianship of records and tabled documents since 1856. The requirement that leave of the House be sought prior to any document being removed from the custody of the Clerk has similarly applied since the inception of the Legislative Council (1856 SO 24):

> The custody of all Documents and Papers belonging to this Council shall be in the Clerk, who shall not permit any to be removed therefrom without leave of the House.

The standing order was readopted in the same terms in 1870 (SO 27), then amended in 1895 to also make the Clerk the custodian of the Minutes of Proceedings, production of which had been provided for under previous standing orders, but the custody of which had not previously been specified. 1895 SO 17 made further minor amendments, specifying that documents may not be removed from 'the chamber or offices', and noting that the 'express leave or order of the House' was required for their removal:

> The custody of the minutes of proceedings, records, and all documents whatsoever laid before the House, shall be in the Clerk, who shall neither take, nor permit to be taken, any such minutes, records, or documents, from the Chamber or Offices, without the express leave or order of the House.

Like many of the 1895 standing orders, the changes to the terms of 1895 SO 17 were prompted by the Council's adoption of the Legislative Assembly's new standing order relating to the same subject (Assembly 1894 SO 53). However, the Assembly's provision varied in one key respect: it required only the leave or order of the Speaker for a document to be removed, rather than the authority of the House.

The 2004 rewrite of the standing orders resulted in a number of significant changes in terms of the standing order, the most substantial of which was a new provision for the President to provide approval for documents to be removed from the office of the Clerk if the House is adjourned for more than two weeks. Where the President provides such approval, the House is to be notified at its next sitting. Minor amendments were also made to simplify the terms in which the rule was drafted for the purposes of readability.

51. HANSARD

(1) The Clerk is to ensure that a Hansard record is kept of all the debates in the House.

32 *Minutes*, NSW Legislative Council, 21 October 1997, pp 123-126.

(2) Publication, in written or electronic form, of the record of debate in the House or any committee, known as Parliamentary Debates and Hansard, including publication of Hansard 'galley proofs', is authorised under this Standing Order.

Development summary		
2003	Sessional order 51	Hansard
2004	Standing order 51	Hansard

The Clerk is required to ensure that a record of the debates of the House be kept and published. From 2016, the daily hard copy publication of Hansard was dispensed with in favour of an electronic record. The publication of both written and electronic Hansard records are authorised by the House under SO 51.

Operation

Hansard is the transcript of the debates of both Houses of the Parliament, containing the words said by members during debate. Hansard is not a strictly verbatim record, but rather a verified and corrected record.

While Hansard is intended as a record of words spoken and things done in the course of proceedings in the House, on occasion members have, with the leave of the House, incorporated their speeches in Hansard. This most commonly occurs when a minister in the Legislative Council is granted leave to incorporate into Hansard their second reading speech when the same speech has already been given by the minister with carriage of the bill in the Legislative Assembly, as the speech is readily available for the consideration of members in the Hansard record of the other place. This practice has the benefit of accelerating the progress of debate on a bill and allowing other members to speak.

On occasion members, particularly private members, have sought to incorporate the contents of a document in Hansard, such as a letter related to the bill or motion before the House,[33] or a lengthy list,[34] however members have also sought to include maps,[35] graphs[36] and photographs.[37] Presidents' rulings have noted that while it is in order for

33 For example, on 31 October 1996 the Hon Franca Arena sought the leave of the House to incorporate in Hansard a letter from the Royal Commission into the Police Service (*Hansard,* NSW Legislative Council, 31 October 1996, p 5622). On 14 March 2002, the Hon Ian MacDonald, Parliamentary Secretary, sought the leave of the House to incorporate in Hansard a letter he had written to the Department of Immigration and Multicultural and Indigenous Affairs regarding the case of a group of Afghan workers whose temporary visa was due to expire (*Hansard,* NSW Legislative Council, 14 March 2002, p 489).

34 *Hansard,* NSW Legislative Council, 17 June 2011, p 2666. For an example of a member reading a lengthy list after being refused leave to incorporate the list, see *Hansard,* NSW Legislative Council, 27 June 2002, p 3970.

35 *Hansard,* NSW Legislative Council, 1 April 2004, p 7954. The member noted that she had been informed that for technical reasons it would not be possible.

36 *Hansard,* NSW Legislative Council, 28 September 1976, pp 1007-1008.

37 *Hansard,* NSW Legislative Council, 21 November 1979, pp 3367-3368.

a member to seek the permission of the House to incorporate material in Hansard,[38] members should ensure that the courtesy extended to them in this regard is not abused,[39] should not seek to incorporate material which is readily available to members or the public,[40] and should ensure that Hansard is kept as near as possible to a true record of words said in debate.[41] In 2002, following a member reading a lengthy list of names, having been refused leave to incorporate the list, the House adopted a sessional order providing that where a member attempts to read a list of names and objection is taken, the Chair is to direct the member to confine their remarks to a statement of the comments or views of those individuals or organisations and the number of individuals or organisations making identical representation.[42] The sessional order was readopted in the following session, then incorporated into SO 91 (5).

SO 51(2) authorises the publication, in written or electronic form, of the record of debate in the House or any committee, including publication of Hansard proofs.

Members may make minor corrections to the Hansard record while it is in its proof form, however once finalised the Hansard record cannot be altered or redacted without a resolution of the House.

In rare and exceptional circumstances, the House has ordered that information be expunged from Hansard. For example, in 1996 and 2005, the House ordered that comments made revealing the names of minors who were the subject of legal proceedings be 'expunged'[43] or 'edited to suppress the names'[44].

Information relating to the content of Hansard, the history of 'Hansard' records in Parliaments and policies regarding the correction of mistakes and inclusion of interjections in New South Wales are discussed further in *New South Wales Legislative Council Practice*.[45]

Background and development

There was no Hansard record in New South Wales prior to 1879, though the *Sydney Gazette* published some accounts of proceedings of the early Council between 1828 and 1843, and between 1843 and 1879 reports of debate in the Council were published in the *Sydney Morning Herald*.[46] The recording and publication of debates in the

38 Ruling: President Johnson, *Hansard,* NSW Legislative Council, 22 August 1979, p 444.
39 Ruling: President Johnson, *Hansard,* NSW Legislative Council, 15 August 1979, pp 150-151; Ruling: Deputy President Healy, *Hansard,* NSW Legislative Council, 24 August 1983, p 403.
40 For example, Ruling: President Johnson, *Hansard,* NSW Legislative Council, 18 February 1982, p 2157.
41 Ruling: President Johnson, *Hansard,* NSW Legislative Council, 30 March 1983, p 5369.
42 *Minutes,* NSW Legislative Council, 29 August 2002, p 321.
43 *Minutes*, NSW Legislative Council, 15 May 1996, p 137.
44 *Minutes,* NSW Legislative Council, 21 September 2005, p 1590.
45 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, pp 272-273.
46 These were reports, rather than complete records of debate.

New South Wales Parliament by Hansard staff employed by the Parliament commenced on 28 October 1879 at the opening of the third session of the ninth Parliament.[47]

The requirement for the Clerk to maintain a Hansard record of debate was first incorporated in the standing orders in 2004. When first adopted as a trial sessional order in 2003, SO 51 did not contain paragraph (2), which authorises the publication in written or electronic form of Hansard, including 'galley proofs'. In May 2004, the Procedure Committee published its second report on the proposed new standing orders and recommended that the additional paragraph be incorporated.[48] The committee's minutes note that the additional provision, together with an additional paragraph inserted into SO 49, was adopted in order to resolve ambiguities as to the privilege attaching to the publication by the Parliament of the business papers and Hansard in electronic form.[49] The additional paragraph was then included in the final standing orders adopted on 5 May 2004.[50]

47 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, p 272.

48 Procedure Committee, NSW Legislative Council, *Proposed New Standing Rules and Orders: Second Report*, Report No. 2, p iii.

49 Procedure Committee, NSW Legislative Council, *Proposed New Standing Rules and Orders: Second Repor*t, Report No. 2, p viii.

50 *Minutes,* NSW Legislative Council, 5 May 2004, p 676.

CHAPTER 9

TABLING OF DOCUMENTS

52. ORDER FOR THE PRODUCTION OF DOCUMENTS

(1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.

(2) When returned, the documents will be laid on the table by the Clerk.

(3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.

(4) If at the time the documents are required to be tabled the House is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to be have been presented to the House and published by authority of the House.

(5) Where a document is considered to be privileged:

(a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,

(b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:

(i) made available only to members of the Legislative Council,

(ii) not published or copied without an order of the House.

(6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.

(7) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

(8) A report from the independent legal arbiter is to be lodged with the Clerk and:

(a) made available only to members of the House,

(b) not published or copied without an order of the House.

(9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.

Development summary		
1856	Standing order 23	Orders for papers
1870	Standing order 26	Orders for papers
1895	Standing order 18	Orders for papers
1922	Standing order 18	Orders for papers
1927	Standing order 18	Orders for papers
1998	Sessional order	Appointment of Independent Legal Arbiter
2003	Sessional order 52	Order for the production of documents
2004	Sessional order 52	Order for the production of documents

Standing order 52 regulates the House's power to order the production of documents concerning the administration of the state, including from ministers, departments and other entities. While SO 52 is not the source of the power, which is conferred on the House as a reasonably necessary power at common law,[1] the standing order outlines the administrative process by which orders will be made, communicated and returned, and provides for an arbitration mechanism in the event that a member disputes a claim of privilege made over a document.

Operation

Orders made under SO 52

Orders for the production of documents are initiated by resolution of the House, agreed to on motion in the usual manner. The resolution states the offices, agencies and other bodies that are the subject of the order and the documents sought. The definition of

1 The power of the Legislative Council to order the production of state papers is derived from the common law principle of reasonable necessity. This principle finds expression in a series of 19th-century cases decided by the Judicial Committee of the Privy Council between 1842 and 1886, in which it was held that while colonial legislatures did not possess all the privileges of the Houses of the British Parliament, they were entitled by law to such privileges as were 'reasonably necessary' for the proper exercise of their functions. (See *Kielly v Carson* (1842) 12 ER 225, *Fenton v Hampton* (1858) 14 ER 727, *Barton v Taylor* (1839) 112 ER 1112). This is discussed further in Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008) and David Blunt, 'Parliamentary sovereignty and parliamentary privilege', 2015, Paper presented to a Legalwise Seminar, www.parliament.nsw.gov.au/lc/articles, retrieved 1 June 2016.

a document extends to a number of materials and formats under the provisions of section 21 of the *Interpretation Act 1987*,[2] and returns have included maps, books, other publications and data in electronic format on CD and USB.[3]

The resolution must also nominate the date by which the return is required (SO 52(4)). Returns to orders have been required between 1 day[4] and 28 days[5] from the date of the resolution. Between the late 1990s and 2013, orders routinely nominated a deadline of 14 days, with occasional variation to 7 days or 28 days. However, following a 2013 Privileges Committee inquiry into the orders for papers process and feedback provided by the Department of Premier and Cabinet,[6] the House has moved to a default deadline of 21 days, although this is still subject to the discretion of the member proposing the motion and the House in considering the merits of an order on a case by case basis.

On several occasions, following a request from a department or a minister, the House has passed a resolution to extend the due date for an order previously agreed to[7] or to alter the terms of a resolution previously agreed to.[8] On other occasions, departments have advised that they would not be able to produce the documents within the time specified. A supplementary return containing additional documents was then made some time after the original due date.[9]

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2 Under section 21 of the Interpretation Act 1987, a document means any record of information, and includes: (a) anything on which there is writing, or (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or (d) a map, plan, drawing or photograph.

3 For example, returns regarding unflued gas heaters and the 'Going Home, Staying Home' reforms included data provided on a USB (*Minutes*, NSW Legislative Council, 19 May 2010, p 1831; 6 May 2015, p 51); a return regarding the Lower Hunter Regional Strategy included a roll of maps (*Minutes*, NSW Legislative Council, 9 May 2007, p 26); returns regarding Cessnock Council (*Minutes*, NSW Legislative Council, 2 June 2010, p 1873), the Building Australia Fund (*Minutes*, NSW Legislative Council, 31 August 2010, p 1994) and Barangaroo (*Minutes*, NSW Legislative Council, 21 September 2010, p 2060) contained information on CD.

4 For example, *Minutes*, NSW Legislative Council, 13 October 1998, pp 749-752; 26 November 1998, pp 953-961. These orders were consequential upon earlier orders on the same subject, with longer deadlines, not having been complied with.

5 For example, *Minutes*, NSW Legislative Council, 14 May 2009, p 1166; 11 March 2010, pp 1696-1697; 1 December 2010, pp 2313-2314.

6 Privileges Committee, NSW Legislative Council, *The 2009 Mt Penny return to order*, Report No. 69 (October 2013).

7 For example, *Minutes*, NSW Legislative Council, 26 October 2006, p 316; 13 November 2013, p 2191.

8 *Minutes*, NSW Legislative Council, 8 May 2014, pp 2486-2488; 15 May 2014, pp 2520-2521; 19 November 2014, pp 323-324.

9 *Minutes*, NSW Legislative Council, 19 May 2010, p 1831 (see *Minutes* entry relating to unflued gas heaters) and subsequent return on 8 June 2010, p 1894; 22 June 2010, p 1936 (see index tabled relating to a return to order regarding NSW Lotteries) and subsequent return on 7 September 2010, p 2025; 26 November 2013, p 2260 (see index tabled relating to a return to order regarding Mr Matthew Daniel) and subsequent return on 30 January 2014, p 2310; 4 November 2014, p 219 (see index tabled relating to a return to order regarding Martins Creek and Wollombi Public Schools) and

When a resolution is agreed to, the Clerk writes to the Secretary of the Department of Premier and Cabinet[10] to communicate the terms of the order (SO 52(1)). The department then carries out the administrative function of coordinating the return by the due date from the offices and agencies named in the order.

While an order is directed to the ministers or agencies named in the resolution, there is an expectation that if the resolution coincides with a change in the allocation of portfolios or the restructure of an agency, the order will nevertheless be complied with. The ramifications of such arrangements came to the attention of the Council in 2013, when it became apparent that a change in the allocation of portfolios in the Executive may have contributed to certain documents not being returned in response to an order for papers.[11]

The return to order

Documents returned to an order of the House are tabled immediately by the Clerk, or received out of session if the House is not sitting (SO 52(2) and (4)). Returns must be accompanied by an indexed list of all documents returned, showing the date of creation, a description of the document and the author of the document (SO 52(3)).

Documents returned over which no claim of privilege is made are immediately made public. However, in one case in 2009, the House resolved to delay the publication of documents in a return to order not covered by a claim of privilege, in response to concerns that the publication of information concerning the future configuration of the Hurlstone Agricultural High School would coincide with a period during which students would be sitting their HSC exams.[12]

Claims of privilege

If privileged documents are contained within the return the Clerk announces the receipt of the privileged documents, but tables only the index provided under paragraph (3), as all documents tabled by the Clerk are otherwise immediately made public (SO 54). Privileged documents cannot be 'tabled' as they may only be made available to members of the Legislative Council (SO 52(5)). Privileged documents are stored in the Office of the Clerk for security. Under SO 52(5)(b)(ii) privileged documents must not be published

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subsequent returns on 11 November 2014, p 253 and 13 November 2014, p 300; 6 May 2015, p 52 (see index tabled relating to a return to order regarding Parramatta Road Urban Renewal Project) and subsequent return also reported that day.

10 SO 52(1) refers to 'Premier's Department', as it was constituted in 2004.

11 The circumstances that led to this series of events, and the manner in which this bore upon the return process, are discussed in chapter 3 of the Privileges Committee, *The 2009 Mt Penny return to order*, Report No. 69.

12 Publication delayed (*Minutes*, NSW Legislative Council, 29 October 2009, p 1473); publication further delayed (*Minutes*, NSW Legislative Council, 11 November 2009, p 1498); documents published (*Minutes*, NSW Legislative Council, 12 November 2009, p 1516).

or copied without an order of the House, and while members may view the documents they cannot make public the information contained therein. Privileged documents are nevertheless effective in informing members of the particulars of matters the subject of the documents, which in turn may be instructive in influencing further actions taken by members on the matter, or in determining their vote on the matter.

The House may decide to authorise the publication of privileged documents by way of a subsequent resolution to that effect. This ordinarily occurs following an assessment by an independent legal arbiter (see below), however the House is at liberty to pass such a resolution at any time. For example, in 2003 the House resolved to publish documents received in a return to order concerning the removal of Dr Shailendra Sinha from the Register of Medical Practitioners, which had previously only been authorised to be viewed by members of the Parliamentary Joint Committee on the Health Care Complaints Commission.[13]

On five occasions, claims of privilege have been subsequently withdrawn by the department from which the documents originated. On three occasions, the claim was withdrawn following the publication of an independent legal arbiter's report that recommended that the House publish those documents;[14] on two occasions the claim was withdrawn following receipt of a dispute and referral to an arbiter, but prior to the arbiter reporting on the dispute.[15]

On several occasions, a claim of privilege or confidentiality has been made over documents already provided as public documents. In one case, the Department of Premier and Cabinet lodged a claim for privilege on documents provided as public documents the previous month.[16] In another, the Secretary of Family and Community Services advised that due to the large number of documents provided in response to a return, there was a risk that certain sensitive information may have been included in the public documents. The Secretary recommended that the Clerk require any person accessing the public documents to certify that they would not disclose certain information, should it be contained in the documents.[17] The Clerk agreed to the request.

The arbitration mechanism

Under paragraph (6), any member may dispute the validity of a claim of privilege in relation to a particular document or documents by written communication to the Clerk. In doing so, members are encouraged to be as detailed as possible in their correspondence, identifying the particular documents disputed (based on the

13 *Minutes*, NSW Legislative Council, 30 October 2003, p 372.

14 *Minutes*, NSW Legislative Council, 23 November 2006, p 436; 1 September 2009, p 1293; 3 June 2010, p 1884.

15 *Minutes*, NSW Legislative Council, 6 May 2014, pp 2458-2459; 12 August 2014, p 2646.

16 *Minutes*, NSW Legislative Council, 12 August 2014, p 2645.

17 Correspondence from the General Counsel, Department of Premier and Cabinet, *Request for papers – 'Going Home, Staying Home',* dated 20 November 2014, tabled *Minutes*, NSW Legislative Council, 6 May 2015, p 51.

information contained in the index) and the reasons they believe the documents do not warrant a claim of privilege. On receipt of a dispute, the Clerk is authorised to release those specific documents to an independent legal arbiter for evaluation and report (SO 52(6)). The arbitration mechanism was first incorporated into the standing orders in 2004, having been introduced by way of resolutions of the House during the *Egan* disputes (discussed under Background).

The arbiter is appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge (SO 52(7)), in recognition of the complexity of the issues under consideration and the need for an arbiter to be highly experienced in determining issues of public interest. On one occasion, a second arbiter was appointed to evaluate a claim of privilege after the first arbiter appointed advised that he would be unable to complete the evaluation due to personal circumstances.[18]

SO 52(6) requires that a report by an arbiter be provided within seven days. In practice, the House has not sought to enforce this deadline as the volume and complexity of the documents the subject of most disputes do not lend themselves to such a tight deadline. Most assessments are made within a matter of weeks, however, in one case a report was provided almost a year after the documents were released, and was never made public.[19]

In some cases, the arbiter has sought additional information or assistance, either from the Clerk or from the departments that have claimed privilege.[20] More recently, a newly appointed arbiter sought submissions from members and stakeholders on both the merits of a disputed claim of privilege and the role he was expected to perform as arbiter.[21] The arbiter took this approach in response to statements made in the House which questioned the first assessment made by that arbiter.[22] As a result of the submission process, the arbiter took the opportunity to set out his understanding of the broad principles by which an assessment should be determined. The arbiter also foreshadowed that he would likely elect to adopt the same process of seeking submissions from members to assist him in determining the merits of any future disputes referred to him for assessment.[23]

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18 *Minutes*, NSW Legislative Council, 13 November 2012, p 1351.

19 *Minutes*, NSW Legislative Council, 9 May 2007, p 44 (Clerk announced that dispute had been referred to arbiter on 20 December 2006); 27 November 2007, p 367 (Clerk announced receipt of report).

20 Report of Independent Legal Arbiter, *Documents on ventilation in the M5 East, Proposed Cross City and Lane Cove Road Tunnels*, 26 August 2004, pp 2-4, tabled *Minutes*, NSW Legislative Council, 14 September 2004, p 977; Report of Independent Legal Arbiter, *Papers on M5 East Motorway*, 25 October 2002, pp 2-4, tabled *Minutes*, NSW Legislative Council, 30 October 2002, p 445; Report of Independent Legal Arbiter, *Millennium Trains Papers*, 22 August 2003, tabled *Minutes*, NSW Legislative Council, 3 September 2003, p 265; Report of Independent Legal Arbiter, *Unflued gas heaters*, 4 June 2010, pp 4-5, tabled *Minutes*, NSW Legislative Council, 10 June 2010, p 1928.

21 *Minutes*, NSW Legislative Council, 13 August 2014, p 2658.

22 *Hansard*, NSW Legislative Council, 6 March 2014, pp 27157-27158.

23 Report of Independent Legal Arbiter, the Hon Keith Mason, *Report under standing order 52 on disputed claim of privilege: Westconnex Business case*, 8 August 2014, tabled *Minutes*, 13 August 2014, p 2658.

The arbiter's report is lodged with the Clerk. The report is only made available to members, unless the House otherwise orders (SO 52(8)). The House is informed, but not bound, by the arbiter's determination, and the decision as to whether documents should be published remains the final prerogative of the House. On a small number of occasions, the House has not acted on the arbiter's recommendation that certain documents be published[24] or has gone beyond the recommendation of the arbiter by resolving that information be redacted from a greater volume of documents than that originally recommended by the arbiter.[25] In some cases, the House has not published a report provided by the arbiter.[26] As the recommendations remain confidential and available only to members, it cannot be determined whether the House acted on the arbiter's recommendations in those cases.

In the majority of cases, if the arbiter has recommended that documents the subject of the dispute be made public, the member who lodged the dispute will seek to have the report tabled and published, by motion on notice in the usual way, so that the report and its recommendations can be discussed more openly and a determination made as to whether the documents in question warrant the claim of privilege. These procedures usually occur over successive days, however, there has been some variation in procedure over the years. On one occasion, a member gave a contingent notice that, on the report of the arbiter being published, he would move a motion for the publication of the documents, thereby accelerating the process of publication.[27]

Unusual proceedings in relation to claims of privilege

House resolves to publish documents prior to receipt of arbiter's report

On one occasion, prior to the adjournment of the House for the summer recess, the House agreed to a series of resolutions concerning several disputed returns that, if the arbiter's reports on the disputes found that the documents did not warrant the claims of privilege made, both the reports and documents in question were authorised to be published by the Clerk out of session.[28] This practice has been the subject of varied comment.[29]

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24 *Minutes*, NSW Legislative Council, 8 May 2003, p 72 (report tabled; report recommended that documents be published but no subsequent motion to that effect was moved); 10 March 2010 p 1688 (House resolved that some, but not all, of the documents determined by the arbiter not to warrant a claim of privilege be published).

25 *Minutes*, NSW Legislative Council, 23 June 2010, p 1952.

26 For example, reports regarding the Dalton reports into juvenile justice (2005); grey nurse sharks (2006); Boral Timber (2007); Hunter Rail Cars (2007); the 2007-08 Budget (2007); and the Lower Hunter Regional Strategy (2007) have been received and reported to the House, but the House has not resolved to publish the reports.

27 *Minutes*, NSW Legislative Council, 26 November 2009, p 1574.

28 *Minutes*, NSW Legislative Council, 18 October 2005, p 1644; 30 November 2005, pp 1785-1786; 1 December 2005, p 1815.

29 Anne Twomey, *Executive Accountability to the Australian Senate and the New South Wales Legislative Council*, Legal Studies Research Paper No. 07/70, The University of Sydney Law School,

Referral of privileged documents and arbiter's report to Privileges Committee

As an alternative to this practice, in the lead-up to the final sittings of the 55th Parliament and the summer recess prior to a periodic election, the House resolved that, in view of the fact that the House was currently awaiting receipt of a number of returns to orders, and a number of disputed claims of privileges had been referred to the independent legal arbiter for evaluation and report, the Privileges Committee be authorised to undertake the role usually performed by the House in dealing with disputed claims of privilege over returns to order while the House was not sitting. The motion specified that this would extend to the committee being authorised to make public any documents over which privilege had been claimed but not upheld by the arbiter. Any member of the Council who had disputed a claim of privilege would be entitled to participate in the deliberations of the committee, but could not vote, move any motion or be counted for the purposes or any quorum or division unless they were a member of the committee.[30]

There have been occasions on which further alternative procedures have been followed in relation to the determination of claims of privilege. In October 2014, the House resolved that the Privileges Committee inquire into and report on the implementation of a report by an independent legal arbiter on papers relating to the VIP Gaming Management Agreement, entered into between the Independent Liquor and Gaming Authority (ILGA) and Crown Casino. The arbiter's report had recommended that information claimed by the Executive to be commercially sensitive and confidential be published, as the claim was not valid.[31] The committee invited submissions from the member who had lodged the dispute and, through the Department of Premier and Cabinet, from Crown Resorts Limited and the ILGA. The committee reported that, having reviewed the matter in reference to the submissions received, it supported the recommendation made by the arbiter in his report, and the House in turn resolved to publish the arbiter's report and the information the subject of the dispute.[32]

The House authorises a committee to determine whether papers not subject to a claim of privilege should be published

On 12 November 2014, the House established a select committee to inquire into and report on the conduct and progress of the Ombudsman's inquiry 'Operation Prospect'. Later that month, under SO 52, the House ordered the production of a report prepared by Police Strike Force Emblems and other related documents. The resolution provided

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November 2007; Lynn Lovelock, 'The power of the New South Wales Legislative Council to order the production of State papers: Revisiting the *Egan* decisions 10 years on' (Spring 2009), vol 24 (2), *Australasian Parliamentary Review*, pp 199-220.

30 *Minutes*, NSW Legislative Council, 20 November 2014, pp 365-367.

31 *Minutes*, NSW Legislative Council, 23 October 2014, pp 201-202.

32 Privileges Committee, NSW Legislative Council, *The Crown Casino VIP Gaming Management Agreement*, Report No. 72 (November 2014).

that, notwithstanding anything to the contrary in SO 52, any documents returned over which a claim of privilege was *not* made would:

a) subject to (b) below, remain confidential and available for inspection by members of the House only, and

b) stand referred to the Select Committee on the conduct and progress of the Ombudsman's inquiry 'Operation Prospect', which was authorised to determine whether the documents should subsequently be made public.[33]

Ultimately, the arrangement did not proceed as General Counsel for the Department of Premier and Cabinet lodged legal advice from the Crown Solicitor which stated that information concerning the administration of justice must be ordered from the Governor under SO 53 rather than from the Executive under SO 52.[34] As the House had adjourned for the summer recess, a subsequent order under SO 53 was not pursued.

The House authorises a committee to publish documents the subject of a disputed claim of privilege

In 2013, the House resolved to order the production of certain documents required by General Purpose Standing Committee No. 1 for the purposes of an inquiry into allegations of bullying at WorkCover NSW.[35] The committee had previously sought to order the documents directly from the Public Service Commissioner but had been refused.

The key report received in the return and required by the committee was subject to a claim of privilege. The Chair disputed the claim, and the independent legal arbiter determined that the claim should not be upheld because the 'privacy concerns that have been advanced [did] not establish a relevant privilege known to law'.[36] The House then resolved that, notwithstanding the provisions of SO 52, the documents considered by the arbiter not to warrant privilege from publication be referred to the committee for the purposes of its inquiry, and that the committee have the power to authorise the publication of the documents in whole or in part, taking into consideration the recommendations made by the arbiter.[37] The committee later reported that the House's actions had empowered members to more freely question witnesses in relation to the matters revealed in the return to order.[38]

33 *Minutes*, NSW Legislative Council, 20 November 2014, pp 363-364.

34 *Minutes*, NSW Legislative Council, 6 May 2015, p 52.

35 *Minutes*, NSW Legislative Council, 13 November 2013, p 2171.

36 Report of Independent Legal Arbiter, the Hon Keith Mason, *Disputed claim of privilege on the report regarding a former WorkCover NSW employee*, 5 March 2014, p 2; *Minutes*, NSW Legislative Council, 5 March 2014, p 2333.

37 *Minutes*, NSW Legislative Council, 6 March 2014, p 2347.

38 General Purpose Standing Committee No. 1, NSW Legislative Council, *Allegations of bullying in WorkCover NSW* (2014), p 9.

Register maintained by the Clerk

Under SO 52(9), the Clerk is to maintain a register showing the name of any person examining documents tabled under this order. The register is not made available for perusal by other members or the public and is not regarded as a public document. The requirement for a register first appeared in the 2004 standing orders, the result of deliberations of the Standing Orders Committee (see commentary below).

Refusal to provide documents

On occasion, in the years since the *Egan* decisions, the Secretary or Director-General of the Department of Premier and Cabinet has advised that returns to orders, or particular documents within those returns, would not be provided for various reasons. These have included:

- Advice that two documents identified had not been provided because they 'formed part of a Cabinet Minute dealing with Grey Nurse Sharks' and 'Cabinet Minutes and documents are exempt from standing order 52 requests'.[39]
- That it was not practicable to produce the documents sought.[40]
- That, on the advice of the Crown Solicitor, orders for papers in place at the time of prorogation had lapsed and returns would not be provided. The House subsequently agreed to four new resolutions when the new session of Parliament commenced, noting that 'there are many established conventions recorded in the Journals of the Legislative Council where the government has complied with an order of the House for state papers in the subsequent session, notwithstanding the prorogation of the House'.[41]
- The document sought by the order was tabled by a minister as general ministerial tabling.[42]

There have been cases where documents sought have not been returned, or where the Department advised that no documents were held.[43] Where this occurs, it is assumed that the documents have not been provided because they fall within the class of Cabinet documents, however the House retains the prerogative to further pursue the matter should it so choose.[44]

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39 *Minutes*, NSW Legislative Council, 22 March 2005, p 1283.

40 *Minutes*, NSW Legislative Council, 6 May 2014, p 2458.

41 *Minutes*, NSW Legislative Council, 25 June 2006, pp 49-50 and 53-57; 6 June 2006, pp 70-71; 8 June 2006, p 119.

42 *Minutes*, NSW Legislative Council, 25 October 2006, p 305; 26 October 2006, p 320; 17 March 2010, p 1718.

43 *Minutes*, NSW Legislative Council, 8 June 2010, p 1894; 14 February 2012, p 669.

44 The decision in *Egan v Chadwick* (1999) 46 NSWLR 563 was not conclusive as to the powers of the House to order the production of Cabinet documents. See comments made by Mr Bret Walker SC, keynote address, *Proceedings of the C25 Seminar marking 25 years of the committee system in the Legislative Council*, 20 September 2013, pp 7-11.

In cases where documents are not provided, the onus is on the House to pursue the matter. In some cases, the House has chosen not to take any further action.[45] In others, particularly where members have identified that documents may be missing from a return, the Clerk, at the request of the member, has written to the Department of Premier and Cabinet to forward the member's concerns and invite a response. On several occasions, these inquiries have led to additional documents being tabled.[46] In one particularly significant example, a member wrote to the Clerk to advise that documents published in the course of an Independent Commission Against Corruption investigation had not been provided by a department in a return regarding the same matter. The matter ultimately led to two Privileges Committee inquiries regarding possible non-compliance with SO 52.[47]

Orders directed to statutory bodies and related entities

If the House seeks to order the production of documents from a statutory body or other similar entity not under the direct control of a minister, the resolution is communicated by the Clerk directly to the head of that body, with a courtesy letter also copied to the Secretary of the Department of Premier and Cabinet. This practice came about as the result of an attempt to order the production of documents from Greyhound Racing NSW in recent years. No return was received from GRNSW and correspondence from the Department of Premier and Cabinet advised that section 5 of the *Greyhound Racing Act 2009* provides that GRNSW does not represent the Crown and is not subject to direction or control by or on behalf of the government. With the concurrence of the President, the Clerk subsequently sought advice from Mr Bret Walker SC on some of the legal issues raised by the matter. Mr Walker advised that, in his opinion, bodies with public functions, such as GRNSW, are amenable to orders for papers addressed to them directly by the Council, and are compelled to comply with such an order. Failure to do so would result in the responsible officer being in contempt of Parliament.

The House opted to pursue the matter. However, in August the Government had passed the *Greyhound Racing Prohibition Act 2016*, which included a section 27 which stated that the minister may, at any time after the assent of the Act and until the dissolution of GRNSW, require GRNSW to produce any specified record and may make the information publicly available. The House was therefore obliged to take this new arrangement into account in its pursuit of the matter. The new resolution agreed to by the House noted the order for papers originally made, noted the advice provided by Bret Walker SC, noted the provisions of section 27 of the Act, and called on the Minister for Racing to require GRNSW to produce the documents originally ordered in September 2015, together with any related documents created until the date of the resolution. In October 2016, the

45 *Minutes*, NSW Legislative Council, 8 June 2010, p 1894; 14 February 2012, p 669.

46 For example, *Minutes*, NSW Legislative Council, 27 March 2012, p 834; 15 October 2013, p 2032; 6 May 2015, pp 52-53.

47 Privileges Committee, NSW Legislative Council, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report No. 68 (April 2013); *The 2009 Mt Penny return to order*, Report No. 69.

Clerk tabled a return received directly from the Administrator of GRNSW. The return comprised of both public documents and documents over which a claim of privilege was made and which were made available only to members.

The receipt of the return from GRNSW, and the willingness on the part of GRNSW to liaise directly with the Clerk in the provision of several additional returns to that order for papers in the subsequent months, is taken to be indicative of the acceptance by the Executive Government of the correctness of Mr Walker's advice.

Background

The standing orders have contained provisions for the House to order the production of state papers since 1856. The power of the Legislative Council to order papers was routinely exercised between 1856 and the early 1900s. However, orders for papers ceased to be a common feature of the operation of the Council during the years leading to 1920, with the occasional exception up to as late as 1948.

The 1856 and 1870 standing orders provided that all orders for papers made by the Council must be communicated to the Colonial Secretary by the Clerk (1856 SO 23; 1870 SO 26). The Colonial Secretary occupied the role of the chief government spokesperson and representative in the colonial legislature.

In 1895, the standing orders were amended to reflect a change in that officer's title, with the Clerk then required to communicate with the Chief Secretary of the colony.[48] In 1922, the requirement to communicate the order to the Chief Secretary was omitted on the recommendation of the Standing Orders Committee.[49] During consideration of the report in committee of the whole the Chair noted that the Standing Orders Committee had recommended the amendment because the Legislature had by then moved under the purview of the Premier's Department rather than the Colonial Secretary. The Committee recommended the provision be left open rather than providing that communication be forwarded to the Premier's Department because the Legislature at a future time may be placed under another department. The Clerk would simply communicate with the minister with portfolio responsibility for matters pertaining to the Legislature.[50] (The concept that the Legislature sits under the purview of an agency of the Executive Government is a repugnant concept in the modern day. It is likely that these references in debate refer to the minister or agency allocated as the principal liaison between the government and the Legislature, rather than the minister or agency having any purported oversight of the Legislature).

48 Although the title was not officially changed in statute until 1959, under the *Ministers of the Crown Act 1959*.

49 *Minutes*, NSW Legislative Council, 2 August 1922, pp 32-33; 3 August 1922, pp 36-37; 16 August 1922, p 43. The report was not made in response to a reference from the House.

50 *Hansard*, NSW Legislative Council, 3 August 1922, p 793; *Minutes*, NSW Legislative Council, 3 August 1922, pp 36-37.

In 1927, the standing order was further amended to insert a requirement that the Clerk communicate the terms of any orders made to the Premier's Department, as it was then known, also on the recommendation of the Standing Orders Committee.[51] During consideration of the report in committee of the whole a shift in views was apparent, with the Chair observing that the addition was necessary as there was nobody to whom the duty was assigned following the amendment made in 1922, and it was thought that someone should definitely be named to carry out the duty.[52]

The adoption of provisions regarding privileged documents – the **Egan** *cases*

During the 1990s, the Council, now a democratically elected House, revived the exercise of its power to order papers. This precipitated the *Egan* cases, which were prompted by the refusal of the Treasurer and Leader of the Government in the Legislative Council, the Hon Michael Egan, to produce certain state papers ordered by the Council. Mr Egan refused to produce papers on a number of occasions, regarding a number of subjects, ultimately leading to the matter being pursued in the courts.[53] Over the course of this period, the Council not only sought to clarify the scope of its powers to order the production of documents from the Government and related entities, but also refined the administrative arrangements for the order for papers process.

Following the initial failure of the Government to table the documents ordered,[54] the matter was referred to the Privileges Committee to report on the sanctions that should apply where a minister fails to table documents.[55] Following the referral, but prior to the committee reporting, the Leader of the Government was suspended from the House, which provided the trigger for commencement of legal proceedings.[56] The Privileges Committee provided its report several weeks later and stated that, in view of the proceedings commenced, the power to order the production of documents was (at that time) uncertain and sanctions would therefore not be appropriate. However, the committee further reported that, if the Council did possess the power to order documents, a mechanism for assessing public interest claims for each individual case

51 *Minutes*, NSW Legislative Council, 15 November 1927, p 29; 25 November 1927, p 56. The report was not made in response to a reference from the House.

52 *Hansard*, NSW Legislative Council, 22 November 1927, p 437; *Minutes*, NSW Legislative Council, 22 November 1927, p 41.

53 *Egan v Willis and Cahill* (1996) 40 NSWLR 650; *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563.

54 The documents related to orders regarding the closure of veterinary laboratories (ordered *Minutes*, NSW Legislative Council, 18 October 1995, p 232); the development of the Sydney Showground site (ordered *Minutes*, NSW Legislative Council, 25 October 1995, p 264); the restructure of the Department of Education (ordered *Minutes*, NSW Legislative Council, 26 October 1995, p 279); and the proposed Lake Cowal Gold Mine (ordered *Minutes*, NSW Legislative Council, 23 April 1996, p 63).

55 *Minutes*, NSW Legislative Council, 13 November 1995, pp 292-296.

56 *Minutes*, NSW Legislative Council, 2 May 1996, pp 112-118 (suspension of Leader of the Government); 14 May 1996, pp 125-126 (President informed House of the commencement of legal proceedings in *Egan v Willis and Cahill*).

should be implemented in order to address conflicts between the Council and the Executive over claims of public interest immunity.[57] The committee observed that an equivalent arbitration model was not available in other Houses, so a mechanism was subsequently developed in consultation between the Clerks and the Leaders of the Government and the Opposition for inclusion in future resolutions of the House.

Several months after the Privileges Committee's report was tabled, the Court of Appeal handed down the first of the *Egan* decisions, ruling that the power to order the production of documents was a reasonably necessary power of the Council (*Egan v Willis & Cahill*)[58] (confirmed on appeal by the High Court in 1998 in *Egan v Willis*).[59] However, the Court did not rule on the power of the House to order documents over which a claim of privilege was made – this instead became the subject of further proceedings commenced after a series of resolutions were agreed to by the House in 1998.

On 24 September 1998 (prior to the decision in the Court of Appeal being handed down), the House agreed to a new resolution ordering the production of documents concerning the contamination of Sydney's water supply.[60] On 13 October 1998, the President reported receipt of correspondence from the Director-General of the Premier's Department advising that following advice received from the Crown Solicitor, the Government would not comply with the order for papers because the documents were covered by legal professional privilege or public interest immunity privilege.[61]

Later that day, the House agreed to another resolution censuring the Leader of the Government, and calling on the Leader to table the documents the following day, subject to a number of additional criteria. These criteria reflected the first adoption of procedural provisions to address privileged documents in returns to orders:

- documents subject to claims of legal professional privilege or public interest immunity would be clearly identified and made available only to members, and would not be published or copied without an order of the House
- in the event that a member disputed the validity of a claim of privilege made over the documents in writing to the Clerk, the Clerk would be authorised to release the disputed document to an independent legal arbiter who was either a Queen's Counsel, a Senior Counsel or a retired Supreme Court judge, appointed by the President, for evaluation and report within five days as to the validity of the claim

57 Privileges Committee, NSW Legislative Council, *Inquiry into sanctions where a minister fails to table documents*, Report No. 1 (May 1996), pp 19, 23-24.

58 *Egan v Willis and Cahill* (1996) 40 NSWLR 650.

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

60 *Minutes*, NSW Legislative Council, 24 September 1998, pp 730-731. The resolutions passed in 1998 did not direct the order to a department or agency, and asked for all documents relating to the subject matter.

61 *Minutes*, NSW Legislative Council, 13 October 1998, p 740.

- any document identified as a Cabinet document would not be made available to members, however the legal arbiter could be requested to evaluate any such claim
- the President would advise the House of any report from an independent arbiter, at which time a motion could be made forthwith that the disputed document be made (or not made) public without restricted access.[62]

The following day, the Government tabled the public documents regarding Sydney's water supply, but did not table the documents over which privilege was claimed. The President subsequently informed the House that further legal proceedings (*Egan v Chadwick & Ors*)[63] had been commenced by the Leader of the Government, claiming that the Council had 'no power to order the production of documents the subject of legal professional privilege or public interest immunity, or to determine itself a claim for legal professional privilege or public interest immunity', and claiming that the orders made by the Council in that regard were beyond its power.[64]

On 20 October 1998, the Clerk tabled further documents received from the Government over which no claim of privilege was made.[65] The President then tabled an opinion from Mr Philip Taylor, barrister, relating to the Leader of the Government's failure to fully comply with the resolution of the House of 13 October 1998, and the House, on motion of the Leader of the Opposition, judged the Leader of the Government in contempt and suspended him from the chamber for five sitting days or until the 13 October resolution was complied with.[66] On 22 October 1998, the President informed the House that amended summonses were issued from the Supreme Court in the matter of *Egan v Chadwick & Ors*, with the plaintiff (Mr Egan) claiming that the Council's order of 20 October was punitive and thus beyond the powers of the House. Mr Egan sought an injunction restraining the House from suspending him.[67]

In November 1998, following the ruling by the High Court in *Egan v Willis*[68] but prior to a decision being handed down in *Egan v Chadwick*, the House ordered the production of all documents previously ordered by the House since 1995 and not yet provided, including those covered by privilege. The resolution once again incorporated provision for privileged documents to be made available only to members, and for an independent legal arbiter to assess any disputed claim of privilege, including documents identified as Cabinet documents. However, the previous requirement that documents covered by privilege be 'clearly identified' was replaced with a requirement that a return be prepared showing the date of creation, description and author of any document for

62 *Minutes*, NSW Legislative Council, 13 October 1998, pp 744-747 and 749-752.
63 *Egan v Chadwick* (1999) 46 NSWLR 563.
64 *Minutes*, NSW Legislative Council, 14 October 1998, pp 759-760.
65 *Minutes*, NSW Legislative Council, 20 October 1998, p 772.
66 *Minutes*, NSW Legislative Council, 20 October 1998, pp 773-776.
67 *Minutes*, NSW Legislative Council, 22 October 1998, pp 796-797.
68 *Egan v Willis* (1998) 195 CLR 424.

which a claim of privilege was made and the reason made for the claim of privilege (which later became the index required under SO 52(5)(a)(b).[69]

On 26 November 1998, the Attorney General tabled a selection of the documents requested, but did not provide the privileged documents. The Attorney General additionally tabled a report prepared by Sir Laurence Street, whom the Government had asked to assess the validity of the claims of privilege on the documents not provided.[70] This was a notable development in the dispute between the House and the Government. Rather than provide the documents to the Council and allow the arbiter to assess the validity of the claim of privilege from publication, the Government had instead provided the documents to the arbiter and used the arbiter's assessment as authority for *non-production* of the documents, contrary to the House's resolution. The House immediately resolved that the documents be produced[71] and, when the resolution was not complied with, once again suspended the Leader of the Government.[72]

On 2 December 1998, the House adopted a sessional order to formalise the procedures for privileged documents for all orders for papers agreed to by the House, based on the terms of the 26 November 1998 resolution.[73]

In 1999, the House did not readopt the sessional order, however, soon after the commencement of the new parliamentary session the Court of Appeal handed down its judgement in *Egan v Chadwick*, which confirmed the power of the House to order the production of documents covered by legal professional or public interest immunity privilege.[74]

Further development of the rules for orders for papers following the **Egan** *cases*

The first order for papers agreed to by the House in 1999, which ordered the production of documents previously ordered and not yet provided, included a provision for privilege to be claimed. However, rather than require that an arbiter assess the validity of any claim the subject of a dispute, in keeping with previous resolutions and the 1998 sessional order, the order instead provided that a dispute would be resolved by a resolution of the House.[75]

Notwithstanding, after that initial resolution every subsequent order made included provision for an independent legal arbiter to make an assessment on any claims the subject of a dispute. The terms of the resolutions adopted varied slightly to those adopted previously, but generally formed the basis for those incorporated into SO 52(6) to (8) in 2004, which set out the dispute mechanism, and the terms of SO 52(4), which

69 *Minutes*, NSW Legislative Council, 24 November 1998, pp 920-927.
70 *Minutes*, NSW Legislative Council, 26 November 1998, pp 946-947.
71 *Minutes*, NSW Legislative Council, 26 November 1998, pp 947, 948-951 and 952-961.
72 *Minutes*, NSW Legislative Council, 27 November 1998, p 970.
73 *Minutes*, NSW Legislative Council, 2 December 1998, pp 998-1000.
74 *Egan v Chadwick* (1999) 46 NSWLR 563.
75 *Minutes*, NSW Legislative Council, 23 June 1999, pp 148-150.

made provision for the Clerk to receive documents out of session if the House was not then sitting.

From 2004, SO 52 formalised these arrangements, with two additions:

- the time within which the arbiter must provide a report on a dispute was extended from five calendar days to seven (SO 52(6))
- on the motion of a government member during the Standing Orders Committee's consideration of the proposed new standing orders, SO 52(9) was inserted to require that the Clerk maintain a register showing the name of any person who examines a return.[76]

53. DOCUMENTS FROM THE GOVERNOR

The production of documents concerning:

(a) the royal prerogative,

(b) dispatches or correspondence to or from the Governor, or

(c) the administration of justice,

will be in the form of an address presented to the Governor requesting that the document be laid before the House.

Development summary		
1895	Standing order 19	Addresses for papers
2003	Sessional order 53	Documents from the Governor
2004	Standing order 53	Documents from the Governor

The House has the power to order the production of papers concerning the administration of the state from the Executive. The procedures by which orders are made are set out in SO 52. SO 53 requires that orders for the production of papers concerning the royal prerogative, dispatches or correspondence to or from the Governor, or the administration of justice, must be made by way of an Address to the Governor.

The distinction between the operation of SO 52 and SO 53 is that SO 52 applies to matters that fall within the purview of the Executive Government, whereas SO 53 reflects the separation of powers and applies to matters that fall within the purview of the Crown and the Courts.

An Address is the formal mechanism by which the Council communicates with the Governor (see SO 120).

76 Standing Orders Committee, NSW Legislative Council, *Report on proposed new Standing Rules and Orders*, Report No. 1, September 2003, p 118. A similar resolution appeared in two early resolutions but referred only to members – see *Minutes*, NSW Legislative Council 26 November 1998 p 960, 2 December 1998, p 1000.

Operation

Addresses are made by motion on notice in the usual way, with the exception of an Address-in-Reply under SO 8. Once agreed to, a message is delivered to the Governor enclosing the resolution agreed to by the House

Matters under SO 53 (a) and (b), being those concerning the royal prerogative or correspondence to or from the Governor, have rarely been the subject of an Address under SO 53 and are unlikely to be the subject of frequent scrutiny within modern governance arrangements, though *Odgers'* notes that correspondence from the Governor to the Premier concerning appointments made would fall within this category of documents.[77]

In contrast, matters concerning the administration of justice, particularly matters relating to criminal and legal matters, have been the subject of a number of Addresses. There has been ongoing difference of opinion as to the matters that justifiably fall within the definition of the 'administration of justice', the background to which is discussed below. The argument has not been settled, and members are encouraged to seek the advice of the Clerk before giving a notice of motion for an Address under SO 53.

The issue has previously arisen through challenges to the terms of motions for orders for papers under SO 52, on the grounds that the documents sought fall within the definition of the 'administration of justice'. In ruling on the matter, Presidents have referred to previous rulings which indicate that papers relating to the administration of justice include:

- those that make reference to actual court proceedings
- material touching on or concerning papers relating to court proceedings or the police investigation leading to such proceedings
- the administration of a sentence on conviction and the orders made
- material concerning conditions of custody where such could be seen as giving effect to or being closely connected with the sentence of the court
- documents relating to legal action.[78]

While requests to the Governor for the return of papers were frequently made and routinely complied with until the early 20th century, the practice of making requests fell away until a number of requests were made between 2005 and 2014 under SO 53.[79] On each occasion, the Governor has declined to provide the documents on the advice of the Executive Council, and on some occasions provided reasons for so doing, as follows:

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77 See Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 581.

78 Presidents' rulings: President Burgmann, *Hansard,* NSW Legislative Council, 9 April 2002, pp 1194 and 1195; President Primrose, *Hansard,* NSW Legislative Council, 24 June 2009, p 16638.

79 *Minutes,* NSW Legislative Council, 15 September 2005, p 1568; 2 September 2009, p 1312; 18 March 2010, p 1724; *Hansard,* NSW Legislative Council, 20 November 2014, p 352.

- in relation to an Address concerning the transfer and parole of a sex offender, the Governor declined due to the possible impact of disclosure on the future provision of information from other jurisdictions, the possible impact on the victims of the offender, and the possible impact on the likelihood of victims of assault coming forward in future[80]
- in relation to an Address concerning the Bushranger Thunderbolt, the Governor declined stating that the documents were over a century old and related to a pre-federation period in which New South Wales did not exist as a state; the documents were not reasonably necessary for the House to review the conduct of the Executive Government; and historical research of archived colonial records could be undertaken by any member of the public through the State Records Authority[81]
- in relation to an Address concerning the removal from office and withdrawal of commission of Mr Tony Stewart MP, the Governor declined on the grounds that the legal proceedings were still current, and production of the documents could bear upon the legal privilege owed to participants in the proceedings, and stated that 'documents the subject of legal privilege should not be produced and tabled pursuant to an Address under SO 53 or should be produced and tabled only in exceptional circumstances'[82]
- in relation to an Address concerning Birdon Marine Pty Ltd, the Governor declined because documents on the matter would be produced by the relevant department in response to a concurrent order made under SO 52, subject to claims of legal professional privilege. The Governor stated that 'it would be preferable for the Governor not to produce any documents that are preparatory to a court process … as, unlike SO 52, there is no process under SO 53 to permit a claim of privilege to be made in relation to any document produced'.[83]

While there is no provision under SO 53 for a claim of privilege, contrary to the statements in the examples above, if a claim of privilege was made on a document returned to an Address, the document could be made available only to members by order of the House. The House could then subsequently make the document public if circumstances warranted such an order being made. Similarly, any dispute as to the validity of a claim of privilege could be resolved by the House ordering that the document be assessed by an independent arbiter using the mechanism provided under SO 52. This process could be applied either by including such a requirement within the original terms of

80 Correspondence from Brian Davies, Official Secretary to the Governor, to the Clerk of the Parliaments, dated 4 October 2005, tabled *Minutes,* NSW Legislative Council, 11 October 2005, p 1605.

81 Correspondence from the Official Secretary to the Governor dated 22 April 2010, tabled *Minutes,* NSW Legislative Council, 22 April 2010, p 1760.

82 Correspondence from the Official Secretary to the Governor, dated 25 September 2009, tabled *Minutes,* NSW Legislative Council, 20 October 2009, p 1419.

83 Correspondence from the Official Secretary to the Governor, dated 15 December 2010, tabled *Minutes,* NSW Legislative Council, 4 May 2011, p 46.

the Address, or by the House resolving to apply the process following the return of the documents.

Although an Address is made to the Governor, the government is nevertheless responsible for providing the documents to the House[84] and ultimately responsible to the Parliament for the advice it gives to the Governor. Where no return has been received, the House has not pursued the matter. Options open to the House would be to seek an explanation from the Leader of the Government as to the advice provided to the Governor and the reasons for that advice; to further resolve that the documents be provided and reaffirm the power of the House to request the papers; to censure the minister for the advice given to the Governor; and, ultimately, to take action against the minister for contempt.

Background

The provisions of SO 53 were first adopted in almost identical terms in 1895 (SO 19), taking the form of the Assembly's equivalent new standing order.[85] SO 53 made only minor amendments to simplify the terms and introduce gender neutral language.

However, even prior to the adoption of the standing order in 1895, the Council made requests to the Governor for documents concerning the administration of justice on 139 occasions. Following the adoption of SO 19 in 1895, an additional 11 requests were made, the last being in 1948. The practice then fell away until 1987 (when a motion was moved but not agreed to), then fell away once again until 2002, when the Leader of the Government took a point of order that a notice of motion for an order for papers under SO 18 (the precursor to current SO 52), concerning matters relating to the conviction and custody of an inmate in a correctional facility, should instead be made under SO 19. The President reserved her ruling with a view to taking advice.[86]

The following month, the President tabled a detailed advice from the Crown Solicitor which concluded that documents have reference to the 'administration of justice' if they contain material touching on or concerning court proceedings or the police investigation leading to the administration of justice. The Crown Solicitor further advised that documents containing material concerning custody following conviction may have reference to the administration of justice if they have a relationship to the proceedings concerned, and that this will be the case if the material concerns conditions of custody that could be seen as giving effect to, or as closely connected with, the sentence of the court.[87]

84 See, for example, where a minister tabled a return to an Address, *Minutes,* NSW Legislative Council, 18 August 1948, p 210.

85 Assembly 1894 SO 55.

86 *Minutes,* NSW Legislative Council, 19 March 2002, p 69.

87 Crown Solicitor's advice, 'Standing order 19: Administration of Justice', 26 March 2002.

Following receipt of the advice, the President ruled certain paragraphs of the notice of motion out of order and determined that requests regarding those matters would be better directed under SO 53. In the event, the motion was amended but not moved.

In 2004, the 1895 provisions were carried over, with minor amendments. Soon after, an order for papers under new SO 52 relating to a police operation was ruled out of order on the basis that it should instead be made under SO 53.[88] An Address was agreed to the following year, requesting documents concerning a paroled offender who had been transferred to New South Wales from interstate.[89] As noted above, both this and all subsequent Addresses agreed to since that time have been refused by the Governor on various grounds.

It should be noted that the definition of the administration of justice and the circumstances in which documents are required to be sought under SO 53, rather than the more commonly used and complied with SO 52, are not yet satisfactorily settled.

54. OTHER METHODS OF TABLING DOCUMENTS

(1) The President and Ministers may table documents at any time when there is no other business before the House.

(2) The Clerk, under the authority of any Act or by resolution of the House, may table documents at any time when there is no other business before the House.

(3) The publication of documents tabled by the President, a Minister or the Clerk is authorised under this standing order.

(4) Other members may table documents by leave, and unless authorised by the House to be made public, are available for inspection by members of the House only.

Development summary		
1895	Standing order 20	Papers laid upon the Table to be deemed public
2003	Sessional order 54	Other methods of tabling documents
2004	Standing order 54	Other methods of tabling documents

The purpose of tabling documents is to provide the House with the information it requires in order to properly scrutinise the actions and decisions of the Executive and to assess legislative and other proposals.

SO 54 specifies the times at which documents may be tabled in the House by the President, a minister, the Clerk and private members, and the publication status attached to such documents. Documents 'authorised to be published' attract certain legal protections

88 *Minutes*, NSW Legislative Council, 21 October 2004, p 1058.
89 *Minutes*, NSW Legislative Council, 15 September 2005, p 1568.

and immunities under statute for the purposes of defamation and other proceedings. The clarity afforded by the standing order has been important in removing certain ambiguities that attached to tabled documents under previous standing orders.

Operation

Documents tabled by the President, a minister or the Clerk are immediately authorised to be published and may be tabled at any time when there is no other business before the House.

In contrast, and unlike some other Australian jurisdictions such as the Australian Senate, private members may only table documents by leave and such documents may only be viewed by members of the Legislative Council, unless the House agrees to a motion authorising the publication of the document. Under the terms of SO 54(4) and SO 57, this motion may be moved immediately on tabling and should take the form: 'I move: That the document be published'.[90] If the motion is not moved immediately it may be moved on a subsequent day, on notice. While the reasons for making private members' documents confidential have not been articulated in the official records of the House, the motivation is likely that a private member should not be afforded the same rights and privileges as office holders unless the House specifically confers them. The provision also affords the House the opportunity to verify the contents of a document tabled by a private member prior to the contents being circulated more widely with the protections and immunities afforded to the House.

Private members must obtain the leave of the House in order to table a document – that is, they must seek the unanimous concurrence of all members, and the objection of one member is sufficient to prevent the document being tabled. It is relatively rare for a private member to seek to table a document; where it does occur the member has usually been prompted to do so as an alternative to utilising other procedures provided for in the standing orders. For example, in recent years several members have tabled documents that comprised petitions that were deemed too irregular to be tabled as petitions (or even as 'irregular petitions' – see SO 68).[91] Members have also sought to table a document during debate in support of a point being made or to spare the House the inconvenience of listening to the member read from a lengthy document.[92] As an alternative to tabling brief documents, members have sought leave to have the text incorporated in Hansard where it automatically becomes public.[93]

Committee reports are tabled by the Chair of the committee, or in the absence of the Chair another member of the committee, in accordance with SO 230 (Tabling reports).

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90 *Minutes*, NSW Legislative Council, 20 August 2013, p 1894; 23 June 2016, p 1000.

91 *Minutes,* NSW Legislative Council, 22 April 2010, p 1761; 2 June 2010, p 1870; 2 September 2010, p 2013; 4 June 2015, p 190.

92 For example, *Minutes*, NSW Legislative Council, 22 June 2010, p 1943; 8 May 2012, p 954; 25 March 2014, p 2404; 25 February 2016, p 683.

93 For example, *Hansard,* NSW Legislative Council, 25 March 2009, pp 13733-13734; 15 October 2013, p 2035.

The reports are not automatically made public – a motion is moved 'That the report be printed', with a view to authorising the publication of the report.

Background

Prior to 1895, the only reference made to tabled documents in the standing orders related to orders for papers (see SO 52), the custodian of tabled documents (the Clerk – see SO 50) and to the procedural motions that could be moved on tabling to either order that the document be printed or to appoint a day for consideration of the document (see SO 57). Documents were routinely tabled, however, documents tabled but not ordered to be printed were not considered public. This process and the principles behind it are discussed in detail under SO 57. Private members occasionally tabled documents, usually by leave.

In 1895, SO 20 was adopted, taken in part from the terms of the new Assembly standing orders.[94] The standing order made specific reference to the publication status of documents tabled by ministers:

> All papers and documents laid upon the Table of the House by a Minister shall be considered public, and may be ordered to be printed on motion without notice, and it shall always be in order on the presentation of any document, except a petition, return to Address, or order [for papers] for the member presenting it to move, without previous notice, that it be printed, and, if desired, that a day be appointed for its consideration.

Past advice held by the Clerk suggests that the reference to documents tabled by ministers as being 'considered public' under the 1895 standing order began to confuse the issue of publication. Over time, officers of the Council came to provide documents tabled by ministers to members and the public on the authority of the standing order, however, concerns were later raised that the provisions of 1895 SO 20 may not be sufficient to authorise the publication of a document, particularly in instances where the document contained material that was potentially actionable for the purposes of defamation or other proceedings. The matter was not quickly resolved, and practice remained somewhat inconsistent (see discussion under SO 57) until 2004, when the standing order was redrafted to specifically make clear that any document tabled by the President, a minister or a Clerk (including those received out of session under SO 55 or the provisions of certain statutes) were automatically authorised to be published under the authority of the House, unless the House agreed to a motion to the contrary. Documents tabled by private members would remain confidential and available only to members of the Legislative Council.

The provisions of the second half of 1895 SO 20, regarding motions for the document to be printed and for a day to be appointed for its consideration, were absorbed by new SO 57, and these provisions are discussed further under that standing order.

94 Assembly 1894 SO 57.

55. TABLING OF REPORTS AND DOCUMENTS WHEN HOUSE NOT SITTING

(1) Where, under any Act, a report or other document is required to be tabled in the House by a Minister, and the House is not sitting, such report or document may be lodged with the Clerk.

(2) Any report or document lodged with the Clerk is:

(a) on presentation, and for all purposes, deemed to have been laid before the House,

(b) to be printed by authority of the Clerk,

(c) for all purposes, deemed to be a document published by order or under authority of the House, and

(d) to be recorded in the Minutes of Proceedings of the House.

(3) Documents may not be lodged with the Clerk when the House has been prorogued.

Development summary		
2003	Sessional order 55	Tabling of reports and documents when House not sitting
2004	Standing order 103	Tabling of reports and documents when House not sitting
2009	Sessional order	Tabling of reports and documents when House not sitting – Amdt to SO 55

SO 55 authorises the Clerk to receive documents out of session which are required to be tabled under statute. This provision overcomes the absence of provision in some statutes for the Clerk to receive documents out of session, which would otherwise prevent documents being tabled and published during lengthy adjournments of the House.

Operation

Certain New South Wales statutes require ministers or statutory bodies to provide documents to both Houses. Of these Acts, some include provision that, if the House is not sitting at the time at which the report is required to be tabled, the document may be provided to the Clerk, who is authorised to receive the document out of session. These Acts also generally state that such documents are, on receipt, authorised to be public.[95]

Other Acts require the minister to table certain documents and reports in Parliament, but do not include provision for the document to be received out of session if the House is not sitting. SO 55 has the effect of providing the House's ongoing authority for the Clerk to receive such documents out of session, and to authorise them to be published. Reports received out of session under SO 55 are immediately available to both members and the public.

95 For example, the *Annual Reports (Departments) Act 1985*; *Annual Reports (Statutory Bodies) Act 1984*; *Public Finance and Audit Act 1983*.

The authority provided by the House to the Clerk under SO 55 only applies to documents that are required to be tabled by a minister under an Act – if the minister wishes to table an ad hoc report or document not required under statute, or a member other than a minister wishes to table a document, the Clerk has no authority to receive or publish the document. In practice, the Clerk is nevertheless frequently provided with documents out of session that are not required under an Act. For example, reports of the Office of Transport and Safety Investigations frequently recommend that the minister provide a periodic update on the implementation of recommendations made following transport accidents. When the reviews are received out of session, they cannot be tabled as they are produced by the minister on recommendation of a report, rather than under a statute. In such cases, the Clerk will arrange for the documents to be tabled by a minister on the next sitting day.

When the House next sits, the Clerk will announce the receipt of any reports received out of session under SO 55 and a list is published in the Minutes of Proceedings.

Receipt of reports during prorogation under sessional order

SO 55(3) states that 'documents may not be lodged with the Clerk when the House has been prorogued'. Nevertheless, a significant number of reports required to be tabled under statute inevitably fall due during periods in which the House has been prorogued. In past years, the Clerk continued to routinely be provided with reports during these periods and was obliged to hold over the reports until the House resumed sitting, leading to confusion both as to whether the ministers and agencies concerned had complied with their statutory obligations (as the reports in question were not deemed to have been 'tabled' by the requisite deadline), and as to the publication status of those reports which had on occasion been inadvertently received out of session when the House was prorogued.

In an effort to introduce a more consistent tabling process, in 2009 the House adopted a sessional order that varied paragraph 3 of SO 55 as follows:

> 3. A report or other document which is not required to be tabled in the House according to legislation may not be lodged with the Clerk when the House has been prorogued.[96]

The intended effect of the sessional order is to provide that documents that are required to be tabled in the House according to legislation may be lodged with the Clerk under SO 55 when the House is prorogued.

Background

SO 55 was first adopted in 2004. It does not appear to replicate the provisions of any other Australian jurisdiction, though bears limited similarities to Senate SO 166, which provides for the Presiding Officer to receive documents required to be laid before the Senate out of

96 *Minutes*, NSW Legislative Council, 3 June 2009, p 1189; 16 May 2015, p 57.

session. It is anecdotally understood that SO 55 was adopted to facilitate a more consistent tabling process during periods in which the House is not sitting.

Prior to 2004, documents could only be received by the Clerk out of session if an Act authorised the Clerk to do so.

Presentation of documents to the Clerk out of session has become a widespread and commonly followed practice, utilised by many ministers since 2004.

56. DOCUMENTS QUOTED IN DEBATE

(1) A document relating to public affairs quoted by a Minister may be ordered to be laid on the table, unless the Minister states that the document is of a confidential nature or should more properly be obtained by order.

(2) An order under paragraph (1) may be made by motion without notice moved immediately on the conclusion of the speech of the Minister who quoted the document.

Development summary		
2003	Sessional order 55	Documents quoted in debate
2004	Standing order 55	Documents quoted in debate

A document relating to public affairs quoted by a minister may be ordered to be laid on the table. However, a minister should not be required to table documents if the document is of a confidential nature and should more properly be sought by way of an order of the House under SO 52.[97] Documents ordered to be tabled under SO 56 are limited to those relating to public affairs.

Operation

When a minister quotes from a document relating to public affairs, at the conclusion of the minister's speech a member may move, without notice, that the document be tabled. If the motion is agreed to, the document must be tabled, except where a minister states that the document is of a confidential nature and should more properly be obtained by an order for the production of documents under either SO 52 or SO 53. A motion under SO 56 can be moved during the course of any debate in the House but has most commonly occurred during Question Time.[98]

97 Rosemary Laing, *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009), p 481.

98 *Minutes,* NSW Legislative Council, 7 September 2006, pp 185-186; 16 February 2012, p 704; 27 August 2013, p 1931; 19 March 2014, p 2381; 27 March 2014, p 2441; 16 September 2014, p 76.

Since its adoption in 2004, the procedure provided for under SO 56 has been used on 10 occasions. On most occasions, the motion has been agreed to and the document requested has been tabled,[99] but there have been exceptions.

On two occasions, the minister claimed that the document was confidential. The standing order does not require the President to validate the claim by the minister or the document in question, and in both cases the President ruled that the document was not required to be tabled.[100]

On another occasion, a minister challenged the order, arguing that the document ordered to be tabled was not the document from which he was quoting at the time. The President accepted the assurances of the minister and the document was not tabled.[101]

On several occasions, points of order have been taken concerning the correct time for the minister to table a document requested under SO 56, particularly where the motion has been moved during Question Time.

In 2006, an order made under SO 56 was agreed to in the course of the final question of Question Time. At the conclusion of Question Time, the minister had not tabled the document when he suggested that the House break for lunch. On a point of order being taken that the minister had not complied with the order of the House, the President ruled that there is nothing in SO 56 that determines the time at which the document ordered to be tabled must be tabled.[102] When proceedings resumed following lunch, the document was tabled by another minister. However, a point of order was then taken that the document tabled was not the document the minister was quoting from at the time the motion was moved under SO 56. Members stated that this was supported by the video record of proceedings. Following debate on the point of order, it emerged that the document was a photocopy of the document originally quoted, however, members argued that the document had been redacted and information removed. A minister then tabled a second document purporting to be the original of the photocopied document first tabled. At the conclusion of these proceedings, the Deputy President ruled that the Chair has no responsibility to judge the accuracy or correctness of a document tabled. No further points of order were taken.[103]

In 2012, a member interrupted a minister's answer during Question Time and requested that the House direct the minister to table a document from which he was quoting. The President ruled that the member could move a motion under SO 56 at the conclusion of the minister's answer, which she did, and the motion being agreed to the document was tabled.[104]

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99 *Hansard,* NSW Legislative Council, 16 February 2012, pp 8391-8392; 27 August 2013, pp 22739-22740; 27 March 2014, p 28013; 16 September 2014, pp 455-456.

100 *Minutes,* NSW Legislative Council, 22 June 2010, p 1940; 19 March 2014, p 2381.

101 *Hansard,* NSW Legislative Council, 7 December 2004, p 13332.

102 *Hansard,* NSW Legislative Council, 7 September 2006, pp 1615-1618.

103 Ruling: Deputy President Donnelly, *Hansard,* NSW Legislative Council, 7 September 2006, pp 1618-1620.

104 Ruling: President Harwin, *Hansard,* NSW Legislative Council, 16 February 2012, pp 8391-8392.

SO 56 does not dictate the type of document which falls under the provisions of the standing order except that it must be a document 'relating to public affairs'. In 2012, in response to a motion moved under SO 56, a minister argued that rather than a document, he was quoting from notes which had already been provided to Hansard. The President ruled that notes from which a minister is quoting in answer to a question do not fall within the category of documents which can be the subject of a motion under the standing order and ruled the motion was out of order.[105]

Development

The provisions of SO 56 derive from Senate standing order 168 but differ in two key respects. Firstly, the Senate standing order extends the provision to senators as well as ministers; secondly, the Senate standing order exempts ministers from complying with the standing order if the document should more properly be obtained by an Address for papers, rather than an order for papers as provided in the Council standing order.

The *Annotated Standing Orders of the Australian Senate* notes that, when originally adopted in 1903, the provisions of SO 168 were a new concept that was not based on any pre-existing standing order, although paragraph (1) codified the practice of most states. The practice of the states was in turn based on House of Commons practice, where the rule was that a minister could not quote from a state paper or despatch unless he was prepared to table it. The general principle, which applies also to senators who are not ministers, is that members of parliament are expected to contribute their own views and words to a debate. The right of members to use the words of another person is subject to the right of the Senate to see the whole document from which those words were quoted. However, the obligation on ministers to table so-called 'state-papers' is subject to the qualification that ministers may avoid tabling such papers by claiming confidentiality.[106]

Prior to the adoption of SO 56 in 2004, there were at least two occasions on which the House order a document quoted from in debate be tabled.

In 1990, during debate on an urgency motion,[107] a series of allegations were attributed to a document from which a private member was reading. During a point of order regarding the nature of the document, a minister moved without notice 'That the document be laid on the table'. The motion was agreed to and the document tabled.[108]

In 1976, during debate on the Dairy Industry Authority Bill, a point of order was taken and a request made that a document from which a member was quoting be laid on

105 Ruling: President Harwin, *Hansard,* NSW Legislative Council, 23 February 2012, p 8823.

106 Laing, *Annotated Standing Orders of the Australian Senate*, p 481.

107 Under SO 201, previously 1895 SO 13.

108 *Hansard,* NSW Legislative Council, 22 May 1990, pp 4048-4065; *Minutes,* NSW Legislative Council, 22 May 1990, p 199. Shortly thereafter Mr Egan raised as a matter of privilege concerns that the document he had tabled may not attract privilege. Although the President assured the House that the document was public and attracted privilege, as the paper was tabled by a private member it was not a public document, under the provisions of the standing orders.

the table to enable members to ascertain whether he was quoting from the document in context. The President ruled that there was no standing order which provided for a member to be requested to table a document from which a member was quoting.[109]

57. MOTION AFTER TABLING

On a document being laid before the House, other than a petition or a return to an address or order, a motion may be made:

(a) that a day be appointed for its consideration, or

(b) that it be printed.

Development summary		
1856	Standing order 31	Motions for Printing, &c.
1870	Standing order 41	Motions for Printing, &c.
1895	Standing order 20	Papers laid upon the Table to be deemed public
2003	Sessional order 57	Motion after tabling
2004	Standing order 57	Motion after tabling

This standing order provides for the subsequent procedural motions that may be moved when a document is tabled. The first of these enables the House to appoint a day for consideration of the document and is one of two provisions made under the standing orders for the House to debate a tabled document, the other being the provision for a 'take note' debate on a committee report (SO 232). The second motion provides for the document to be ordered to be 'printed', historically the mechanism by which a document was 'published' and therefore able to be circulated to the public. The standing order applies to any document tabled other than a petition, a return to an order under SO 52 or a return to an Address to the Governor under SO 53.

Operation

Immediately on a document being tabled, a member may move 'that the document be printed', or that consideration of the document stand an order of the day for [a date/ next sitting day] (the form of this motion being a take note motion, discussed further below). While the standing order suggests that a member may move one motion *'or'* the other, its predecessor, 1895 SO 20, stated that a member could move one motion '*and, if desired*' the other. As there is no procedural consequence of a member moving both motions, it is thought that the word 'or' was used only to simplify the terms of the previous standing order and it was not intended that a member would be prevented from moving both motions to the one document, as it is logical that a paper be first made public before it can be discussed. However, while 1895 SO 20 did not preclude such motions being moved on a day subsequent to the day on which the document was

109 Ruling: President Budd: *Hansard,* NSW Legislative Council, 26 November 1976, pp 3692-3693.

tabled, SO 57 makes clear that such motions may now only be moved 'on tabling' – that is, immediately.

The motions may be moved to any document tabled, except returns and petitions, whether tabled by the President, a minister, the Clerk or a private member. In the case of a document tabled by a private member it would be necessary for the House to first order that the document be published (under the provisions of SO 54) as the contents of the document would otherwise be confidential, so should not be the subject of debate.

While provision has been made for papers to be ordered to be printed since 1856, the current terms of SO 57 derive from Senate SO 169, which states:

1. On a document being laid before the Senate, it shall be in order to move:

   (a) that a day be appointed for its consideration; or
   (b) that it be printed.

2. Where a motion is moved by leave in relation to a document presented to the Senate, including a document presented to the President when the Senate is not sitting, a senator speaking to such a motion shall not speak for more than 10 minutes, and debate on the motion shall not exceed 30 minutes; where 2 or more such motions are moved in succession, debate on all motions shall not exceed 60 minutes.

However, while paragraph (1) of the Senate was adopted in the 2004 rewrite, the subsequent provision regarding the timing and manner of consideration was not.

Motion that a day be appointed for consideration of a document

SO 57 makes clear that certain motions may be moved immediately without notice following the tabling of a document, but, unlike the Senate model, does not provide other guidance as to the manner in which debate on these procedures should proceed, particularly that relating to consideration of a document. For this reason, while the standing orders have made provision since 1856 for the House to appoint a day for consideration of a document, documents have been considered under the standing orders in a number of different ways. The various trends and precedents are discussed below under 'Background'.

In 2015, the House adopted a sessional order to provide a clearer procedure for the consideration of a document under SO 57.[110] The sessional order sets out the time limits for debate on a document set down for consideration, and makes clear that the document will be considered as either government or general business, according to the member who requests consideration. Under the terms of the sessional order, speakers are limited to 10 minutes, including the mover, and after one hour the Chair is to interrupt business and put all questions to finally dispose of the matter.

110 *Minutes,* NSW Legislative Council, 6 May 2015, p 61.

The sessional order does not amend the terms of paragraph (a) of SO 57, which states that 'a member may move that a day be appointed for the consideration of a document', but does not specify the motion that is to be put before the House. As discussed under 'Background', the established mechanism by which the House has considered documents in the recent history of the Council has been by way of a 'take note' motion. In accordance with this convention, the correct mechanism for the consideration of a document under SO 57 is a motion to take note of a document. This interpretation was first tested in 2016 when, on the Clerk reporting receipt of a report of the Auditor-General, a non-Government member moved: That the House take note of the document. In accordance with the terms of the sessional order, the member immediately moved that debate be adjourned until next sitting day and the item was set down for resumption of debate on the Notice Paper under private members' business outside the order of precedence.[111]

Motion that a document be printed

The motion 'that the document be printed' finds its origin in the historic process by which documents were disseminated to the public following tabling. The motion was also thought to have some bearing on whether a document was authorised to be 'published', and therefore attract legal protections for the purposes of defamation and other proceedings (see discussion under 'Background').

The terms of new SO 54 now make clear that documents tabled by the President, the Clerk or a minister are automatically authorised to be published. In doing so, the standing order clarifies the immunities that apply to documents tabled by those office holders – that is, those protections afforded to 'the publication of a document by order, or under the authority, of [a parliamentary body]' under section 27 of the *Defamation Act 2005*, and the extension of those immunities applied by the *Parliamentary Papers (Supplementary Provisions) Act 1975*. The application of these immunities and the terms of the Acts are discussed further in Chapter 3 of *New South Wales Legislative Council Practice*.[112]

Despite clarification of these points, the House has nevertheless continued the practice of ordering the majority of reports tabled by the President, ministers and the Clerk to be printed under SO 57. In some cases, certain Acts[113] require that a document tabled with the Presiding Officer or with the Clerk out of session be ordered to be printed; in others, the House has simply continued the practice of ordering those documents to be printed, both for the purposes of consistency and in the absence of any clear authority that the motion 'that the document be printed' no longer has any legal or other effect.

111 *Minutes*, NSW Legislative Council, 13 September 2016, p 1111.

112 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008.

113 For example, the *Public Finance and Audit Act 1983*, the *Annual Reports (Departments) Act 1985* and the *Annual Reports (Statutory Bodies) Act 1984* also require the document to be ordered to be printed, or deem the report to be automatically ordered to be printed, and then only when the document is tabled with the Clerk out of session.

Committee reports

However, in the case of committee reports two procedural motions are moved, under the joint provisions of SO 57 and SO 232. Immediately after tabling, the Chair moves that the report be printed, under SO 57. The Chair may then, if they choose, move 'That the House take note of the report' under SO 232. This provides the House with an opportunity to debate the report, so is similar in its effect to the provision for the House to consider a document under SO 57.

Background

From 1856 (SO 31) to 1870 (SO 41), the standing orders provided that 'it shall be in order, on the presentation of any document, except a petition, to move, without notice, that it be printed, and to appoint a day for its consideration'. From 1895 (SO 20), the standing order was amended to provide that all papers and documents laid on the table by a minister 'shall be considered public', and to extend the restriction on the subsequent motions to capture petitions, returns to Addresses and returns to orders for papers. Despite the prohibition on printing of petitions under the standing orders, there are nevertheless examples of such motions being agreed to.[114]

Motion that a day be appointed for consideration of the document

Although the standing orders of 1856, 1870 and 1895 all provided for a motion to be moved on the tabling of a document that a day be appointed for its consideration, there are very few precedents from which the intended procedure can be determined. Prior to the recent consideration of a paper under SO 57 in February 2013 (discussed below), the provision had not been used since 1927. All prior examples concerned reports of the Standing Orders Committee and all applied different procedures under the standing order:

In 1858, a report of the Standing Orders Committee was tabled and ordered to be printed. The proposed standing orders were subsequently considered in committee of the whole, by motion on notice.[115]

- On two occasions in 1859[116] on reports of the Standing Orders Committee being tabled, a motion was agreed to 'that the report be printed'. On a subsequent day, a motion, on notice, was agreed to 'that the report be adopted'. A motion was then moved forthwith (and apparently without notice) for the House to resolve into committee of the whole for consideration of the report.[117]

114 For example, *Minutes,* NSW Legislative Council, 18 February 1926, p 22; 23 February 1926, p 26; 2 March 1926, p 42.

115 *Minutes*, NSW Legislative Council, 21 May 1858, p 28; 4 June 1858, p 35; 16 June 1858, pp 37-38; 25 June 1858, p 43; 29 July 1858, p 58.

116 *Minutes*, NSW Legislative Council, 27 January 1859, p 11; 14 December 1859, p 41.

117 There is no provision in the standing orders for the report to be adopted.

- In 1897 and again in 1909 on the tabling of a report of the Standing Orders Committee, a motion was moved by consent that the report be considered in committee of the whole.[118]
- In 1922 and again in 1927 on the day after a report of the Standing Orders Committee was tabled and ordered to be printed, a motion was moved on notice for the House to consider the report in committee of the whole.[119]

Although the procedures used vary, the majority of the reports tabled were considered in committee of the whole. The term 'consideration' has consistently been used when committing a bill to the committee of the whole and may have been interpreted to require consideration in committee, rather than in the House. There are advantages in considering a document or report in committee of the whole, as the rules of debate in committee allow for detailed discussion and, if desired, for consideration of a document page by page, or chapter by chapter. Nevertheless, the practice of considering documents, messages[120] and resolutions in committee fell into disuse from 1927.

In later years, the Council favoured a take note debate as an alternative mechanism for the consideration of documents. The practice appears to have been introduced in the early 1990s, taken from the new procedures adopted for the first standing committees (Social Issues and State Development), which included provision for a motion to be moved without notice, following the tabling of a report, 'That the House take note of the report'.[121] For example, in 1992, the Independent Commission Against Corruption report on the investigation into the Metherell Resignation and Appointment was considered using a take note motion, moved as a matter of necessity and without previous notice.[122] In 1997, the House similarly considered the report of the Royal Commission into the New South Wales Police Service – Paedophile Inquiry in the form of a take note debate, also moved as a matter of necessity without previous notice.[123] A take note debate on the Report of the Royal Commission of Inquiry into the arrest, charging and withdrawal of charges against Harold James Blackburn was moved in 1990 pursuant to notice, in the usual manner.[124]

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118 *Minutes*, NSW Legislative Council, 7 July 1897, p 70; 3 November 1909, pp 102 and 103.

119 *Minutes,* NSW Legislative Council, 3 August 1922, p 36; 22 November 1927, p 41.

120 The practice of considering messages relating to bills did not fall into disuse, and is provided for under SOs 152, 153, 156, 157 and 158.

121 *Minutes*, NSW Legislative Council, 9 June 1988, p 185. The resolution included provision for the manner in which the debate would proceed in the House and the time allocated for debate, and a number of reports were considered under this provision in the ensuing years. Similar provisions were subsequently included in the resolutions establishing the Law and Justice and General Purpose Standing Committees, and have since been incorporated into the standing orders (SO 232).

122 *Minutes*, NSW Legislative Council, 30 June 1992, pp 204-205 and 205-206. The report made findings of corruption and led to the resignation of both the Premier and the Minister for the Environment.

123 *Minutes*, NSW Legislative Council, 23 September 1997, pp 62 and 63.

124 *Minutes*, NSW Legislative Council, 16 August 1990, p 357.

The practice of considering documents then fell into disuse again until 2012 when, on a minister tabling an extract from the House of Representatives Hansard, a motion was moved by a member of the Opposition under SO 57 'that consideration of the document tabled by Mr Gay stand an order of the day for Tuesday 19 February 2013'. In the absence of recent established practice, the order of the day was set down on the Notice Paper for 19 February 2013 with precedence of all other business.[125] On 19 February 2013, prior to the order being called on, the minister suspended standing orders to allow a motion to be moved to set out the procedure by which consideration of the document would proceed: members would be permitted to speak for 20 minutes each for up to two hours, and once debate had been exhausted the matter would be considered to have concluded and the House would proceed to the next item of business on the Notice Paper. The motion also specified that if the matter was interrupted by the operation of any standing or sessional order of the House, it would be set down on the Notice Paper for next sitting day at the beginning of all other business.[126] In the event, debate on the matter was interrupted by Question Time that day and set down on the Notice Paper for further consideration on a future day. Consideration of the matter resumed and concluded the following day.[127]

This precedent arguably gave the consideration of the document undue precedence, and prompted the House to adopt a new sessional order, discussed above, in 2015.

Motion that a document be printed

The motion 'that the document be printed' has historically been moved in one of two ways: either on motion of the minister/member at the time of tabling, or on the recommendation of the Printing Committee, which was tasked with reviewing, on behalf of the House, a list of documents tabled but not ordered to be printed. Provision for the Printing Committee was omitted from the 2004 standing orders and replaced with new SO 59 (Printing of tabled papers and documents).

The administrative effect of the House agreeing to a motion ordering a document to be printed has historically been to allocate the document to the Parliamentary Papers Series. The Clerk of each House in New South Wales is custodian of that House's respective tabled papers series, comprised of a hard copy of all documents tabled in the House. Separately, a joint Parliamentary Papers Series is maintained. This series is comprised of any document 'ordered to be printed', on motion, by either House. The Parliamentary Papers Series was historically a series of bound volumes that were distributed to public reference libraries and individual subscribers. The series was historically the principal means by which people outside the parliament accessed published material relating to government agencies. Over time, as a result of the direct publication of documents by government agencies and the increasing availability of documents online, demand for the bound volumes has diminished. While a Parliamentary Paper Number continues

125 *Minutes*, NSW Legislative Council, 22 November 2012, p 1440; *Notice Paper*, Legislative Council, 19 February 2013, p 7228.

126 *Minutes*, NSW Legislative Council, 19 February 2013, p 1459.

127 *Minutes*, NSW Legislative Council, 20 February 2013, p 1468.

to be allocated to documents and they are made available on the Legislative Assembly website, the future of the bound volume series is under review.

The procedural and legal effect of ordering a document to be printed has historically been twofold: to include the document in the Parliamentary Papers Series, and to authorise the publication of the document to the public. However, while this relationship was quite clear during the 1800s, the correlation became less clear as time went on, following amendments to the terms of the standing orders.

In the early years of the Council, documents tabled but not ordered to be printed were not considered public. On 20 May 1886, President Hay observed that

> Certain papers laid upon the table of the House might, if printed, be the means of doing great injury to individuals, which the House, of course, does not wish to do. Papers are laid before the House for the purpose of the House; but they are not laid before the public until they are printed by authority of the House. That is a very important question, and I hope that the House will always be particular in guarding against any abuse which might arise from papers being printed without any necessity.[128]

However, when former standing order 20 was adopted in 1895 it provided that documents tabled by a minister were 'considered public', a provision not previously contained in the standing orders:

> All papers and documents laid upon the Table of the House by a Minister shall be considered public, and may be ordered to be printed on motion without notice, and it shall always be in order on the presentation of any document, except a petition, return to Address, or order, for the member presenting it to move, without previous notice, that it be printed, and, if desired, that a day be appointed for its consideration.

Past advice held by the Clerk suggests that the terms of the new standing order led to an assumption that documents tabled were deemed published and, over time, officers began to provide documents tabled by ministers to members and the public on the authority of the standing order without regard to whether they had been ordered to be printed.

Concerns were later raised that the provisions of standing order 20 may not be adequate to authorise the publication of a document, particularly in instances where the document may contain actionable material. In 1963, the Crown Solicitor questioned the effect of similar provisions[129] in the Legislative Assembly's former SO 57, observing that the standing order was unlikely to have been intended to be a permanent order or an

128 *Minutes*, NSW Legislative Council, 20 May 1886, p 2089.

129 Until 1928 Assembly SO 57 was the same in terms as the then Council SO 20, stating that 'all papers and documents laid upon the Table of the House by a minister shall be considered public'. However in 1928 the limitation to papers tabled by ministers was removed, therefore at the time of the 1963 advice all papers tabled were instead 'considered public' and SO 57 read as follows: 'All papers and documents laid upon the Table of the House shall be considered public, and may be ordered to be printed without notice and without debate'.

authority to publish every paper tabled in the House.[130] In support of this view, the Crown Solicitor advised that:

- in the House of Commons tabled documents were not available to the public unless they had been ordered to be printed
- the power to make documents available to the public was unlikely to be within the scope of 'reasonable necessity'
- it was unlikely that SO 57 had been adopted with the intent of being a permanent order or authority to publish within the meaning of the provisions of the defamation legislation as it then stood. If that had been intended 'a more direct form of wording would have been adopted'.

The Crown Solicitor concluded that the only safe course was to regard Assembly SO 57 as not applying to documents the publication of which might constitute a civil or criminal wrong and to not allow public access to documents tabled but not ordered to be printed.

In 1965, the Crown Solicitor provided similar advice to the Clerk of the Parliaments, suggesting that former SO 20 was unlikely to confer legal protection on officers of the House who permitted members of the public to view or copy tabled documents. The Clerk was advised:

> Reference was made in [the previous opinion to the LA] to the great uncertainty about the meaning of the words 'considered public' used in the standing order, and also to the fact that standing orders are not part of the general law. The significance of this is that standing orders are not likely to be construed as conferring rights on members of the public, especially where this may expose other persons (eg. the officers of the House) to civil or criminal liability, or both, and, in particular, that such a construction would not be given to the words 'considered public'…
>
> Your standing order… neither authorises nor prohibits a person from –
>
> (a) making extracts from a document tabled by a minister but not ordered to be printed, or
> (b) making a photo-copy of the complete document.
>
> … All this means that your present practice of allowing members of the public to make extracts (and of copying the whole document if the practice extends, or is widened to extend, that far) is unexceptionable unless the publication involved in this amounts to a civil or criminal wrong, and it does cast on the President or the Clerk or whoever it is who permits the publication the onus of satisfying himself, for his own protection, that no such civil or criminal wrong (whether of defamation or otherwise) is involved.[131]

130 Advice from the Crown Solicitor to the Clerk of the Legislative Assembly, 'Re: Standing order no. 57', dated 29 October 1963.

131 Advice from the Crown Solicitor to the Clerk of the Parliaments, 'Ref. CS. 65/1899', dated 26 November 1965.

Despite this advice, practice remained inconsistent. Documentation dating from the late 1970s states that the Printing Committee and the broader Council department was guided by the original principle that documents should not be made available to the public at large until ordered to be printed.[132] On this basis, an order that a document be printed was an important determinant of whether or not the document was made public to people other than members. Yet the documentation also notes that officers made papers available for inspection by representatives of the press and, on occasion, for other persons on request immediately after tabling.[133] Officers at the time reasoned that 'by allowing the press the right of inspection, the public is informed of what is in a tabled document prior to copies becoming available' via the usual process of ordering to be printed and subsequent distribution.[134] On occasion, copies of papers tabled were also printed in advance and made available to members and 'other persons' at the time of tabling in the House.[135]

With the adoption of SO 54, the immunities afforded to tabled documents tabled by the President, ministers, the Clerk and private members, and their publication status, were clarified. However, as noted earlier, the House has continued to order certain documents to be printed, in keeping with precedent.

58. AMENDMENTS AFTER TABLING

Clerical or typographical errors may be corrected, by authority of the President, in a document that has been ordered to be printed. No other amendments may be made except by authority of the House.

Development summary		
2003	Sessional order 58	Amendments after tabling
2004	Standing order 58	Amendments after tabling

Standing order 58 allows clerical or typographical errors to be corrected in a document that has been ordered to be printed.

Operation

SO 58 was first adopted in 2004 and the records of the House suggest the provisions have not been used since that time. While it is commonplace for errors to be identified in documents tabled in the House, such as annual reports of departments, it is a well-established practice that such errors are addressed by the minister or other member (or Presiding Officer, where applicable) tabling an erratum to the document. This practice has continued notwithstanding the adoption of SO 58.

132 A paper prepared at the request of the Printing Committee in 1979 on the role and operation of the committee states words to this effect.

133 Anonymous paper prepared at the request of the Printing Committee, The Legislative Council Printing Committee, 1979, p 2.

134 Ibid.

135 Ibid.

Development

SO 58 appears to have been inspired by Senate standing order 170, which provides:

> Amendments not altering the substance of the document may be made, and clerical or typographical errors may be corrected, by authority of the President in a document that has been ordered to be printed. No other amendments may be made except by authority of the Senate.

The *Annotated Standing Orders of the Australian Senate* notes that the genesis of this standing order was a dispute over alterations made to the 5th edition of *Australian Senate Practice* after it had been tabled and before it was printed as a parliamentary paper. It transpired that, as was usual practice, the document had been further edited before going to print to reflect current precedents and elaborate meaning, though the integrity of the document remained unchanged. The matter identified a procedural dilemma created by the absence of authority for routine amendment of a tabled document, namely whether altering a document after tabling, substantively or otherwise, contravened the order of printing the document. The matter was referred to the Standing Orders Committee, which recommended that a standing order similar to the standing order relating to the correction of bills (the equivalent of the Council's SO 150) be adopted to address a perceived deficiency in the standing orders.[136] The standing order was further revised in 1989 to omit a provision previously made in the standing order for 'amendments of a verbal or formal nature' to be made and instead make provision for 'amendments not altering the substance of the document' to be made.[137] This provision was not included in the standing order adopted by the Legislative Council.

As noted above, the Council has received errata related to annual reports of government departments[138], however, an erratum has also been tabled to correct an error in a committee report.[139] Errata are a relatively recent phenomenon. Prior to the 1990s, errata were only received in relation to regulations published in the *Government Gazette* and tabled in the House.

59. PRINTING OF TABLED PAPERS AND DOCUMENTS

(1) On the first sitting day of each month, a Minister is to table a list of all papers tabled in the previous month and not ordered to be printed.

(2) On tabling, a motion may be moved without notice, that certain papers on the list be printed.

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136 Laing, *Annotated Standing Orders of the Australian Senate*, p 486.

137 Laing, *Annotated Standing Orders of the Australian Senate*, p 487.

138 For example, *Minutes*, NSW Legislative Council, 26 October 1989, p 1023; 20 November 1990, p 630; 31 March 1998, p 351; 22 November 2012, p 1441; 26 March 2013, p 1605; 4 November 2014, p 215.

139 *Minutes*, NSW Legislative Council, 27 February 2001, p 846.

Development summary		
1862–2003	Sessional order	Printing committee
1895	Standing order 280	Sessional committees
2003	Sessional order 59	Printing of tabled papers and documents
2004	Standing order 59	Printing of tabled papers and documents

SO 59 requires a minister to table a list of all papers tabled in the previous month and not ordered to be printed. The motion was historically a mechanism by which the House authorised a document to be published and disseminated, and by which the document attracted legal protections from defamation and other proceedings. SO 59 should be read in conjunction with SO 57, which discusses the motion 'that the document be printed'.

Operation

As noted under SO 57, when a document is tabled, a member may move: 'That the document be printed'. Under SO 59, on the first sitting day of each month a minister is required to table a list of all papers tabled but not ordered to be printed in the previous month (or since the previous sitting of the House, if the last sitting occurred more than one month ago). This list is provided to the minister by the Council Procedure Office. Occasionally, the first sitting day of the month will occur on the last calendar of that month (e.g. the 30th day) and be immediately followed by a sitting day that is the first day of the new month. On such cases, a list is tabled in the House on both days.[140]

Under SO 59(2), on tabling, a motion may be moved without notice that certain papers on the list be printed. This provides the House with a second opportunity to consider whether a document ought to be printed.

Documents are usually ordered to be printed on the advice of the Clerk at the time of tabling, with a view to ensuring that the categories of documents ordered to be printed have remained broadly consistent over time (see discussion below for background to this procedure). For this reason, while SO 59 is complied with and the list is tabled each month, it is very rare for the subsequent motion to be moved. When the motion has been moved in recent years, it has been in order to correct an oversight that occurred when the document was originally tabled.[141]

For an explanation of the effect of the motion 'That the document be printed', see the discussion under SO 57.

140 For example, *Minutes*, NSW Legislative Council, 31 August 2010, p 1983; 1 September 2010, p 2004.

141 For example, *Minutes*, NSW Legislative Council, 22 March 2005, p 1281; 25 September 2007, pp 223-224.

Background and development

Until 2003, a Printing Committee considered and reported on any document tabled but not ordered to be printed. The committee was first appointed by resolution in 1862,[142] and reappointed each session, prior to any provision being made in the standing orders. From 1895, SO 281 (later SO 280 following the rescission of SO 210) provided that the House may appoint the committee and set out the duties and powers afforded to a committee so established, however, the standing order still required that the committee be appointed by sessional order.

Under the sessional order, the Committee tabled a report recommending whether each document tabled ought to be printed and, if so, whether in full or in abstract.[143] Documents ordered to be printed were subsequently included in the Parliamentary Papers Series. The order for printing was historically the means by which papers were printed and disseminated – after the committee's report was tabled, the Clerk forwarded copies of documents ordered to be printed to the Government Printer, who compiled copies of the Parliamentary Papers Series for dissemination to repository libraries and to individuals and organisations who paid a subscription fee. The motion ordering a document to be printed was also the catalyst for the Government Printer to start the 'print run', with copies of the document then being distributed more widely to departments, members[144] and the public, including via public libraries.[145] The Parliamentary Papers Series was therefore an important means of facilitating access to information. However, over time, as a result of the direct publication of documents by government agencies and the increasing availability of documents online, demand for the bound volumes has diminished. While a Parliamentary Paper Number continues to be allocated to documents and they are made available on the Legislative Assembly website, the future of the bound volume series is under review.

Provision for the Printing Committee was omitted from the revised standing orders in 2004, in favour of the new system of requiring the minister to table a list of documents not ordered to be printed each month.

The process for determining whether a document should be ordered to be printed

The decision as to whether a document should be ordered to be printed has historically been made in one of two ways: either on motion of a minister/member at the time of

142 *Minutes*, NSW Legislative Council, 31 July 1862, p 41.

143 See, for example, terms of sessional order adopted *Minutes*, NSW Legislative Council, 24 May 1988, p 50. In practice the committee tabled a report that included a statement to the effect that 'in their opinion', certain reports 'ought to be printed'. The House then ordered that the report be printed. See Report No. 6 of the Printing Committee, printed in the *Journal of the Legislative Council*, 1990-91, vol 181, pp 1087-1092, and corresponding motion for printing in *Minutes*, NSW Legislative Council, 25 October 1990, p 598.

144 Under 1895 SO 22, the Clerk was obliged to distribute to each member of the Council a copy of each paper printed by order of the Council, and transmit to the Clerk of the Assembly a sufficient number of copies of all papers for distribution to Assembly members.

145 *The Legislative Council Printing Committee*: paper on the role and operation of the Printing Committee, prepared at the request of the Committee, 1979.

tabling, or subsequent to tabling, either following a recommendation of the Printing Committee (to 2003) or on motion under SO 59 (from 2004 to date).

The 'Manual of Procedure' in use by the Clerk to the Printing Committee in the 1970s and 1980s suggests that the Committee usually made their determination on the advice of the Clerk, following the Clerk's consideration of each individual paper.

An analysis of the categories of documents usually ordered to be printed by the Printing Committee, conducted in 2003,[146] determined that they have included: statutory reports received by the President when the House was not sitting, government responses to committee reports, and certain statutory reports tabled by ministers in relation to which the question of printing had not been addressed by the House at the time of tabling.

The categories of documents generally not ordered to be printed by the Printing Committee included: returns to orders, petitions, messages, bills, statutory instruments, assents, regulatory impact statements, annual reports other than those produced under the annual reports legislation, statutory reports other than annual reports, such as reviews of legislation and documents tabled by private members by leave of the House.

Since the adoption of new SO 59, the Clerk has continued to routinely advise whether documents received should be ordered to be printed according to similar criteria to that applied by the Printing Committee, and this is reflected in the motion moved by the minister on tabling.

SO 57 also specifically prohibits a member from moving that a petition or a return be ordered to be printed.

60. INSPECTION OF DOCUMENTS

(1) Documents may be inspected in the offices of the Clerk at any reasonable time.

(2) The Clerk may charge a reasonable fee for copies of extracts from documents or papers tabled in the House.

Development summary		
2003	Sessional order 60	Inspection of documents
2004	Standing order 60	Inspection of documents

The Clerk is the custodian of all documents tabled in the Legislative Council. Members of parliament and the public may make arrangements to view tabled documents, including documents tabled in response to an order under SO 52, at any reasonable time.

146 David Blunt, 'Review of Sessional Committees', 2003.

Operation

While standing order 60 provides that documents may be inspected in the offices of the Clerk, in practice, documents are stored and managed by the Procedure Office on the Clerk's behalf. Members may request to view documents at any time, including during the sittings of the Council, however, it is preferable that members of the public make an appointment to view documents within business hours on days when the Council is not sitting. Where multiple requests to view documents are received, priority is afforded to members of the Legislative Council in recognition of the purpose of papers being tabled, in the first instance, for the information of members.

Confidential documents, including those tabled in return to an order of the House and subject to a claim of privilege, and documents tabled by private members, may only be inspected by members of the Legislative Council unless otherwise ordered by the House. In 2003, the House resolved to allow members of the Legislative Assembly appointed to serve on the Parliamentary Joint Committee on the Health Care Complaints Commission to access privileged documents tabled in return to an order for papers relating to the removal of Dr Shailendra Sinha from the Register of Medical Practitioners.[147]

Background and development

The provisions of standing order 60 were first included in the standing orders in 2004. While the records of the Council do not provide guidance as to its background, its origin is anecdotally understood to derive from entirely pragmatic considerations. The Council experienced a sharp increase in requests to view documents in the late 1990s and early 2000s following the resurgence of orders for the production of documents under SO 52 arising from the *Egan* decisions (see SO 52). The provisions of SO 60, particularly paragraph (2), were likely to have been considered prudent to ensure that the standing orders provided the Clerk with requisite authority to charge a reasonable fee to meet the considerable expense incurred by members and the public using the Council's photocopying facilities.

147 *Minutes*, NSW Legislative Council, 29 May 2003, p 139.

CHAPTER 10

ATTENDANCE

61. RECORD OF MEMBERS

(1) The Clerk is to keep a roll of members, showing:

(a) the name of each member elected to the Council,
(b) the date of election,
(c) term of service,
(d) date of taking oath or affirmation,
(e) expiry of term of service,
(f) date of ceasing to be a member, and
(g) length of service.

(2) A member must sign the roll when the member takes the oath or affirmation of allegiance required by law.

(3) A list of current members is to be published by the Clerk.

Development summary		
1856	Standing order 2 Standing order 3	Register of Members List of Members
1870	Standing order 3 Standing order 4	Register of Members List of Members
1895	Standing order 26	Record of members
2003	Sessional order 61	Record of members
2004	Standing order 61	Record of members

The Clerk keeps three records in relation to the members of the House: the roll of members, the list of current members referred to in SO 61, and the register of members. The register is not referred to in the current standing orders but was provided for prior to 2004 and has continued to be updated.

Operation

The roll

The roll consists of a series of volumes the current volume of which dates back to 1978. It records the name and signature of each member, the date of the member's election, the Parliament in which the member's term is due to expire, the date on which the member was sworn and the signature of the attesting clerk. The roll does not include the date on which the member ceased to be a member or the actual length of the member's service as required under SO 61(1)(f) and (g), as these details are instead recorded in the register.

SO 61(2), which requires a member to sign the roll when taking the oath or affirmation of allegiance, is interpreted as also applying to a member who takes the pledge of loyalty. This reflects section 12 of the *Constitution Act 1902* which was amended in 2006 to allow a member to take the pledge of loyalty instead of the oath or affirmation of allegiance before sitting or voting.

Members elected at a periodic Council election are sworn and sign the roll before commissioners on the first day of the new Parliament (SO 6). Members elected to fill casual vacancies may not be sworn before the expiration of two days from their election[1] and are usually sworn before the President or the Deputy President and sign the roll during a sitting of the House when there is no other business before the House (SO 10). In 2010, however, four members who had been elected to casual vacancies took the pledge of loyalty before the Governor and signed the roll during an adjournment of the House.[2] In 2016, a member elected at a casual vacancy took the pledge of loyalty before the Governor and signed the roll before the House on the next sitting day.[3]

The list of current members

SO 61(3) requires the Clerk to publish a list of current members. The list includes party memberships, offices held and the Parliament in which the term of each member is due to expire, and is updated whenever a change occurs. A copy of the current list is kept in the chamber when the House is sitting and published on the Council's website.

When changes occur, a new list is published, forming a record of membership at any given time.

The register

The register records the name of each member, the date of each member's election, the Parliament in which each member's term is, or was, due to expire, the date on which each member took his or her seat, the date on which each member ceased to be a member,

1 *Constitution Act 1902*, section 22E.
2 *Minutes*, NSW Legislative Council, 21 September 2010, p 2057.
3 *Minutes*, NSW Legislative Council, 13 September 2016, p 1109.

the cause of ceasing to be a member, and the total length of each member's service. The current volume, which includes the details of members elected since 1984, is kept on the Table when the House is sitting.

By longstanding practice, when a member resigns, the President reports the receipt of the communication from the Governor advising of the resignation and informs the House that the communication has been acknowledged and that an appropriate entry has been made in the register.

Background and development

SO 2 of 1856 provided for the Clerk to keep a register showing 'the name of each Member summoned, the date of the Writ of Summons, the date of his taking his seat, and, on his ceasing to be a Member, the date and cause thereof'. SO 3 provided that 'A list of the members of the time being, to be prepared from the Register by the Clerk, and signed by the President, shall lie at all times on the Table.'

SO 2 and SO 3 were renumbered SO 3 and SO 4 in 1870.

SO 26 of 1895 provided for the keeping of the register and the list in similar terms to the former standing orders. In 1934, following the introduction of indirect elections and fixed terms for Council members, SO 26 was amended to remove reference to the writ of summons and to require the date of election and term of service to be recorded in the register. The amended part of SO 26 was as follows:

> A Register of the members of the House shall be kept by the Clerk, in which shall be entered the name of each Member elected to the Council, the date of his election, the term of his service, the date of commencement of his term of service, the day of expiry of his term of service, the date of his taking his seat; and, on his ceasing to be a Member, the date and cause thereof. …

It was the practice that when a member died in office, resigned, or the seat of a member became vacant as a result of disqualification, the President informed the House that a relevant entry had been recorded in the register.[4]

Members of the Council signed a roll on being sworn since at least 1856.[5] However, the first standing order referring to the roll was not adopted until 1895. SO 3 of 1895 provided that:

> New Members may present themselves and take and subscribe the Oath or Affirmation required by law and sign the Roll of the House at any time during the Sitting of the House, but no debate or business shall be interrupted for any such purpose.

4 See, for example, *Minutes*, NSW Legislative Council, 4 July 1922, p 4; 24 June 1925, p 3; 11 May 1932, p 534; 16 November 1937, p 64.

5 *Minutes*, NSW Legislative Council, 22 May 1856, p 3.

In some cases members were sworn before the Governor and later subscribed the roll before the House.[6]

Minor amendments to SO 3 were made in 1985 to insert 'Unless otherwise provided' and delete 'New'. The provisions of SO 3 are now in SO 10.

62. ATTENDANCE OF MEMBERS

A record is to be kept in the Minutes of Proceedings each day of members who do not attend at some time during the sitting.

Development summary		
2003	Sessional order 62	Attendance of members
2004	Standing order 62	Attendance of members

SO 62 ensures that a record of attendance is available should an issue arise under section 13A(1)(a) of the *Constitution Act 1902*, under which a member who fails to attend for one whole session without the permission of the House is disqualified, or for any other reason that the attendance of a member needs to be attested.

Operation

The final entry in the minutes each day records the name of any members who did not attend the chamber at some stage during the sitting. The entry states 'All members present' or 'All members present, except …', and any member not recorded as absent is regarded as having attended during the sitting day.

A sessional return is prepared using the information recorded in the minutes showing the number of days each member attended in the session.

Background and development

Before 2004, there was no requirement in the standing orders to record members' attendance except where the House adjourned due to lack of a quorum.[7] However, the first page of the minutes each sitting day recorded the members in attendance[8], while on the first day of a session the minutes included a list of those present and those absent.[9] The current practice, of recording any absences at the end of the document, was introduced by the President on the second sitting day of 2003.[10]

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6 *Minutes*, NSW Legislative Council, 1 December 1931 p 388; 29 June 1998, p 610.

7 SO 4 of 1856 and SO 11 of 1895.

8 See, for example, *Minutes*, NSW Legislative Council, 6 May 1997, p 639.

9 See, for example, *Minutes*, NSW Legislative Council, 22 May 1856, 23 August 1904, 17 April 1928, 16 September 1997, 29 April 2003.

10 *Minutes*, NSW Legislative Council, 30 April 2003, pp 38 and 51; *Hansard*, NSW Legislative Council, 30 April 2003, p 54 (President Burgmann).

63. LEAVE OF ABSENCE

(1) The House may by motion on notice stating the cause and period of absence give leave of absence to a member.

(2) A member who has been granted leave of absence is excused from service in the House or on a committee for the period of the absence.

(3) A member will forfeit leave of absence by attending in the House or a committee before the expiration of the leave

Development summary		
1856	Standing order 151	Absence from House
1870	Standing order 167	Absence from House
1895	Standing order 27	Leave of Absence
1922	Standing order 27	Leave of Absence
2003	Sessional order 63	Leave of absence
2004	Standing order 63	Leave of absence

Under section 13A(1)(a) of the *Constitution Act 1902*, if a member fails to attend the House for one whole session of the Council and Assembly, the member's seat shall become vacant 'unless excused in that behalf by the permission of that House entered upon its journals.' The member may be excused by obtaining leave of absence from the House by motion on notice under SO 63.

Operation

If a member is absent for less than one whole session, leave of absence is not required. In practice, absences of less than a session are usually managed by the use of pairs. However, pairing is an informal arrangement between the parties which is not reflected in the standing orders except in regard to the counting of divisions under SO 115, and has no effect for the purpose of the *Constitution Act 1902*.

Since the adoption of the current standing orders, there has been only one case in which notice of a motion for leave of absence has been given. The motion sought leave of absence on account of illness for a member who had been absent since the beginning of the session[11] but the notice of motion was withdrawn the next day[12] and the member attended later in the session.[13]

A motion seeking leave of absence is placed on the Notice Paper as business of the House and takes precedence of government and general business for the day on which it is set down for consideration (SO 39(a)).

11 *Notice Paper*, NSW Legislative Council, 6 June 2006, p 124. (Notice given by Dr Moyes seeking leave of absence for Mr Jenkins).

12 *Minutes*, NSW Legislative Council, 6 June 2006, p 75.

13 *Minutes*, NSW Legislative Council, 22 November 2006, p 416.

Background and development

By section 5 of *the Constitution Act 1855* and its successor, section 19(a) of *Constitution Act 1902*, a member's seat became vacant if the member failed to attend the House for two successive sessions of the legislature without the permission of His Majesty or the Governor. Between 1858 and 1925, when members of the Council were appointed for life, there were 15 occasions on which a member lost their seat for being absent for two successive sessions without approval. In a further case, in 1865, the House considered whether three members had been absent for two successive sessions but concluded that their seats had not become vacant.[14]

While the constitutional provision required leave of absence from the Governor, the standing orders recognised that leave of absence could be granted by the House. The 1856 standing orders provided that a member who failed to comply with a 'call of the House' (an order that members attend for a particular debate), or who was absent for more than three consecutive weeks without leave of the House, was to be held guilty of contempt. A member who was found guilty of contempt could be fined up to 20 pounds and, in default of payment, committed to the custody of the Usher of the Black Rod for up to 14 days.

In practice, the 'call of the House' procedure was rarely used and there appears to have been no case in which a member was found in contempt on the ground of absence. However, it was not uncommon for members to be granted leave of absence by the House by motion on notice. In light of this, new standing orders adopted in 1895 omitted reference to the call of the House and contempt on the ground of absence, and included a procedure for granting leave of absence in SO 27:

> Notice shall be given of a motion for granting leave of absence to any Member, stating the cause and period of absence; and leave, for any time not exceeding the remainder of the then Session, may be given by the House to such Member.

In 1922, on the recommendation of the Standing Orders Committee,[15] the following note was added to SO 27: *'(For leave of absence by the Governor, see section 19, paragraph (a), Constitution Act, 1902)*'.[16] The Chair of the Standing Orders Committee explained the intention behind the new provision as follows:

> That will be a footnote calling the attention of hon. members to the fact that leave of absence granted by the Governor is controlled by section 19 of the Constitution Act. The standing order by itself, without a note of that character, is apt to mislead an hon. member into the belief that he can get leave of absence from the House simply by applying for it through a motion in the House. It is necessary that leave of absence should be dealt with by the Governor.[17]

14 See, for further detail, *New South Wales Legislative Council Practice,* pp 155-157.

15 *Minutes*, NSW Legislative Council, 2 August 1922, pp 32-33.

16 *Minutes*, NSW Legislative Council, 3 August 1922, pp 36-37.

17 *Hansard*, NSW Legislative Council, 3 August 1922, p 793.

In 1978, section 19(a) of the *Constitution Act 1902* was replaced by section 13A(a) (now section 13A(1)(a)) which provides that a member's seat shall become vacant if the member fails to attend for one whole session unless excused by the House. The note to SO 27 was not formally omitted from the standing orders by the House following the legislative change but was left out when the standing orders were reprinted in 1985.

Unlike SO 27 of 1895, SO 63 does not confine leave of absence to 'the remainder' of the session. This appears consistent with section 13A(1)(a) of the *Constitution Act 1902* which contemplates that a member could be absent for a whole session with the permission of the House.

Between 1856 and 1934, the House and the Governor regularly granted leave of absence to members.[18] Following the introduction of fixed 12-year terms for members of the Council in 1934, the instances of motions seeking leave of absence declined[19] but the practice was revived somewhat in later decades.[20]

Motions seeking leave of absence were listed as general business,[21] government business[22] or business of the House[23] or moved without notice by consent. Where the member for whom leave was sought was already absent, the motion was moved by another member. While the cause of the absence was usually stated in the motion as required by SO 27, this was not always the case.[24] In 1865, a member was granted leave of absence,[25] another member querying whether leave of absence should be given as the member had not yet taken the oath that session.

While the motion seeking leave of absence was usually agreed to, a case in 1873 proved controversial. The motion sought three months leave of absence for Mr Smart who had been absent since the previous session having been detained by private business in England. The mover of the motion advised that the House's permission was being

18 1856-1874: 8 Governor, 74 House; 1874-1893: 45 Governor, 73 House; 1894-1913: 78 Governor, 61 House: New South Wales Legislative Council, *Consolidated Index to the Minutes of the Proceedings and Printed Papers*, 1856-1874, vol 1; New South Wales Legislative Council, *Consolidated Index to the Minutes of the Proceedings and Printed Papers*, 1874-1893, vol 2; New South Wales Legislative Council, *Consolidated Index to the Minutes of the Proceedings and Printed Papers*, 1894-1913, vol 3, 'Leave of absence'.

19 Between 1934 and 1954 leave of absence was granted by the Governor on 68 occasions but by the House only once: New South Wales Legislative Council, *Consolidated Index to the Minutes of the Proceedings and Printed Papers*, 1934-1954, vol 5, 'Leave of absence'.

20 See, for example, *Minutes*, NSW Legislative Council, 2 August 1989, p 787; 20 September 1989, p 898; 3 March 1994, p 38; 10 November 1999, p 197; 18 November 1999, p 244; 23 November 2000, p 742; 28 March 2001, p 902; 6 June 2001, p 1006.

21 See, for example, *Minutes*, NSW Legislative Council, 12 June 1918, p 7; 26 August 1925, p 12.

22 *Minutes*, NSW Legislative Council, 26 November 1930, p 13.

23 *Minutes*, NSW Legislative Council, 16 August 1983, p 28; 19 September 1989, pp 897-898.

24 See, for example, *Minutes*, NSW Legislative Council, 9 September 1925, p 14; 2 August 1989, p 787; 20 September 1989, p 898; 3 March 1994, p 38; 23 November 2000, p 742.

25 *Minutes*, NSW Legislative Council, 7 February 1865, p 19 (leave of absence granted for one month for urgent private business); *Sydney Morning Herald*, 8 February 1865, p 5.

sought 'as a matter of courtesy, and in order to purge the hon. member of contempt, and from the penalty for absence provided by the standing orders'. However, other members argued that absences for an entire session were matters for His Majesty or the Governor rather than the House and that Mr Smart had left the colony after the Government had advised that members by their non-attendance were preventing public business being carried out. It was also pointed out that Mr Smart was already in contempt as he had been absent for about 30 weeks without leave.[26] The motion was defeated on division,[27] however, no action appears to have been taken by the House against Mr Smart following his return in 1874.

26 *Sydney Morning Herald,* 7 November 1873, p 2.
27 *Minutes*, NSW Legislative Council, 6 November 1873, p 49.

CHAPTER 11

QUESTIONS SEEKING INFORMATION

64. QUESTIONS TO MINISTERS AND OTHER MEMBERS

(1) Questions may be put to Ministers relating to public affairs with which the Minister is officially connected, to proceedings pending in the House, or to any matter of administration for which the Minister is responsible.

(2) Questions may be put to other members relating to any matter connected with the business on the Notice Paper of which the member has charge.

(3) Questions may be put to a chair of a committee relating to the activities of that committee, but the question must not attempt to interfere with the committee's work or anticipate its report.

(4) At the discretion of the President, one supplementary question may be immediately put by the member who asked a question to elucidate an answer.

(5) The asking of each question must not exceed one minute and the answering of each question must not exceed four minutes. A Minister may seek leave to extend the time for an answer by one minute.

(6) The asking of a supplementary question must not exceed one minute and the answering of each supplementary question must not exceed two minutes.

Development summary		
1856	Standing order 18	Questions to members
1870	Standing order 21	Questions to members
1895	Standing order 29	Answers recorded to questions respecting public business
2001-2003	Sessional order	Questions without notice
2003	Sessional order 64	Questions to Ministers and other members
2004	Standing order 64	Questions to Ministers and other members

The rules for questions can be found in a number of different standing orders, which must be read together to provide a complete picture. There are two types of questions: those without notice and those on notice, provided in writing and published on the Questions and Answers Paper. While SOs 47, 64 and 66 lay out the framework for the former and must be read together, SO 67 lays out the framework for the latter. The rules regarding content can be found in SOs 64 and 65, collectively.

SO 64 is split into two parts. Paragraphs (1) to (3) specify to whom questions may be directed and the matters that may be the subject of questions asked, and apply to both written questions and questions without notice.

Paragraphs (4) to (6) apply to rules regarding Question Time. Paragraph (4) makes provision for a supplementary question to be asked, while paragraphs (5) and (6) set out the time limits that apply.

Operation

Any type of question – either without notice or on notice – may be put to a minister relating to public affairs and matters of administration that fall under the minister's responsibilities (SO 64(1)). Presidents have ruled that questions must relate to matters that could be dealt with by legislative or administration action,[1] and while questions relating to the affairs of a minister's department or office are in order, questions relating to the affairs of a particular political party are not.[2] Any question may be put to the Leader of the Government, as that minister represents the Premier in the Legislative Council.[3]

Questions may be put to other members relating to a matter on the Notice Paper of which the member has charge (SO 64(2)), however SO 65(4) states that such questions may only relate to matters listed outside the order of precedence or an order of the day relating to the budget estimates, so as not to offend against the rule of anticipation (SO 65(4)). This is also supported by rulings of the President.[4] In 2012, President Harwin further articulated that questions to private members should relate to the timing or progression of a bill or motion, however, if the answer to a question would require the member to anticipate debate on the matter, the question and answer would be out of order.[5]

Questions may be put to a Chair of a committee relating to the activities of that committee, however, the question must not attempt to interfere with the committee's work or anticipate its report (SO 64(3)). Presidents have ruled that a question may only be put

1 Ruling: President Burgmann, *Hansard*, NSW Legislative Council, 31 August 2000, p 8551.
2 Ruling: President Burgmann, *Hansard*, NSW Legislative Council, 2 November 2000, p 9589; Ruling: President Harwin, *Hansard,* NSW Legislative Council, 22 October 2013, p 24339; Ruling: President Harwin, *Hansard,* NSW Legislative Council, 18 March 2014, p 27317; Ruling: President Harwin, *Hansard,* NSW Legislative Council, 6 May 2014, p 28135.
3 Ruling: President Harwin, *Hansard*, NSW Legislative Council, 10 September 2014, p 127.
4 Ruling: President Burgmann, *Hansard*, NSW Legislative Council, 26 May 2005, p 16222; Ruling: President Harwin, *Hansard*, NSW Legislative Council, 2 April 2012, p 10286.
5 Ruling: President Harwin, *Hansard*, NSW Legislative Council, 2 April 2012, p 10286.

to the Chair of a committee in regard to an inquiry on which the committee has not yet reported if the question relates to the administrative operations of the committee.[6]

Under SO 64(4), during Question Time, members may ask a supplementary question of a minister at the discretion of the President. Supplementary questions must be asked immediately after the minister has concluded his or her answer to the original question. Presidents' rulings have articulated that supplementary questions must seek to elucidate a matter canvassed during the answer, and may not be used for the purpose of asking a new question or simply restating the original question.[7] The President has also ruled that a supplementary question may not be asked of a minister who has taken a question on notice.[8]

In 2015, the President informed the House that in view of his concern that supplementary questions were being used for the purposes of extending lengthy answers to Dorothy Dixers by members asking that a question be 'generally elucidated', he intended to ensure that supplementary questions clearly requested an elucidation of a particular aspect of the minister's answer to the original question. The President also advised that in order to prevent members from taking points of order merely to prevent members completing their questions and answers within the timeframes set by the standing orders, he would order that the clock be stopped when a point of order was taken during a question or answer. The clock would resume once debate on the point of order had concluded and the President had ruled on the matter.[9]

SO 64(5) and (6) outline the time limits that apply to questions and answers. Both substantive questions and supplementary questions may not exceed one minute. Answers may not exceed four minutes, and ministers may seek leave to extend the time for an answer by one minute. Answers to supplementary questions may not exceed two minutes.

Background

Provision for an official question time was first made in 1984. In the years prior to 1984, questions were published in the list of general business at the back of the minutes under 'Notices of Motions and Orders of the Day', therefore Question Time commenced according to practice at the point in the day at which questions were reached in the order of business listed for that day (usually after notices),[10] although in the earlier years

6 Ruling: President Willis, *Hansard*, NSW Legislative Council, 30 May 1996, p 1776; Ruling: President Primrose, *Hansard*, NSW Legislative Council, 29 October 2009, pp 18949-18950.

7 For example, Ruling: President Fazio, *Hansard*, NSW Legislative Council, 8 June 2010, p 23816; Ruling: President Willis, *Hansard*, NSW Legislative Council, 23 June 1997, p 10909; Ruling: President Primrose, *Hansard*, NSW Legislative Council, 17 June 2008, p 8411; Ruling: President Harwin, *Hansard*, NSW Legislative Council, 16 October 2014, p 1264.

8 Ruling: President Harwin, *Hansard*, NSW Legislative Council, 26 June 2013, p 22017.

9 Ruling: President Harwin, *Hansard*, NSW Legislative Council, 12 May 2015, p 338.

10 See, for example, *Minutes*, NSW Legislative Council, 25 September 1979, p 85; 16 August 1984, p 39.

of the Council it was commonplace for members to ask questions of ministers during the debate on the motion to adjourn the House.[11]

From August 1984, the House adopted a sessional order appointing a time at which business would be interrupted for Questions each sitting day, but did not adopt any other rules to apply to questions without notice.[12] The sessional order was not debated, but it is understood that the new rule was prompted by the desire of the then Leader of the Government for Council Question Time to commence after the Assembly's Question Time. The sessional order also followed the House agreeing to publish written questions, on notice, on a separate Questions and Answers Paper in place of the Notice Paper.[13] The background to the adoption of a Question Time is discussed further under SOs 47 and 49, and the practice for questions on notice under SOs 65 to 67.

The rules applied by SO 64 were first adopted as a sessional order in 2001 on the motion of the Leader of the Opposition, in almost the exact terms of SOs 64 and 65.[14] The sessional order applied time limits to questions and answers for the first time, made provision for supplementary questions, and formalised the types of matters that may be the subject of questions asked and the members to whom questions could be directed. The adoption of the sessional order followed concerted but unsuccessful attempts by members of the record 13-member crossbench since their election in 1999 to require that a minimum number of questions be answered during Question Time. The attempts had been met with refusal by both the major parties.[15]

In speaking to the motion, the Leader of the Opposition stated that the rules for the content of questions, including a requirement for answers to be relevant to the question asked, reflected practice in the Senate and House of Representatives.[16] Mr Jobling, an Opposition member, moved that the question be amended to insert provision for a minister to seek leave to extend the time for an answer by one minute, reasoning that 'in the rare event of a relevant and important answer, we will hear the whole lot'.[17] This amendment, later agreed to, has since been incorporated in SO 64(5).

Members speaking for the Government suggested that the spurious points of order that could arise following the introduction of the new rules for content could lead

11 See, for example, *Hansard*, NSW Legislative Council, 6 October 1915, pp 2369-2370; 8 March 1927, p 2064; 2 May 1950, pp 6351-6353.

12 *Minutes*, NSW Legislative Council, 16 August 1984, p 36. See discussion under SO 47 for subsequent variations made to this sessional order since 1984.

13 *Minutes*, NSW Legislative Council, 15 August 1984, p 27.

14 There are only two differences between the original sessional order moved and the current standing orders. The provision for a minister to seek leave to extend the time for an answer by one minute under SO 64 (5) was adopted as an amendment to the Leader of the Opposition's question during debate that same day. The rule that questions may anticipate 'an order of the day relating to the budget estimates' under SO 65(4) was first adopted in the 2004 rewrite of the standing orders.

15 Statements made by Mr Richard Jones, *Hansard*, NSW Legislative Council, 12 May 1999, pp 61-62.

16 *Hansard*, NSW Legislative Council, 30 May 2001, pp 13898-13899.

17 *Hansard*, NSW Legislative Council, 30 May 2001, p 13899.

to a 'procedural nightmare', while other members argued that the rules may address the recent deterioration of Question Time and the tendency for ministers to resort to unwarranted abuse of both members and Question Time in general. It was also hoped that the additional rules would enhance the accountability and scrutiny function of Questions in the Council as the House of Review (although Mrs Sham-Ho, a crossbench member and former member of the Opposition, stated that many of the new rules were already standard practice in the Council).[18]

Earlier that day, during debate on a related sessional order concerning the time for Questions (now SO 47), the Leader of the Government had stated that the new time limits proposed by the Leader of the Opposition would reduce the number of questions asked, as ministers would be at liberty to give lengthy four minute answers to each question under the new provisions.[19] The Leader of the Opposition had refuted this suggestion, stating that while ministers *could* give an answer of four minutes, it would be highly unlikely they would need to do so for each question. Should ministers employ the tactic simply to fill the hour allotted to Question Time the opposition and crossbench would simply further amend the rules for Questions (the opposition and crossbench having a majority in the House).[20]

During debate on the Leader of the Opposition's motion, Mr Jones, a crossbench member, reiterated the possibility that four-minute replies would lead to a reduction in the number of questions asked. The member moved that the paragraph prohibiting a statement or announcement of Government policy be omitted, stating that it had been put to the Crossbenchers privately that the Government would be happy to have a minimum number of questions, and he desired further opportunity to discuss the new procedures with the Government and the Opposition before coming to a position.[21]

The Leader of the Government, contrary to his earlier observations, moved an amendment to provide that the new rules be incorporated into the standing orders, rather than operate as sessional orders for a limited period. The Leader of the Government stated that it was his belief that, under the new rules, there were 'not too many questions I have heard from [the opposition and crossbench] that they will be allowed to ask again'.[22]

The amendments proposed by Mr Jones and the Leader of the Government were ultimately negatived, and the motion, as amended by Mr Jobling, was agreed to on voices.[23] The sessional order was readopted each session[24] until incorporated in the 2004 rewrite of the standing orders as SOs 64 and 65.

18 *Hansard*, NSW Legislative Council, 30 May 2001, pp 13912-13914.
19 *Hansard*, NSW Legislative Council, 30 May 2001, p 13894.
20 *Hansard*, NSW Legislative Council, 30 May 2001, p 13895.
21 *Hansard*, NSW Legislative Council, 30 May 2001, p 13913.
22 *Hansard*, NSW Legislative Council, 30 May 2001, p 13920.
23 *Minutes*, NSW Legislative Council, 30 May 2001, pp 985-986.
24 *Minutes*, NSW Legislative Council, 12 March 2002, pp 42-43; 30 April 2003, pp 43-44.

65. RULES FOR QUESTIONS

(1) Questions must not contain:

(a) statements of fact or names of persons unless they are strictly necessary to render the question intelligible and can be authenticated,

(b) arguments,

(c) inferences,

(d) imputations,

(e) epithets,

(f) ironical expressions, or

(g) hypothetical matter.

(2) Questions must not ask:

(a) for an expression of opinion,

(b) for a statement or announcement of the government's policy, or

(c) for a legal opinion.

(3) Questions must not refer to:

(a) debates in the current session, or

(b) proceedings in committee not yet reported to the House.

(4) Questions must not anticipate discussion upon an order of the day or other matter on the Notice Paper, except an item of private members' business outside the order of precedence or an order of the day relating to the budget estimates.

(5) An answer must be relevant to a question.

(6) In answering a question a member must not debate the question.

(7) The President may direct that the language of a question be changed if it is unbecoming or not in conformity with these rules.

Development summary		
1895	Standing order 30 Standing order 31	Questions not to involve argument or opinion No debate allowed in answering
2001-2003	Sessional order	Questions without notice (Rules for questions)
2003	Sessional order 65	Rules for Questions
2004	Standing order 65	Rules for Questions

The rules for questions apply to both questions without notice asked during Question Time and to questions on notice published in the Questions and Answers Paper (SO 67(2)). However, the rules are sometimes applied less stringently to questions asked during Question Time in view of the rough and tumble nature of debate characteristic of Question Time in the Council and in other Westminster jurisdictions.

Operation

The rules that apply to questions under SO 65 seek to ensure that questions are targeted to the relevant minister and that Question Time proceeds in an orderly manner consistent with the rules of debate and general practice. The comprehensive rules set out under SO 65 are frequently the subject of points of order during Question Time and rulings by the President.[25] SO 67(2) provides that the rules apply equally to written questions on notice, which are reviewed by the Clerk on behalf of the President, before publication. Under SO 65(7), the President may direct that the language of a question be changed if it is unbecoming or not in conformity with these rules, and on occasion the President has ruled that a member reframe a question in Question Time. Written questions have been amended prior to publication and usually following consultation with the member who submitted them.

In contrast, the rules regarding answers are simple – an answer must be relevant to a question, and in answering a question a member must not debate the question (SO 65(5) and (6)). Nevertheless, Presidents have consistently ruled that a minister may answer in any way they deem fit. Rulings of the President have also clarified that the Chair cannot direct a minister to answer a question, or how to answer a question, and a minister is free to decline to answer a question.[26] While other Australian jurisdictions such as the Australian House of Representatives,[27] the Senate,[28] the Northern Territory Legislative Assembly[29] and the ACT Legislative Assembly[30] have experimented with a more stringent or literal interpretation to the provision by requiring a minister to be 'directly relevant to the question' when answering, the Council has not adopted such

25 Legislative Council, *Selected Rulings of the President*¸ August 1975 to December 2014, pp 99-105.

26 Ruling: President Johnson, *Hansard*, NSW Legislative Council, 20 October 1988, p 2704; Ruling: President Johnson, *Hansard*, NSW Legislative Council, 11 April 1989, p 6103; Ruling: President Burgmann, *Hansard*, NSW Legislative Council, 7 June 2001, p 14588; Ruling: President Primrose, *Hansard*, NSW Legislative Council, 11 March 2009, p 13229; Ruling: President Harwin, *Hansard*, NSW Legislative Council, 11 November 2011, p 7423; Ruling: President Harwin, *Hansard*, NSW Legislative Council, 13 June 2012, p 12654.

27 The provision for direct relevance arose as a result of an agreement made between the major parties and non-aligned members of the House of Representatives following the 2010 general election. Other provisions adopted for the purposes of enhancing Question Time included imposition of time limits, limiting the duration of Question Time and allowing for only one point of order on relevance for each question.

28 The provision for direct relevance was first discussed in the Australian Senate following the Procedure Committee's *First Report of 2008*, dated 16 September 2008, which considered a proposal initiated by President Ferguson to restructure Question Time. The final trial proposal was adopted following a subsequent report (Procedure Committee, Australian Senate, *Third report of 2008* (12 November 2008) on 13 November 2008 (*Journal of the Senate*, 13 November 2008, p 1206), and the procedure has been readopted since then.

29 A provision that answers be 'succinct, concise and directly relevant to the question' was inserted into the standing orders following a report of the Standing Orders Committee in 2009.

30 The ACT Legislative Assembly amended their standing orders in 2007 to require that answers be directly relevant to the question asked under an agreement made between Labor and The Greens that enabled Labor to form a minority government.

an approach to date, though the matter was considered by the Procedure Committee in 2011[31] and 2014.[32]

Background

From 1856 to 1895, the standing orders provided that members may ask questions of other members on notice, however Presidents' rulings provided the only guidance as to the rules that applied to questions and answers.[33]

In 1895, the House adopted new standing orders that formalised several key rules for questions, prohibiting argument and opinion (1895 SO 30), and prohibiting members and ministers from debating the matter to which the question referred (1895 SO 31).

The current rules for questions and answers find their origins in the standing orders of both Houses of the Commonwealth Parliament. The comprehensive rules that apply today were first adopted on 30 May 2001, on the motion of the Leader of the Opposition, who sought to ensure that practice in the Council was brought into line with that operating in the Senate and the House of Representatives (see detailed discussion under SO 64).[34]

The sessional order was readopted each session[35] until the 2003 rewrite of the standing orders, when the provisions were incorporated under new SOs 64 and 65, with the exception of SO 65(4) – the prohibition on questions that anticipate discussion upon 'an order of the day relating to the budget estimates' was first adopted in the 2004 rewrite of the standing orders.

66. ANSWERS TO QUESTIONS WITHOUT NOTICE

(1) When a Minister refers a question to a Minister in the other place, the Minister must provide the answer to the House within 35 calendar days after the question was first asked.

(2) (a) If an answer to a question without notice is not provided within 35 calendar days, the President is to inform the House on the next sitting day of the details of any question not answered. The relevant Minister must immediately explain to the House the reason for non-compliance.

(b) Unless an answer to a question without notice not provided within 35 calendar days, but provided before the next sitting day, is accompanied by an explanation of the reasons for the late provision

31 See Procedure Committee, NSW Legislative Council, *Report relating to private members' business, the sitting pattern, Question Time and petitions*, Report No. 6 (November 2011).

32 *Minutes,* NSW Legislative Council, 15 October 2014, p 143. The matter was referred but the committee did not report prior to prorogation.

33 See *Rulings of the Presidents of the Legislative Council since 22 May 1856*, pp 326-333.

34 *Hansard,* NSW Legislative Council, 30 May 2001, pp 13898-13899.

35 *Minutes,* NSW Legislative Council, 12 March 2002, pp 42-43; 30 April 2003 pp 43-44.

of the answer, the late provision of the answer will be reported to the House by the President, in accordance with paragraph (a).

(3) If, after explanation in the House, the Minister has not provided an answer within three sitting days, the President is to again inform the House and the Minister will again be called to explain. This procedure is to continue until an answer is provided.

(4) The reply to a question without notice may be delivered to the Clerk when the House is not sitting.

(5) When a reply to a question without notice is received by the Clerk, it is for all purposes deemed to be a document published by order or under the authority of the House.

(6) On any prorogation of the House, answers to questions without notice delivered to the Clerk since the last sitting of the House, are to be printed and circulated.

Development summary		
1895	Standing order 32	Questions without notice
1996–2003	Sessional order	Answers to questions without notice
2003	Sessional order 66	Answers to questions without notice
2004	Standing order 66	Answers to questions without notice

SO 66 applies rules where a ministers refers a question to a minister in the other House. Where a minister takes a question asked during Question Time on notice, the minister must provide the answer within 35 days. The deadline applies regardless of whether the question was asked of the minister relating to his or her own portfolios, or those of a minister in the Legislative Assembly represented by that minister in the Council.

Operation

Ministers may be appointed from either House of Parliament. For this reason, for the purposes of questions, ministers in each House take questions relating both to their own portfolios, and to those of ministers in the other House whom they represent in the House of which they are a member.

Where a member asks a question of a minister that the minister is unable to answer immediately or fully during Question Time, the minister may choose to take the question 'on notice' – that is, they will provide an answer at a future time after consulting departmental advice. This most commonly occurs in relation to questions relating to the portfolio of an Assembly minister. Council ministers may also choose to take a question on notice relating to their own portfolio, particularly where the question necessitates a detailed or lengthy response.

When a question is directed to a minister in the other House, the Council minister is permitted 35 calendar days in which to provide a response (SO 66(1)). This process is

monitored by the Procedure Office, on behalf of the Clerk, which maintains a register of questions asked and answers received as a matter of courtesy (that is, the register has no official standing or authority – it is the prerogative of ministers and their staff to ensure that they take note of the questions a minister has taken on notice and that answers are duly provided).

Answers received to questions without notice are published in Hansard for that day or, if the House is not sitting, are received out of session by the Clerk and published in Hansard on the next sitting day, at the conclusion of the record of that day's proceedings in Question Time. When a reply to a question without notice is received by the Clerk out of session, it is for all purposes deemed to be a document published by order or under authority of the House and can be provided to members and the public (SO 66(4) and (5)).

If an answer is not received within 35 calendar days, the President is required to inform the House on the next sitting day. The relevant minister must immediately explain to the House the reason for non-compliance. If after explanation in the House the minister has not provided an answer within three sitting days, SO 66(3) requires that the President again inform the House and the minister be again called to explain. This procedure is to continue until an answer is provided. This has not occurred during the operation of the current standing orders.

If an answer that was not provided within 35 calendar days, but was provided before the next sitting day, is accompanied by an explanation of reasons for lateness, the late answer is not reported, and the explanation is published in Hansard alongside the answer to which it relates.[36] A late answer not accompanied by an explanation will be reported to the House by the President (SO 66(2)).

Under SO 66(6), on the prorogation of the House, the Clerk is required to published a Questions and Answers Paper containing answers to questions without notice delivered to the Clerk since the last sitting of the House. Any answers still outstanding at the time of prorogation are not required to be returned, however, where possible, ministers routinely make an effort to return answers prior to the date of prorogation.

Background

Prior to 1996, answers to questions taken on notice during Question Time for Legislative Assembly ministers were not subject to a deadline.

On 27 November 1996 the House, on the motion of the Leader of the Opposition, agreed to a sessional order providing that where questions are put without notice and the minister refers the question to a minister in the Legislative Assembly:

- the minister must provide the answer to the House within 35 calendar days after the question was first asked,

36 For example, *Hansard,* NSW Legislative Council, 24 May 2005, p 15925; 20 April 2010, p 21845.

- if an answer to a question without notice is not received within 35 calendar days, the President is to inform the House on the next sitting day the details of any question not answered. The relevant minister must immediately explain to the House the reason for non-compliance,
- if, after explanation in the House, the minister has not provided an answer within three sitting days, the President is to again inform the House and the minister will again be called to explain. This procedure is to continue until an answer is provided,
- during any adjournment of the House, replies to questions without notice may be delivered to the Clerk, and
- answers to questions without notice delivered to the Clerk are to be printed and circulated on any prorogation of the House.[37]

The rules replicated those agreed to for questions on notice, which the House first agreed to in May 1995 (see SO 67 – Written questions).[38]

The motion for the sessional order was moved by the Leader of the Opposition, who reasoned that the new rules were necessary because 'certain ministers in the other place treat this Chamber with contempt … Those remarks are not necessarily limited to the current Government'.[39]

The Government of the day opposed the motion, arguing that there was an absence of any tangible evidence of a problem, and the standing orders did not impose an obligation on ministers to provide an answer to questions.[40] Nevertheless, the motion was agreed to on voices with the support of the crossbench.

Following adoption of the sessional order, answers to questions without notice continued to be read in the House at the conclusion of Question Time, in keeping with the previous practice, or the receipt of answers was announced to the House and the text published in Hansard.

The sessional order was readopted each session[41] before being incorporated in the 2004 rewrite of the standing orders as new SO 66, in slightly amended terms. The principal change made was provision for answers to questions to be made public immediately following lodgment with the Clerk (SO 66(5)). This change enabled members to access answers during the adjournment of the House, which had previously not been possible.[42]

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37 *Minutes*, NSW Legislative Council, 27 November 1996, pp 505-506.

38 *Minutes*, NSW Legislative Council, 24 May 1995, p 34. See 'Questions on notice' for further commentary.

39 *Hansard*, NSW Legislative Council, 27 November 1996, p 6646.

40 *Hansard*, NSW Legislative Council, 27 November 1996, p 6647.

41 *Minutes*, NSW Legislative Council, 17 September 1997, p 42; 12 May 1999, p 49; 8 September 1999, p 30; 30 April 2003, p 45.

42 Explanatory Note, Deputy Clerk to the Standing Orders Committee, undated.

When first adopted as a trial sessional order in 2003, SO 66 did not contain paragraph (2)(b), relating to the provision of an explanation of reasons for a late answer. In May 2004, the Procedure Committee published its second report on the proposed new standing orders and recommended that the additional paragraph be incorporated. The committee also recommended a change in terminology for paragraph 66(6), to clarify that only those answers received since the last sitting of the House were required to be circulated by the Clerk on prorogation.[43]

The additional paragraphs were subsequently included in the standing order adopted in 2004.[44]

67. WRITTEN QUESTIONS

(1) Notices of questions, signed by a member, must be handed to one of the Clerks-at-the-Table during the sitting of the House.

(2) The rules for questions apply to written questions.

(3) The Clerk is to publish in a Questions and Answers Paper, printed and circulated to members, notices of questions in the order in which they are received.

(4) The reply to a question on notice may be delivered to the Clerk, whether or not the House is sitting, and is to be published in the Questions and Answers Paper.

(5) When a reply to a question on notice is received by the Clerk, it is for all purposes deemed to be a document published by order or under the authority of the House.

(6) Ministers must lodge answers to questions on notice within 35 calendar days after the question is first published.

(7) If an answer to a question on notice is not received within 35 calendar days, the President is to inform the House on the next sitting day the details of any question not answered. The relevant Minister must immediately explain to the House the reason for the non-compliance.

(8) If, after explanation in the House, the Minister has not submitted an answer within three sitting days, the President is to again inform the House and the Minister will again be called to explain. This procedure is to continue until a written answer is submitted.

(9) A Questions and Answers Paper is to be printed and circulated on any prorogation of the House.

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43 Procedure Committee, NSW Legislative Council, *Proposed New Standing Rules and Orders: Second Report*, Report No. 2 (May 2004), p iii. The committee did not discuss its motivations for recommending the change.

44 *Minutes*, NSW Legislative Council, 5 May 2004, p 676.

Development summary		
1856	Standing order 18	Questions to Members
1859	Standing order 20	Record of questions and ministerial answers
1870	Standing order 21 Standing order 22	Questions to Members Record of questions and ministerial answers
1895	Standing order 29	Answers to questions respecting public business
1922	Standing order 32A	Notice of questions
1984–1986	Sessional order	Questions and Answers Paper
1988–2003	Sessional order	Questions on notice
2003	Sessional order 67	Written questions
2004	Standing order 67	Written questions

Since 1984, the Clerk has published a Questions and Answers Paper containing all written questions lodged with the Clerks-at-the-Table during that day's sitting. Answers to questions on the Questions and Answers Paper are subject to the same 35-day deadline that applies to questions taken on notice during Question Time.

Operation

Notice of written questions must be signed by a member and handed to a Clerk-at-the-Table during the sitting of the House (SO 67(1)). Questions received that day are published on the Questions and Answers Paper at the conclusion of the sitting (SO 67(3)). Questions and answers can also be accessed on the Parliament's website.

The rules for questions without notice under SO 65 also apply to written questions published on the Questions and Answers Paper (SO 67(2)). In practice, the Clerk reviews questions received to ensure that the terms comply with the standing orders. On occasion, the terms of a question will be amended, usually in consultation with the member who lodged the question. Questions are also edited to apply standardised formatting practices across all House Papers.

Under SO 67(6), ministers have 35 calendar days in which to provide a response to a written question. This process is monitored by the Procedure Office, on behalf of the Clerk, which maintains a register of questions asked and answers received as a matter of courtesy (that is, as with questions without notice, the register maintained by the office has no official standing or authority – it is the prerogative of ministers and their staff to ensure that they take note of the questions directed to them on the Questions and Answers Paper and that answers have been provided within 35 days).

Answers received to questions on notice are published in the Questions and Answers Paper for that day or, if the House is not sitting, are received out of session by the Clerk and published on the Questions and Answers Paper for the next sitting day (SO 67(4)). When a reply to a question without notice is received by the Clerk out of session, it is for all purposes deemed to be a document published by order or under authority of the House and is available to members and the public (SO 67(5)). Answers are also published

on the Parliament's website on the date received and in recent years this has become the principle means by which members and other access answers.

If an answer is not received within 35 calendar days, the President is to inform the House on the next sitting day. The relevant minister must immediately explain to the House the reason for non-compliance (SO 67(7)). If, after explanation in the House, the minister has not provided an answer within three sitting days, SO 67(8) requires that the President again inform the House and the minister again be called to explain. This procedure is to continue until an answer is provided. This procedure is consistent with that which applies to answers to questions without notice (see SO 66).

Under SO 67(9), the Clerk is required to publish a Questions and Answers Paper containing all answers to questions on notice received by Clerk since the last sitting of the House. Any answers outstanding at the time of prorogation are not required to be returned, however, as noted under SO 66, where possible, ministers routinely make an effort to return answers owing prior to the date of prorogation.

Background

While the purpose of asking questions on notice has remained consistent since responsible government, the practice of asking questions has moved from a predominantly oral practice to a predominantly written practice, with the bulk of questions asked on notice and published each sitting day on the Questions and Answers Paper. While the number of questions asked during Question Time has been limited by the duration of Question Time and averages 20 questions per day in recent years, the number of questions asked on the Paper has ranged from 10 or fewer to numbers well into the hundreds.

In 1856, questions were asked on notice and called on in the order listed on the Notice Paper. However, no record was made of questions asked or answers received. In 1859, the House adopted a new standing order which required the Clerk to enter questions and answers given in the minutes, in response to a recommendation made by the Standing Orders Committee.[45] The committee's report was prompted by a debate on a motion moved by Mr Deas-Thomson to require that the Clerk record questions[46] put to members of the government, together with the answers provided, in the minutes. During debate, other members suggested that answers be provided in writing, and that all statements made by government representatives in the House be recorded. The matter was referred to the committee, which recommended that the new rule as originally proposed by Mr Thomson be adopted.[47] The decision to require questions and answers to be recorded was significant, as it varied the practice

45 *Minutes*, NSW Legislative Council, 27 January 1859, p 11.

46 Only those questions for which notice was given. A practice had emerged for questions to occasionally be put without notice, discussed further under SO 47.

47 *Journal of the Minutes of Proceedings of the Legislative Council,* 1859, p 63.

operating in the Imperial Parliament at the time.[48] The rule remained in this form for the 1870 redraft of the standing orders (SOs 21 and 22) and while the 1895 standing orders adopted the rule in revised terms, the provision remained essentially the same (1895 SO 29).[49]

In 1922, on the recommendation of the Standing Orders Committee, the House adopted new SO 32A, which required that questions be handed to the Clerk rather than given during the call for notices.[50] The new rule additionally required answers to be printed in the minutes.[51] During consideration of the report in committee of the whole, the Chair stated that the new rule had been recommended in order to bring Council procedures into line with those in the Legislative Assembly, the Federal Parliament and Westminster.[52]

While the number of questions on notice lodged by members varied from the 1930s to the 1970s, following reform of the Council to a democratically elected House in 1978 the number of questions without notice increased significantly.[53] The rise in the number of written questions and resulting answers which were printed each day in the minutes prompted the need for publication of questions on notice and answers in a separate paper.

From 1984, questions on notice and the answers given were published in a separate Questions and Answers Paper. The motion establishing the new procedure provided that signed notice of questions would continue to be handed to the Clerks-at-the-Table during the sitting of the House, and the Clerk would enter the questions onto the paper in the order in which they were received. Answers to questions would also be delivered to the Clerk and be published in the paper.[54] In speaking to his motion, the Leader of the House said that the amendment would bring the Council's procedures into line with those of the Assembly. The Leader of the Opposition stated his support for the motion, observing that:

> … under the previous Leader of the House there was an unfortunate tendency for replies to be made privately to members who put questions on a notice paper, thus depriving them of an opportunity to have their answers made public and precluding the answers from attracting parliamentary privilege.[55]

48 *Sydney Morning Herald*, 14 January 1859, p 4.

49 For example, *Minutes*, NSW Legislative Council, 29 November 1871, p 15; 10 June 1896, p 25; 5 September 1923, p 21; 5 September 1923, p 22; 29 September 1983, p 248.

50 *Hansard*, NSW Legislative Council, 3 August 1922, p 797; *Minutes*, NSW Legislative Council, 3 August 1922, pp 36-37.

51 *Minutes*, NSW Legislative Council, 2 August 1922, pp 32-33.

52 *Minutes*, NSW Legislative Council, 3 August 1922, pp 36-37; *Hansard*, NSW Legislative Council, 3 August 1922, p 793.

53 For example, on the last sitting day of the 47th Parliament there were 110 questions on notice (*Minutes,* NSW Legislative Council, 1 March 1984, pp 706-713).

54 *Minutes*, NSW Legislative Council, 15 August 1984, pp 27-28.

55 *Hansard*, NSW Legislative Council, 15 August 1984, p 88.

The sessional order was readopted the following session,[56] but amended from 1988 to include two further provisions:

- during any adjournment of the House, replies to questions on notice may be delivered to the Clerk who shall cause a Questions and Answers Paper to be printed and circulated, and
- a Questions and Answers Paper shall be printed and circulated on any prorogation of the House.[57]

The sessional order was readopted in this amended form each session until 1995,[58] when the terms were again amended, on motion of the Government, to include a requirement for ministers to lodge answers within 35 calendar days and for the President to report a failure to answer within the timeframe to the House, now captured under SO 67(6) to (8).[59]

The sessional order continued to be adopted in this final form over subsequent sessions[60] before being incorporated in the 2004 rewrite of the standing orders, with the additional provision that 'the rules for questions apply to written questions' (SO 67(2)).

56 *Minutes*, NSW Legislative Council, 20 February 1986, p 26.
57 *Minutes*, NSW Legislative Council, 24 May 1988, p 53.
58 *Minutes*, NSW Legislative Council, 18 August 1988, p 26; 21 February 1991, p 25; 2 July 1991, p 18; 4 March 1992, p 23; 2 March 1993, p 25; 2 March 1994, p 30.
59 *Minutes*, NSW Legislative Council, 24 May 1995, p 34.
60 *Minutes*, NSW Legislative Council, 17 April 1996, p 29; 17 September 1997, p 38; 12 May 1999, p 45; 8 September 1999, p 26; 12 March 2002, p 36; 30 March 2003, p 43.

CHAPTER 12

PETITIONS

68. PRESENTATION OF PETITIONS

(1) A petition may only be presented to the House by a member.

(2) At the time provided a member may present a petition, including a petition for a private bill, or relating to a private bill before the House, on public or individual grievances, if it relates to a matter over which the House has jurisdiction.

(3) When presenting a petition, a member may state:

(a) the petitioners,
(b) the number of signatures,
(c) the subject matter of the petition, and
(d) the request for action.

(4) When presenting a petition, a member may move:

(a) "That the petition be received", and
(b) "That the petition be read by the Clerk".

(5) No amendment or debate may be made on questions relating to petitions.

(6) A member may not present a petition from that member.

(7) The member presenting a petition must sign it at the top of the first page.

(8) A petition may not be presented to the House once the House proceeds to the orders of the day, except by leave of the House.

(9) The Clerk must refer a copy of every petition which is received by the House to the Minister responsible for the administration of the matter the subject of the petition.

Development summary		
1856	Standing order 96	When presented
	Standing order 101	Member presenting
	Standing order 103	Mode of presenting
	Standing order 104	Question on presentation
1870	Standing order 108	When presented
	Standing order 113	Member presenting
	Standing order 115	Mode of presenting
	Standing order 116	Petitions may be read
	Standing order 117	Question on presentation
1895	Standing order 42	To be presented by member
	Standing order 43	From members
	Standing order 44	Member presenting, to affix his name
	Standing order 47	Mode of presenting
1935	Standing order 47A	Time of presenting
1986	Sessional order	Provision for referral of petitions to Executive
2003	Sessional order 68	Presentation of petitions
2004	Standing order 68	Presentation of petitions
2014–2015	Sessional order	Presentation of petitions

Standing order 68 lays out the rules for the presentation of petitions to the House. While many of the rules governing the presentation of petitions have operated since 1856, SO 68 incorporates a number of rules that had previously operated under separate standing and sessional orders prior to the 2004 revision of the standing orders. Since 2014, a sessional order has additionally required that ministers table a response to petitions signed by more than 500 signatures within 35 days of the petition being received.

In the early years of the Legislative Council, the vast majority of petitions related to support or opposition to particular public and private bills. In more recent years, the subject matter of petitions has broadened to general matters of public administration and social issues, although these often also relate to proposed legislation or other parliamentary business.

Operation

Rules for the presentation of petitions

A petition may only be presented to the House by a member (SO 68(1)). A member may not present a petition that they have signed (SO 68(6)), however, members and their staff often coordinate the collection of signatures to petitions related to matters about which they are concerned and on several occasions members have presented petitions

signed by other members of the Legislative Council.[1] Petitions have also been presented to the House by the President.[2] In the most recent instance, the President presented the petition from the Chair, while the motion that the petition be received was moved by another member.[3]

At the time provided for in the routine of business for each sitting day (see SO 38), a member may seek the call to present their petition, which must relate to a matter over which the House has jurisdiction (including private bills) (SO 68(2)). When presenting the petition, the member must state who the petitioners are (e.g. citizens of New South Wales), the number of signatories, a summary of the subject matter of the petition and the request made for action (SO 68(3)). The Procedure Office prepares the summary from which the member reads in order to ensure that the terms comply with the standing orders and usual forms of the House.

The member may not make a statement on presenting the petition, but may move either: 'That the petition be received', or 'That the petition be read by the Clerk' (SO 68(4)). Neither motion is open to amendment or debate (SO 68(5)).

The question 'that the petition be received' is moved as a matter of routine. In principle, although the House is no more obliged to receive a petition than a member is to present it, members generally take the view that in order to ensure that the views of their constituents are adequately represented, petitions should be presented and received regardless of members' personal views on the content of the petition. Nevertheless, the question on the receipt of a petition has occasionally been contested or negatived, usually on points of compliance with procedure or the standing orders. For example, in 1861 the House resolved not to receive a petition protesting the temper displayed by a District Court judge on the bench because the petition contained neither specific charge or specific prayer for inquiry.[4] On another occasion, the question was negatived following the President ruling that a petition contained offensive imputations on the judges of the Supreme Court.[5]

The House has on occasion resolved 'that the petition be read by the Clerk', however the provision has not been utilised in recent years.[6]

The member presenting a petition must sign it at the top of the first page to acknowledge that they have read the terms of the petition and take responsibility for its contents (SO 68(7)). This assures the House that the member has acquainted themselves with the contents of the petition, a requirement under SO 70(3) (Content of petitions).

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1 See, for example, *Minutes*, NSW Legislative Council, 29 August 2006, p 145; 12 May 2011, p 98; 21 May 2013, p 1710.

2 *Minutes*, NSW Legislative Council, 7 November 1968, p 176 (x2); 10 December 1968, p 288.

3 *Minutes*, NSW Legislative Council, 4 August 2011, p 304.

4 *Minutes*, NSW Legislative Council, 2 May 1861, p 157.

5 *Minutes*, NSW Legislative Council, 23 April 1858, p 17.

6 For example, *Minutes*, NSW Legislative Council, 1 October 1902, p 142; 15 October 1902, pp 147-148; 15 December 1932, p 190; 5 December 1978, p 96; 29 October 1986, p 414; 12 September 1991, p 113; 13 October 1992, p 293; 24 June 1998, p 580.

A petition may not be presented to the House once the House proceeds to the orders of the day, except by leave of the House (SO 68(8)).

Under SO 68(9), the Clerk must refer a copy of every petition received by the House to the minister responsible for the administration of the matter the subject of the petition. In 2014, the House agreed to a new sessional order which required that ministers must table a response to petitions signed by more than 500 signatures within 35 days of the petition being received.[7] The new rule was prompted by a similar rule adopted in the Legislative Assembly in 2009 (see Assembly SO 125), following which a number of ministers had sought to provide responses to petitions tabled in the Council. In the absence of a provision under which the Clerk could formally receive such responses, the new sessional order authorised the Clerk to table the response in the House, or receive the response out of session if the House is not sitting. The sessional order was readopted in the 56th Parliament.[8]

Irregular petitions

While there is no requirement that petitions be submitted to the Clerk before being presented to the House, it is customary for members to do so in order to ensure that the petition is in order. For this reason, petitions have not routinely been ruled out of order after presentation since the early years of the Council.[9]

Where a petition does not comply with the standing orders there is precedent for members to seek the leave of the House to present an 'irregular petition'. Between the late 1990s and 2010, members obtained the permission of the House to present an irregular petition by first seeking leave to move a motion to suspend standing orders and, if leave was granted, then moving a motion to suspend standing orders and present the petition.[10] However, in 2010, following an increase in the number of petitions that were ruled irregular in a technical sense (e.g. not being addressed to the President and members of the Legislative Council), to streamline the time-consuming two-pronged practice the President ruled that it would be sufficient for a member to obtain the leave of the House for the suspension of standing orders to present the petition.[11] Irregular petitions have continued to be presented on frequent basis since that time and in accordance with the new procedure.[12] Most irregular petitions presented since 2010 have been addressed to the Speaker and members of the Legislative Assembly, but have otherwise conformed with the requirements of the standing orders.[13]

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7 *Minutes*, NSW Legislative Council, 12 August 2014, p 2648.
8 *Minutes*, NSW Legislative Council, 6 May 2015, pp 59-60.
9 See detailed list of examples under SO 69.
10 See, for example, *Minutes*, NSW Legislative Council, 26 February 2008, pp 147-148; 31 August 2004, pp 952-953.
11 *Hansard*, NSW Legislative Council, 23 February 2010, p 20675.
12 See, for example, *Minutes*, NSW Legislative Council, 7 September 2010, pp 2026-2027; 13 November 2012, p 1351; 22 May 2013, p 1729.
13 For example, *Minutes*, NSW Legislative Council, 27 November 2013, p 2273; 4 March 2014, pp 2319-2321; 15 May 2014, p 2522.

Members intending to present an irregular petition are encouraged to consult with the other parties in the House prior to doing so to ensure that members have sufficient notice of the contents of the petition and are therefore more likely to grant leave to the member. In 2013, a minister took a point of order that leave to present a petition could not be granted if members had not seen the petition. Following members' contributions, the President advised that members could not assume leave would be granted for the presentation of irregular petitions, and it would be expected in future that members proposing to seek leave to present an irregular petition should do other members the courtesy of giving them notice of such action.[14]

In some cases, a petition may be deemed so irregular that it cannot be presented as a petition, such as where the petition contravenes more than one rule or where the irregularity is not merely technical. In these cases, the member may seek leave to table the petition under SO 54.[15]

Abstract of petitions

From 1856 to 2003, the standing orders required the Clerk to maintain an abstract of every petition received during the session, including the 'place from which it came' (i.e. origin of the signatories), the number of signatures, the name of the member presenting the petition, the day on which it was presented and a short abstract of the prayer. The standing orders also required the abstract to be printed and distributed among members.[16]

The abstract was produced as a 'sessional return', a summary document compiled by the Clerk and published in the bound volumes of the Journal of the Legislative Council for that session. Although the Journal contains a number of other sessional returns listing the progress of bills, orders and addresses for papers, committees established and the attendance of members, the abstract of petitions is the only sessional return for which specific requirement has been made under the standing orders. This requirement for the abstract was omitted from the 2004 standing orders, but the abstract continues to be produced and printed in the Journal.

Petitions and committees

Under the resolution establishing the standing committees, a committee may inquire into a report on any petition relevant to the functions of the committee which has been laid upon the Table of the Legislative Council.[17] While this provision has not been utilised in recent years, petitions were on occasion referred to committees in the early years of the Council, particularly where the petition related to a bill that had been referred to

14 *Minutes*, NSW Legislative Council, 27 November 2013, p 2273.

15 For example, *Minutes*, NSW Legislative Council, 22 April 2010, p 1761; 2 June 2010, p 1870; 2 September 2010, p 2013; 4 June 2015, p 190; 23 June 2016, p 1000.

16 1856 SO 105, 1895 SO 48. The SOs remained in the same terms across all years.

17 Paragraph 8(c), Resolution establishing the standing committees, *Minutes*, NSW Legislative Council, 6 May 2015, pp 62-65.

that committee.[18] The standing orders also make provisions for petitions for private bills to be referred to select committees for consideration – this process is discussed further under SOs 165 and 168.

Background and development

The first petition was presented to the Legislative Council on 22 August 1856, praying for the extension of the Sydney and Parramatta Railway to the District of Windsor. Since that time, petitions have been presented on a wide range of subjects, requesting the House to introduce or amend legislation, implement a new policy, inquire into a matter of governance or take a particular course of action with regards to a matter of public administration.

Presentation of petitions in the routine of business

The 1856 standing orders provided that 'no petition shall be presented, after the Council has proceeded to the orders of the day' (1856 SO 96), though in practice the House occasionally ignored this rule.[19] The provision continued to apply following the revision of 1870 (SO 108), until omitted from the 1895 revision, which took the form of the Legislative Assembly new standing order, with minor variation.[20] From this point, the routine of business in the Council was interchangeable, with papers presented before petitions some days,[21] and petitions presented before papers on others,[22] or even after the House had proceeded to orders of the day.[23] In 1935, the House adopted SO 47A which provided that petitions could not be presented after the House had proceeded to the orders of the day, except by the leave of the House obtained by question from the Chair without debate.[24] In 1988 a sessional order for the routine of business was adopted (for background, see SO 38). In 2004, the provision of the 1935 standing order was incorporated into the revised standing orders as SO 68(8), and the presentation of petitions in the routine of business was formalised (SO 38).

18 For example, *Minutes*, NSW Legislative Council, 22 August 1900, p 84; 28 August 1858, p 30.

19 See *Minutes*, NSW Legislative Council, 12 April 1888, p 153, where a petition was presented after the motion for adjournment of the House was moved and negatived.

20 While the Assembly adopted a standing order for the routine of business which made clear the time at which petitions (and notices) would be called on during formalities at the commencement of each day, the Council did not make provision for a routine of business until 1988 (see commentary under SO 38).

21 For example *Minutes*, NSW Legislative Council, 14 October 1896, p 161; 25 February 1930, p 172.

22 For example *Minutes*, NSW Legislative Council, 26 August 1896, p 89.

23 For example *Minutes*, NSW Legislative Council, 17 August 1916, p 40.

24 *Minutes*, NSW Legislative Council, 5 April 1935, p 353. The standing order was adopted together with new SO 54A which similarly prohibited the presentation of notices after the House had proceeded to the order of the day, except by consent, and a consequential amendment to 1895 SO 57 which regulated the consideration of formal business. The reasons for the adoption of the new rules were not canvassed in the House.

Rules for the presentation of petitions

Of the rules that directly relate to the presentation of petitions, two have been consistently applied since the adoption of the first standing orders in 1856:

- SO 68(7): a member presenting a petition must sign it at the top of the page[25]
- SO 68(3): when presenting a petition, a member may state the petitioners, the number of signatures, the subject matter and the request for action.[26]

Between 1856 and 1895, the latter provision applied in all cases except where the petition related to a private bill, as the rules for such petitions were governed by separate rules contained in the standing orders relating to private bills. However, from 2004 this was rectified so that the rules for petitions also relate to petitions for private bills (SO 68(2)).

In 1895, additional provisions were adopted in the same terms as those adopted by the Legislative Assembly in 1894:

- SO 42: a petition may only be presented to the House by a member.[27] This was incorporated into SO 68(1).
- SO 43: a member cannot present a petition from that member.[28] This was incorporated into SO 68(6).

Question on presentation of a petition

From 1856 to 1870, the standing orders provided only that, on the presentation of a petition, the question to be entertained by the Council would be 'that the petition be received'. However, when the standing orders were first revised by the Standing Orders Committee in 1870, the committee recommended two amendments:

- provision for a petition to be read by the Clerk, if required
- that the rule be amended to provide that no debate shall be allowed on the motion 'that the petition be received'.

The first amendment was agreed to as 1870 SO 116.[29]

The latter amendment was prompted by concerns that any debate on the motion 'that the petition be received' may enable matter in the petition that would otherwise be deemed objectionable and lead to the House voting 'no' to the question, being entered onto the public record. The President took issue with the proposed restriction on

25 1856 SO 101; 1870 SO 113; 1895 SO 44.
26 1856 SO 103; 1870 SO 115; 1895 SO 47.
27 1895 SO 42 reflects 1894 Assembly SO 92.
28 1895 SO 43 reflects 1894 Assembly SO 93.
29 *Minutes*, NSW Legislative Council, 10 November 1870, p 66; *Sydney Morning Herald,* 11 November 1870, p 2.

debate, arguing that there was no such rule in the House of Lords, and the right to petition might be neutralised if the House did not have the power to discuss petitions on their merits. The amendment was not agreed to and the standing order was ultimately adopted in its original form, in the terms of the 1856 standing order, as 1870 SO 117.

In 1895, SO 47 amalgamated, among other provisions, the two provisions of 1870 SOs 116 and 117 into one standing order:

> …the only Questions which shall be entertained by the House, on the presentation of any Petition, shall be "That the Petition be received", and "That the Petition be read by the Clerk", which Questions shall be decided without amendment or debate.

In doing so, the new standing order applied the prohibition on amendment or debate which had been omitted from the Committee's recommendations in 1870. This is likely due to the inclusion of the same terms in the Legislative Assembly's new standing orders.[30] These provisions were similarly carried over in the 2004 revision as SO 68(5).

Referral of petition to the Executive

The requirement for the Clerk to refer a copy of every petition received to the minister responsible for the administration of the matter the subject of the petition was first adopted as a sessional order in 1986, on the motion of the Leader of the Government.[31] The new rule was not debated, but was likely adopted in order to bring the Council's provisions into line with a new rule adopted in the Assembly in 1976,[32] which in turn had been drawn from the Australian House of Representatives.[33] The sessional order adopted by the Council was readopted in the same terms each session[34] until incorporated into the 2004 standing orders in slightly amended terms.

69. FORM OF PETITIONS

(1) A petition must be made in ink, and written, typewritten or printed without insertion or erasure.

(2) A petition must contain a request for action by the House or Parliament.

(3) A petition is to be in the English language where practicable, and if not, must be accompanied by a translation, in English, certified to be correct by the member who presents it.

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30 Assembly SO 98 adopted in 1874.

31 *Minutes*, NSW Legislative Council, 20 February 1986, p 26.

32 See Assembly SO99 adopted in 1976 and since renumbered to Assembly SO 125.

33 *Hansard*, NSW Legislative Assembly, 30 March 1976, p 4941.

34 *Minutes*, NSW Legislative Council, 24 May 1988, p 47; 18 August 1988, p 25; 22 February 1990, p 23; 21 February 1991, p 24; 2 July 1991, p 16; 4 March 1992, p 21; 2 March 1993, p 24; 2 March 1994, p 28; 24 May 1995, p 25; 17 April 1996, p 27; 17 September 1997, p 36; 12 May 1999, p 43; 8 September 1999, p 24; 12 March 2002, p 35; 30 April 2003, p 45.

(4) Signatures must be written on a page containing the petition, and must not be pasted or otherwise transferred to it. Additional signatures may be attached to the petition.

(5) A petition must be signed by the petitioners with their names. A petition may be signed by a person for another person in the case of incapacity. A person not able to write may make a mark in the presence of a witness, who must sign as a witness.

(6) Petitions of corporations must be made under their common seal.

(7) No letters, affidavits or other documents may be attached to a petition, except for a private bill.

Development summary		
1856	Standing order 98	Form of petition
	Standing order 99	Signatures
	Standing order 100	Documents &., appended
1870	Standing order 110	Form of petition
	Standing order 111	Signatures
	Standing order 112	Documents &., appended
1895	Standing order 33	Written, typewritten, printed or lithographed
	Standing order 34	Prayer
	Standing order 35	To be in English, and free from corrections
	Standing order 36	Signature to be on sheet which prayer is inscribed
	Standing order 37	Signatures to petition
	Standing order 38	From corporations
	Standing order 39	No documents to be attached – exception
2003	Sessional order 69	Form of petitions
2004	Standing order 69	Form of petitions

Standing orders 69 and 70 specify the form that petitions must take to be presented to the House. The rules regarding the form of petitions have been subject to minimal amendment since 1856, however, SO 69 incorporates a number of rules that previously operated under separate standing orders prior to 2004.

Operation

The rules set out under SO 69 are clear and comprehensive. As petitions that do not comply with SO 69 are ordinarily noted by the Clerk and referred back to the member concerned prior to presentation in the House, the President has not had occasion to rule a petition out of order following its presentation since the early years of the Council and points of order concerning the contents of petitions are rarely taken in the House. It is not uncommon for members to seek to present a petition that, for example, is written in pencil or has had words inserted or erased, or has had sheets of signatures attached which were not clearly provided in support of the terms of the petition. In such cases,

the Clerk will liaise with the member to determine whether the petition can be presented in another way (for example, as an irregular petition), or whether the petition is out of order. Where signatures are written in pencil, not clearly attached to the terms of the petition or reflect obviously fictitious identities, those signatures are not included in the final count.

However, in the early years of the Council, petitions were occasionally ruled out of order, sometimes on a day subsequent to the day on which the petition was presented.

- In 1861, the President advised that a petition presented at a previous sitting had been found to be in contravention of the standing orders because the signatures were not written on the petition itself, and the petition did not contain a prayer. Proceedings relating to the petition were rescinded and the petition withdrawn.[35] Similarly, in 1864 two petitions were withdrawn because they were found not to be in writing.[36]
- In 1862, signatures attached by proxy were ruled out of order.[37] This may not be the case today, as SO 69(69) provides that a petition may be signed by a person for another person, but only in the case of incapacity.
- In 1864, a member presented a petition from citizens who stated that their signatures had been obtained for another petition purporting to be for the repeal of the duty on tea and sugar, but which they had since been informed was a petition in favour of free trade, and praying that the House investigate the matter. Following debate, the petition was received.[38]
- In 1866, the President ruled that the question 'That the petition be received' could not be put because the sheet containing the prayer did not contain any signatures.[39] In 1870, a petition presented the previous day was returned to a member and the question on reception of the petition rescinded for the same reason.[40]
- In 1866 and 1900, points of order were taken as to the true identities of citizens who had signed petitions. In one case, the petition was withdrawn; in the other, the member declined to take responsibility for the veracity of the signature but the petition was nevertheless received.[41]

The rules have been applied and interpreted consistently and have varied in only limited areas (discussed below).

35 *Minutes*, NSW Legislative Council, 1 October 1861, p 21.
36 *Minutes*, NSW Legislative Council, 18 February 1864, p 139; 3 February 1864, p 115.
37 *Minutes*, NSW Legislative Council, 2 July 1862, p 21.
38 *Minutes*, NSW Legislative Council, 23 February 1864, p 141.
39 *Minutes*, NSW Legislative Council, 4 September 1866, p 39.
40 *Minutes*, NSW Legislative Council, 13 October 1870, p 20.
41 *Minutes*, NSW Legislative Council, 15 November 1866, p 99; 14 November 1900, p 5123.

Irregular petitions

With the introduction of a practice for the presentation of 'irregular petitions', the House has on occasion permitted, by leave, the presentation of petitions that in are in conflict with SO 69(2) as they do not contain a request for action by the House (see commentary under SO 68).

Signatories to petitions

Although SO 69(4) states that 'additional signatures may be attached to the petition', the provision is read in conjunction with the preceding sentence of that standing order which states that 'signatures must be written on a page containing the petition'. To this end, although additional pages containing signatures may be attached to a petition, it is necessary that any such subsequent page note the substance of the petition and particularly the prayer. This ensures both that persons signing their names to a petition are aware of the request to which their names will be attributed, and in turn ensures that members can be confident in their decision to allow the presentation of the petition to the House.

On occasion, members have attempted to present petitions that contain signatures that have been faxed or photocopied. As this directly contravenes the provision of SO 69(4), which requires that signatures be written on the original page containing the petition, those signatures are ruled out of order and are not included in the final count presented to the House.

Background and development

The rules regarding the form of petitions adopted under the first standing orders in 1856 made clear the standard requirements for petitions presented to the House:

- the prayer must be listed at the end of each petition (1856 SO 98)
- the petition must be signed, by at least one person, on the sheet containing the prayer (1856 SO 98)
- the petition must be in English, and in writing (1856 SO 99)
- the petition must be signed by the petitioners themselves either by their names or marks (1856 SO 99)
- no letter, affidavit or other document may be attached to the petition, unless the petition relates to a private bill (1856 SO 100).

Although the rules have developed since that time, they remain substantially the same.

The 1870 revision of the standing orders saw the continuation of the 1856 provisions, renumbered as SOs 110 to 112. The 1895 revision relied heavily on new terminology adopted in the Legislative Assembly's standing orders and while procedurally most

provisions remained substantially the same,[42] several new provisions were also adopted.

- In addition to the original requirement that a petition be in writing, new 1895 SO 33 provided that a petition could be typewritten, but no printed or lithographed petition could be received, reflecting new technology.[43]
- A petition must be free from interlineations or erasures (1895 SO 35).[44]
- In addition to the original requirement that petitions be signed by the petitioners themselves with their names or marks, 1895 SO 37 required that such names and marks be made only 'by themselves, and by no one else, except in cases of incapacity from sickness'. The standing order also required that every signature be written on the sheets bearing or attached to the petition itself, and not pasted on or otherwise transferred to the petition, and that 'all petitions shall be received only as the petitions of the parties signing the same.'[45]
- Petitions of corporations aggregate must be made under their common seal (1895 SO 38).[46]

Between 1895 and 2003 the provisions relating to the form of petitions were amended only once, in 1922.[47] The Standing Orders Committee[48] had recommended that the text of SO 33 be rescinded and replaced with new text to provide that, in addition to petitions that were written or typewritten, printed or lithographed[49] petitions also be received, but petitions written in pencil be prohibited.[50] During consideration of the report in committee of the whole, the Chair stated that the committee was of the view that it was commonsense that if written and typewritten petitions were accepted, it would

42 1895 SO 34 (the prayer must be listed at the end of each petition) replicated Assembly 1894 SO 82, and also carried over the terms of original 1856 SO 98. 1895 SO 35 (a petition must be in English) carried over the terms of original 1856 SO 99. 1895 SO 36 (the petition must be signed by at least one person on the sheet containing the prayer) replicated Assembly 1894 SO 84, and also carried over the terms of original 1856 SO 98. 1895 SO 39 (no letter, affidavit or other document shall be attached to any petition unless the petition relates to a private bill) replicated the terms of original 1856 SO 100. The prohibition on attachments applied by way of adopting the terms of Assembly 1894 SO 89, however the Assembly additionally provided that in the cases of private bills, Gazettes and newspapers containing the necessary advertisements may be attached, with a copy of the bill.

43 1895 SO 33 replicated Assembly 1894 SO 81.

44 1895 SO 35 replicated Assembly 1894 SO 83, however the requirement for a petition to be in English replicated Council 1856 SO 99.

45 1895 SO 37 replicated Assembly 1894 SOs 85, 86 and 87.

46 1895 SO 38 replicated Assembly 1894 SO 88.

47 An inquiry into the presentation of printed petitions had earlier been referred to the Standing Orders Committee in 1915, and was then followed by the referral of all of the standing orders the following sitting day, however the committee did not report prior to prorogation (*Minutes*, NSW Legislative Council, 15 July 1915, p 32; 21 July 1915, p 34).

48 The report did not follow a reference from the House. However the report may have been the delayed product of the 1915 referral noted above.

49 Lithography was a cheap means of copying and printing.

50 *Minutes,* NSW Legislative Council, 2 August 1922, p 33.

not be justifiable to reject a petition because it was printed or lithographed. However, it would not be proper to permit a petition written in pencil.[51] The provision was also likely prompted by a referral to the Standing Orders Committee on the same topic in 1915, on which the committee did not report prior to prorogation.[52]

The 2004 revision of the standing orders incorporated the provisions of 1895 SOs 33 to 39 into SO 69. Other than the application of plain English and gender neutral language similarly applied to all of the new standing orders, the provisions remained substantially the same with only minor amendment:

- reference to lithographed petitions and those written in pencil was omitted, reflecting technological advancements (SO 69(1)),
- the former requirement that a petition contain the 'prayer' of the petitioners was amended to make reference to the 'request' of the petition, reflecting modern parlance (SO 69 (2))
- a petition not written in the English language was to be accompanied by a translation, in English, certified to be correct by the member presenting it (SO 69(3))
- additional signatures could be attached to a petition (SO 69(4))
- persons who are unable to write and instead make a mark could do so in the presence of a witness, who must sign as a witness (SO 69(5)).

70. CONTENT OF PETITIONS

(1) No reference may be made in a petition to any debate in Parliament of the same session, unless it is relevant to the petition.

(2) A petition must be respectful, decorous and temperate in its language, and must not contain language disrespectful to the Parliament.

(3) A member presenting a petition must be acquainted with its contents, and take care that it is in conformity with the rules and orders of the House.

(4) A petition must not request, either directly or indirectly, a grant of public money.

51 *Hansard*, NSW Legislative Council, 3 August 1922, p 793. The proposed new standing order was agreed to without further debate or amendment (*Minutes,* NSW Legislative Council, 3 August 1922, pp 36-37). The amendment to the standing orders did not follow similar amendment in the Legislative Assembly, as the Assembly's standing orders specifically banned printed and lithographed petitions until 1976 (see Assembly 1976 SO 81).

52 *Minutes,* NSW Legislative Council, 15 July 1915, p 32.

Development summary		
1856	Standing order 97	Contents of petitions
	Standing order 102	The like; duty of
1870	Standing order 109	Contents of petitions
	Standing order 114	The like; duty of
1895	Standing order 40	No reference to debates
	Standing order 41	Language of
	Standing order 45	Member to see that rules are observed
	Standing order 46	Not to pray for public money
2003	Sessional order 70	Content of petitions
2004	Standing order 70	Content of petitions

SOs 69 and 70 cumulatively apply the rules guiding the form and content of petitions. Like the other standing orders governing petitions, the provisions of SO 70 have applied since 1856, varying in limited respects, and the standing order combines several rules that were contained in separate standing orders prior to 2004.

Operation

Under SO 70(1), no reference may be made in a petition to any debate in Parliament of the same session, unless it is relevant to the petition. In practice, this exemption is not routinely exercised as petitions rarely make reference to debates of either House, being more likely to make reference to public debate and issues canvassed in the media. However, on 19 August 1988, during the presentation of a petition concerning the right to life, a member had stated that the petition contained a prayer that members support a motion moved by her and previously passed by the House. The wording of the petition itself requested that members support the motion 'currently before the House'. The President ruled that, as the House had agreed to the motion the previous session, the petition was out of order. The President directed that no entry regarding the petition be shown in the records of the House.[53] Similarly, in 2006, petitions relating to the Anti-Discrimination Amendment (Religious Tolerance) Bill 2005 were returned by the Clerk to the member who had sought to present them because the bill to which the petition related had been negatived that session.

SO 70(2) states that a petition must be respectful, decorous and temperate in its language, and must not contain language disrespectful to the Parliament. This ensures that petitions presented by members conform with the same general rules for debate that apply in the House, set out under SO 91. Rules regarding the language of petitions are rarely tested by members of the Council or by the community members who lodge the petitions, though it is not uncommon for petitions to contain emotive language. The records of the House suggest that the language of a petition has been contested by members on only two occasions.

53 *Minutes*, NSW Legislative Council, 17 August 1988, p 32.

In 1858, the President ruled that the contents of a petition contained offensive imputations on the judges of the Supreme Court. The question 'that the petition be received' was negatived and the member withdrew the petition. Following a successful move by another member to have the vote against receipt of the petition rescinded on a subsequent day, the member later attempted to present the same petition again, but was met with refusal when the Clerk was asked to read the contents of the petition to the House.[54]

In 1915, the President announced that he had been informed that four petitions presented at a previous sitting had not been 'couched in the language which it is customary to employ'. The prayer of the petitions included the word 'beg' rather than 'pray', and the President ruled the petitions out of order. On a question of privilege being raised that the wording of the prayer *did* accord with the requirements of the standing orders, the President ruled that the technicality was an unimportant one and the petitions could be received. However, if the House received the petitions, the word 'beg' would be considered as having exactly the same meaning as the word 'pray', with the effect that the House would be broadening the interpretation of the standing orders and broadening, rather than narrowing, the opportunity of petitioning. The petitions were presented again and, on motion, received.[55] Changes to the requirements concerning requests made by petitions are discussed further under SO 69.

Under SO 70(3), a member presenting a petition must be acquainted with its contents and take care that it is in conformity with the rules and orders of the House. In order to assure the House that the member has fulfilled the requirements of this provision, under SO 68(7) the member presenting a petition must sign it at the top of the first page.

Under SO 70(4), a petition must not request, either directly or indirectly, a grant of public money. This rule is applied in a very literal sense. Petitions that have not directly requested funds but have sought to ensure that adequate funding is directed to a community program,[56] request that legislation be passed that will restore funding to TAFE to that of previous levels,[57] request increased funding for public libraries[58] and reconsider funding cuts to a visitors' centre[59] have been received.

In the early years of the Council, the prohibition on requests for grants of public money was used to call into question the powers of the House. In 1861, a member sought to present a petition on the Western Railway Extension which called for the House to grant to Bathurst mile for mile of railway, in keeping with other districts. A point order was taken that the petition should have been sent to the Legislative Assembly as it required the House to 'grant' money measures. The President ruled that the prayer contravened

54 *Minutes*, NSW Legislative Council, 23 April 1858, p 17; 30 April 1858, p 20; 7 May 1858, p 23; 12 May 1858, p 24.

55 *Minutes*, NSW Legislative Council, 26 August 1915, p 62.

56 *Minutes*, NSW Legislative Council, 20 November 2014, p 361.

57 *Minutes*, NSW Legislative Council, 19 June 2014, p 2614; 13 November 2014, p 293.

58 *Minutes*, NSW Legislative Council, 21 August 2013, p 1906; 27 May 2015, p 131.

59 *Minutes*, NSW Legislative Council, 27 February 2013, p 1493.

1856 SO 97 (which provided that a petition could not contain a prayer 'which it is not competent to entertain') and the petition was withdrawn.[60] The member sought to present the petition again the following week, but the petition was again ruled out of order and withdrawn.[61]

However, despite the ruling above, the prohibition on requests for public money relates not to a question of the powers of the Council but rather to a general principle that applies to both Houses of the Legislature. When the provision was first adopted in 1895, it replicated an equivalent provision already operating in the Legislative Assembly.[62]

Where the President is asked to rule on the admissibility of the content of a petition, the President will be guided by the same principles that guide all questions before the Presiding Officer. In particular, where there is any doubt as to interpretation of a rule or order, the President will lean towards a ruling which preserves or strengthens the powers of the House and the rights of all members rather than an interpretation that may weaken or lessen those powers and rights.

Background

The rules of SO 70 have applied consistently since 1856 either as a matter of practice or under the standing orders, however, the precise terms of some provisions have varied over time.

Under the 1856 SOs, the restriction on reference to debate was originally limited to any debate of the Council.[63] In 1895, the restriction was broadened to debate in either the Council or Assembly.[64] This reflected the terms of the new equivalent Assembly standing order which restricted reference to debate in 'Parliament'.[65]

The 2004 revision saw the adoption of the term 'Parliament' in lieu of reference to the two Houses and limited the restriction on debate to only those debates of the current session. The new standing order also provided an exemption to that rule in cases where reference to debate is 'relevant to the petition'. The reasons for the inclusion of the exemption are not a matter of record but the amendment was likely made to reflect the terms of the Senate's standing orders, which heavily influenced the 2004 revision.[66]

The requirement that a petition be respectful, decorous and temperate in its language and must not contain language disrespectful to the Parliament, under SO 70(2), has consistently applied since 1856, though the terms of the provision have varied slightly.

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60 *Minutes*, NSW Legislative Council, 30 October 1861, p 53.
61 *Minutes*, NSW Legislative Council, 6 November 1861, p 60.
62 Assembly 1894 SO 97.
63 1856 SO 97, readopted as 1870 SO 109.
64 1895 SO 40.
65 Assembly 1894 SO 90.
66 See Australian Senate SO 71.

The 1856 and 1870 standing orders made reference to 'offensive or intemperate language',[67] while the 1895 and 2004 standing orders refer to 'respectful, decorous and temperate language',[68] reflecting the terminology utilised by the Legislative Assembly.[69]

Under SO 70(3), a member presenting a petition must be acquainted with its contents and take care that it is in conformity with the rules and orders of the House. While the terms of the provision have varied slightly, the provision has applied since 1856.[70]

The prohibition against petitions containing a grant of public money (SO 70(4)) was adopted in 1895,[71] however, the records of the House suggest that the principle nevertheless applied prior to that date.[72] It is notable that although the Australian Senate's standing orders regarding the content of petitions, adopted in 1901, were taken from provisions operating in the Victorian and New South Wales Legislative Assemblies at the time, the Senate chose not to replicate the prohibition on requests for grants of public money.[73]

67 1856 SO 97, readopted as 1870 SO 109.

68 1895 SO 41 and SO 45, 2004 SO 70(2).

69 Assembly 1894 SO 91.

70 1856 SO 102, 1870 SO 114, 1895 SO 45.

71 1895 SO 46.

72 In 1861 a petition seeking compensation following the Lambing Flat riots was ruled out of order – see *Minutes*, NSW Legislative Council, 10 April 1861, p 6.

73 Rosemary Laing, *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009), p 258.

CHAPTER 13

NOTICES OF MOTIONS

71. GIVING OF NOTICES

(1) A member may give notice of a motion to initiate a subject for discussion by reading the notice of motion aloud, giving the Clerk at the table a signed written copy and stating the day proposed for moving the motion.

(2) Lengthy notices need not be read, provided a summary of the intent of the notice is indicated to the House.

(3) The Clerk will enter notices of motions on the Notice Paper in the order they are given.

(4) A member may give notice of a motion for any other member not present. The names of both members are placed on the notice.

(5) Only one general business notice of motion may be given by a member on each call from the Chair.

(6) A notice of motion must be given before the House proceeds to the business of the day as set out in the Notice Paper, except by leave of the House.

(7) A notice of motion may not be set down for a day later than four weeks from the day of giving notice.

(8) A notice which is contrary to these standing orders or practice will be amended before it appears on the Notice Paper.

Development summary		
1856	Standing order 27	Motions, how initiated
	Standing order 29	Notices, when given
1870	Standing order 37	Motions, how initiated
	Standing order 39	Notices, when given
1895	Standing order 49	To be Given in Writing
	Standing order 50	Given for an absent Member
	Standing order 51	Order on Business paper
	Standing order 52	Limitation of date for setting down
	Standing order 54	Unbecoming expressions

Development summary		
1935	Standing order 54A	Time of presenting
1992	Standing order 49	To be Given in Writing
2003	Sessional order 71	Giving of notices
2004	Standing order 71	Giving of notices

The majority of business initiated by members commences with a motion moved on notice given at a previous sitting. SO 71 regulates the form of notices of motions, how and when they are to be given and the order in which they are entered on the notice paper.

The rules contained in SO 71 consolidate a number of rules in previous standing orders.

Operation

Each sitting day, before the House proceeds to items of business on the notice paper, there is an opportunity for members to give notices of motions.

Under SO 71(6), after the House proceeds to business on the Notice Paper, notices of motions can only be given by leave. An exception to this rule is provided in SO 77 under which, if the President determines that a motion concerning a matter of privilege should have precedence under SO 77 the member may, at any time where there is no business before the House, give notice of motion to refer the matter to the Privileges Committee.

The President will first give the call to a minister, then the Leader of the Opposition and then alternate among the government, opposition and crossbench until all notices have been given. While ministers may give more than one notice on a call, private members may only give one. (SO 71(5)).

According to practice, shorter notices are usually read aloud while a summary is often provided for lengthy notices and members advise that copies of the written notice are available from the Clerk. The member will also state the day proposed for moving the notice, usually the next sitting day. Under SO 71(7), a notice may not be set down for a day later than four weeks ahead.

Under SO 71(4), a member may give notice of a motion for another member not present. The names of both members are placed on the Notice Paper.[1]

Under SO 71 (3), the Clerk enters notices on the Notice Paper in the order given and under the relevant category of business including business of the House, government business and private members' business.

There is no restriction on the number or length of notices that a member may give. In a report tabled on 21 June 2012,[2] the Procedure Committee noted that the number and

1 See, for example, *Notice Paper,* NSW Legislative Council, 20 October 1999, p 292.
2 *Minutes,* NSW Legislative Council, 21 June 2012, p 1093.

length of notices of motion in the Council had increased significantly over recent years and the length of notices had increased from approximately 100 words in length to some being more than 800 words in length. The committee also noted that there had been a change in the nature, form and number of notices being given in the Council, with a tendency for notices to contain argument, imputations and debating points, virtually amounting to an undelivered speech; to contain facts and detail which are impossible to verify; to relate to matters of a community and constituency nature, potentially trivialising the importance of resolutions of the House; or to contain matters of a trifling nature, thereby wasting the time and processes of the House. Ultimately the committee did not make any recommendations for changes to the standing orders, which remain as adopted.[3]

There is also no restriction on the number of notices on the Notice Paper relating to the same subject matter, or even appearing in identical terms.[4] Once one item is moved, it may not be possible for the other item to be considered if it breaches the same question rule (see SO 103).[5] In 1923, at the suggestion of the President, two notices of motions on the notice paper with the purpose of filling a vacancy on a University Senate, were moved at the same time and debated together. At the end of the debate, the questions were put in the order the items appeared on the Notice Paper. On the first question being negatived, the second question was put and passed.[6]

Under the authority of SO 71(8), notices of motions have been ordered to be amended before appearing on the Notice Paper, and on some occasions have been ruled out of order:

- a notice which infringed upon the principle of comity was out of order and an amended notice was published on the Notice Paper, which was also later ruled out of order[7]
- a notice containing offensive words was ordered to be amended[8]

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3 Procedure Committee, NSW Legislative Council, *Notices of motions* (June 2012).

4 See, for example, *Notice Paper,* NSW Legislative Council, 21 November 2013, p 7140 (three notices for leave to bring in a State Marriage Equality Bill); 27 November 2013, p 11398 (order of the day for Crimes Amendment (Zoe's Law) Bill 2013), p 11440 (order of the day for Crimes Amendment (Zoe's Law) Bill (No 2) 2013).

5 See, for example, *Notice Paper,* NSW Legislative Council, 19 March 2014, p 11720 (two notices for disallowance of Protection of the Environment Operations (General) Amendment (Native Forest Bio-material) Regulation 2013, on the first notice being moved the second was removed from the Notice Paper).

6 *Minutes,* NSW Legislative Council, 21 November 1923, p 90.

7 *Minutes,* NSW Legislative Council, 4 June 2008, p 631; *Hansard,* NSW Legislative Council, 4 June 2008, pp 8100-8101**;** *Minutes,* NSW Legislative Council, 5 June 2008, p 638; *Hansard,* NSW Legislative Council, 5 June 2008, p 8238-41**;** *Minutes,* NSW Legislative Council, 18 June 2008, p 670; *Hansard,* NSW Legislative Council, 18 June 2008, pp 8620-8621.

8 *Minutes,* NSW Legislative Council, 13 March 2013, pp 1521 and 1523; *Hansard,* NSW Legislative Council, 13 March 2013, pp 18435 and 18463-18464.

- a notice for leave to bring in a bill with a title deemed to be frivolous was amended before appearing on the Notice Paper[9]
- a notice of motion for leave to bring in a money bill was ruled out of order.[10]

There are also examples of the President directing the Clerk to remove notices due to related action taken by the House. For example, following the election of the Chair of Committees, a Government notice of motion for the appointment of a Chairman of Committees was removed from the Notice Paper.[11]

Delivering notices to the Clerk

There have been occasions on which the House has agreed to a resolution to allow members to give notices of motions by delivering a signed copy to the Clerks-at-the-Table. According to resolution, the notices given were entered on the Notice Paper in random order. The resolutions anticipated large numbers of lengthy notices likely to be given after the election recess and in response to the amount of time taken each sitting day for the giving of notices.[12]

A resolution of the House on 5 May 2015, the first sitting day of the 56th Parliament, allowed notices to be given by delivering a signed copy to the Clerks for that day and the following day.[13]

Expiration of private members' notices

In June 2011, the Procedure Committee recommended that notices of motions expire after 20 sitting days. Under a sessional order adopted later the same month, notices of motions outside the order of precedence that have remained on the Notice Paper for 20 sitting days without being moved are removed from the Notice Paper.[14] A report of the Procedure Committee of 23 November 2011 found that the sessional order appeared to have the desired effect of reducing the number of items on the Notice Paper, removing outdated notices and introducing a measure of renewal to the paper. The sessional order has been adopted each session since.[15] In 2006, a proposal for a sessional order for notices to expire 30 sitting days after being given was briefly

9 *Minutes,* NSW Legislative Council, 5 March 2014, p 2332; *Hansard,* NSW Legislative Council, 5 March 2014, p 27017.

10 *Minutes,* NSW Legislative Council, 28 June 2007, p 204; *Hansard,* NSW Legislative Council, 28 June 2007, p 2046.

11 *Minutes,* NSW Legislative Council, 30 April 2003, p 49; *Hansard,* NSW Legislative Council, 30 April 2003, p 64; see also *Minutes,* NSW Legislative Council, 26 June 1990 p 330; 16 August 1990, p 359.

12 *Minutes,* NSW Legislative Council, 12 March 2002, p 33; 30 April 2003, p 38.

13 *Minutes,* NSW Legislative Council, 5 May 2015, p 7.

14 *Minutes* NSW Legislative Council, 21 June 2011, p 232.

15 *Minutes,* NSW Legislative Council, 9 September 2014, p 10; 6 May 2015, p 58.

considered by the House before the order of the day for resumption of debate was discharged from the notice paper.[16]

Private members' business is dealt with in SOs 183-189.

Debate on notices of motions

A notice of motion may not be debated when given, except in regard to the day on which the motion is proposed to be moved. This rule was adopted in the standing orders of 1856 and 1870 but omitted from later standing orders. However, Presidents' rulings have continued to enforce this practice.[17]

Background and development

The rules contained in SO 71(1) and (2) have their origin in SO 49 of 1895 as amended in 1992. Originally, SO 49 provided that a notice was to be read aloud. SO 49 was amended in 1922 on the recommendation of the Standing Orders Committee to provide that notices of a lengthy nature need not be read. During consideration of the committee's report in committee of the whole, the inconvenience to members of having to read out very lengthy notices of motions was noted and referred to an occasion on which a very lengthy notice of four pages had been read.[18]

The precursors to SO 49 were SO 37 of 1870 and SO 27 of 1856. SO 37 of 1870 amended the earlier provision to provide that the motion for the adjournment of the House was not subject to the requirement for notice to be given.[19] A special adjournment motion, being a motion for the House to meet at a time not the scheduled time, continued to require notice but in the majority of cases was moved 'by consent', or 'by leave', and without previous notice.[20]

SO 71(3), although the same in substance as previous SO 51, includes the clarification that 'The Clerk' will enter notices on the Notice Paper in the order given. The standing order, when read in conjunction with standing and sessional orders establishing the precedence of business, provides that new items are added to the Notice Paper under the relevant category and in the order given. There was no equivalent standing order prior to 1895. Until 1990, notices of motions were recorded at the end of the Minutes

16 *Minutes,* NSW Legislative Council, 24 May 2006 p 36; *Hansard,* NSW Legislative Council, 24 May 2006, pp 171-172; *Minutes,* NSW Legislative Council, 6 September 2006, p 174.

17 See President's rulings: *Hansard,* NSW Legislative Council, 11 May 2010, p 22274; 7 September 2010, p 25214; 22 June 2011, p 3035.

18 *Minutes,* NSW Legislative Council, 3 August 1922, pp 36-37; *Hansard,* NSW Legislative Council, 3 August 1922, p 794.

19 *Minutes,* NSW Legislative Council, 2 November 1870, pp 62-63; 10 November 1870, p 66.

20 See, for example, *Minutes,* NSW Legislative Council, 5 September 1894, p 15; 10 April 1895, p 170.

of Proceedings. From 21 February 1990, notices of motions have been published in a separate Notice Paper. In a statement to the House, the President advised members that he had approved the publication of a *Notices of Motions and Orders of the Day* paper to streamline preparation and printing and also to enable members and other users of the publication to have easier access to information on the business of the House.[21] The separate Notice Paper would also address the growing number of items of private members' business on the Notice Paper.

The provision under SO 71(4) for a member to give notice of a motion for any other member not present was contained in former SO 50, which also specified that a member could give notice for another member *at the request of the member,* in which case the notice would be given in the name of both members.

The practice of private members only giving one notice on each call was established in 1992 by a ruling of Acting President Willis.[22] The provision was adopted by the President at the beginning of each subsequent session[23] until included in 2004 as SO 71(5). Ministers remained able to give more than one notice when given the call. The purpose of the provision was to ensure a more efficient and fair operation of the House,[24] as members, on having received the call, could give an unlimited number of notices resulting in an inequitable order for general business on the Notice Paper. For example, on Tuesday 2 July 1991, one member gave seven notices consecutively, thereby attaining the first seven positions on the Notice Paper of general business on the next sitting day. Since the adoption of the system of precedence for private members' business under SO 183 to 189, the order in which private members give notices of motions is less important in determining when an item is to be considered by the House.

The provision that notices could not be given after the Council had proceeded to business on the Notice Paper was first adopted as SO 29 in 1856. The provision was adopted in the same terms in 1870 SO 39.

The standing orders adopted in 1895 omitted the rule concerning the time for giving of notices. Prior to the adoption of SO 54A in 1934, in order to give a notice of motion after the House had proceeded to business on the Notice Paper, standing orders would be suspended as a matter of necessity and without previous notice.[25]

SO 54A provided that with the 'consent of the House obtained by Question from the Chair without debate', a member could give a notice of motion after the House had proceeded to the business on the Notice Paper.[26] At the same time, new SO 47A was adopted, which similarly provided that petitions could not be presented after the House had proceeded to the business on the Notice Paper, except by consent. An amendment

21 *Minutes*, NSW Legislative Council, 22 February 1990, p 19.
22 *Hansard*, NSW Legislative Council, 25 February 1992, pp 24-25.
23 See, for example, *Hansard,* NSW Legislative Council, 17 September 1997, p 31; *Minutes,* NSW Legislative Council, 17 September 1997, p 35.
24 *Hansard*, NSW Legislative Council, 24 May 1995, p 81 (Ruling of President Willis).
25 See, for example, *Minutes*, NSW Legislative Council, 21 August 1934, p 130.
26 *Minutes*, NSW Legislative Council, 5 April 1935, p 353.

to SO 57, relating to the conduct of formal business before the House proceeded to the order of the day, was also adopted.

In 1895, the House adopted SO 52 which required that a notice may not be set down for a day later than four weeks ahead. There was no similar standing order prior to 1895. In 1894, the Legislative Assembly had adopted SO 104, which provided that notices of motions could not be set down for a day later than 'the fourth next sitting day on which similar notices have precedence'. On 21 August 1934, standing orders were suspended to allow the setting down of a notice of motion for 27 September 1934.[27]

Under the current standing order, a notice which is contrary to practice or the standing orders is amended before appearing on the Notice Paper. The provision in SO 71 is broader in scope than former SO 54 under which notices containing 'unbecoming expressions' would not be printed by order of the President, or could expunged by order of the House.

In 1895, the House agreed to a motion, moved as a question of privilege, 'That the notice be not entered on the notice paper of the Minutes of Proceedings'. The notice had concerned the reconstitution of the Legislative Council.[28]

Contingent notices

Contingent notices are used to overcome the requirement for notice of a motion to be given at a previous sitting (or, previously, with 24 hours' notice). Contingent notices have a long history, having been given in the first Legislative Council as early as 1843.[29]

Contingent notices indicate that on a particular event occurring a stated motion will be moved. A contingent notice can specify that a motion will be moved on a named event occurring, such as on the tabling of the budget papers, or on a regular event occurring, such as on the Clerk being called on to read the order of the day. Contingent notices that relate to a specific event expire upon activation,[30] while regularly occurring procedures, such as on the Clerk being called on to read the order of the day, can be used multiple times.

The majority of contingent notices given have been for the moving of a motion for the suspension of standing orders, a motion which can only be moved on notice or

27 *Minutes,* NSW Legislative Council, 21 August 1934, p 130.

28 *Minutes,* NSW Legislative Council, 4 May 1895, p 255; *Hansard,* NSW Legislative Council, 4 May 1895, pp 7805-7816 (Notice given by the Hon John Henry Want QC, Attorney General).

29 See, for example, *Minutes,* NSW Legislative Council, 29 September 1843, p 2.

30 See, for example, *Minutes,* NSW Legislative Council, 3 May 2000, p 417 (a contingent notice of motion to allow the consideration forthwith of a message from the Legislative Assembly requesting the concurrence of the Legislative Council in the attendance of the Treasurer in the Legislative Assembly for the purpose only of giving a speech in relation to the budget). See also *Minutes,* NSW Legislative Council, 20 August 1889, p 180 (motions to be moved on a named bill being read a second time); 13 March 1912, p 102 (on the order of the day for the second reading of a named bill being read).

by leave (SO 198). Giving a contingent notice satisfies the requirement for notice to be given under SO 198 and overcomes the need to seek leave to move a motion for the suspension of standing orders when leave is not likely to be given. The adoption of a number of sessional orders at the beginning of the 56th Parliament removed the need for the majority of these contingent notices.[31] Only two of the regularly given contingent notices have since been given by non-Government members: to allow a motion to be moved for the censure of a minister, or to adjudge a minister guilty of contempt of the House, on failing to table documents according to an order of the House.

See SO 198 for further discussion on the suspension of standing orders.

72. ALTERATIONS AND WITHDRAWALS OF NOTICES

(1) A member may by notice change the day proposed for moving a motion, but only to a later day.

(2) A notice may be withdrawn at any time before the notice is moved.

Development summary		
1895	Standing order 53	Change of day for bringing on motion
2003	Sessional order 72	Alterations and withdrawals of notices
2004	Standing order 72	Alterations and withdrawals of notices

A notice of motion on the Notice Paper is not in the possession of the House until moved. The principle is reflected in standing order 72, under which the member who has given the notice may, by notice, change the day proposed for moving the motion to a later day, or may withdraw the motion. Once moved, a motion is in the possession of the House and it may only be withdrawn by leave of the House.

Operation

Change of day

The procedure for changing a day under SO 72 would be the same as that for withdrawing a notice – the member would seek the call during the time for notices of motions in the routine of business, notify the House of the change of day and provide a signed written notice to the Clerk.

SO 72(1) is in similar terms to its predecessor, standing order 53 of 1895, except for the addition in the earlier standing order of the qualification that a day for moving a motion could be changed 'subject to the same rules as other Notices of motions' which is also contained in Senate standing order 77.[32] There is no record of a member changing the

31 *Minutes,* NSW Legislative Council, 6 May 2015, pp 55-62.

32 Although there were instances of change of day by notice, these were not recorded as such as the notice on the Notice Paper was simply moved to the new date.

day for moving a notice of motion except by way of postponement when the item was called on.[33]

Withdrawal

There is no provision in SO 72 for the time at which a notice of motion can be withdrawn, aside from the requirement that it be 'before the notice is moved'.

The practice has developed that members indicate during the time for notices of motions in the routine of business that they wish to withdraw a notice. Members also submit a signed written notice to the Clerk-at-the-Table.

However, there is no restriction on a member withdrawing their notice at any other time during proceedings, although it would be out of order to interrupt business to do so. While there are recent examples of a notice being withdrawn by leave after the House had proceeded to business on the Notice Paper, there is no requirement to seek leave under the standing orders.[34]

Alteration

The only alteration to a notice of motion provided under SO 72 is to change the day for moving the motion. A member wishing to amend their notice can only do so by leave immediately prior to moving it, or by withdrawing the notice and giving it again in an amended form. The terms of SO 72 ensures that members are alerted to any change in a notice.

SO 72 is in the same terms as Senate SO 77 aside from the provision for altering the terms of a notice by delivering an amended notice at the table, either on the same day or any day prior to the day on which the motion will proceed.

Background and development

Paragraph (1) of standing order 72 is similar in terms as its predecessor, standing order 53 of 1895, except for the addition in that standing order of the qualification that a day for moving a motion could be changed 'subject to the same rules as other Notices of motions' which is also contained in Senate SO 77.

There was also no provision for withdrawal until 2003. However, there are numerous precedents of notices being withdrawn.[35]

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33 There was no provision for postponements prior to the adoption of SO 45 in 2003 under which a notice of motion or order of the day may be postponed, by motion, at a time provided in the routine of business, or when the item is called on, but the practice frequently occurred.

34 *Minutes*, NSW Legislative Council, 4 April 2012, p 901; 21 June 2012, p 1113.

35 See, for example, *Minutes*, NSW Legislative Council, 31 March 1964, p 422; 3-4 April 1979, p 295; 30 April – 1 May 1986, p 269.

CHAPTER 14

MOTIONS

73. NOTICE REQUIRED

A motion may only be moved if notice was given at a previous sitting of the House, or by leave of the House, or as provided by the standing orders.

Development summary		
1856	Standing order 27 Standing order 30	Motions, how initiated Unopposed motions
1870	Standing order 37 Standing order 40	Motions, how initiated Unopposed motions
1895	Standing order 56	Motions – Not to be made without previous notice – exceptions
2003	Sessional order 73	Notice required
2004	Standing order 73	Notice required

A member may only move a motion that has been initiated by one of three mechanisms: according to notice given at a previous sitting of the House (under SO 71); by leave of the House – that is, with the concurrence of all members present (see SO 76); or in accordance with the provisions of another standing order.

Operation

Most motions in the House are moved according to notice given at a prior sitting of the House. The procedure for giving notice is discussed further under SO 71.

Members may also move a motion which would otherwise require notice by seeking the leave of the House – that is, with the unanimous agreement of all members present. To do so, the member stands when there is no question then before the House and seeks leave to move their motion. If leave is granted, the motion can then be moved immediately. This does not occur frequently but has been used in cases where, for example, there has been a need to suspend standing orders to move an urgent rescission motion (which would otherwise require notice)[1]

1 For example, *Minutes*, NSW Legislative Council, 24 September 2008, pp 794-795; 24 November 2011, pp 651-652.

or to introduce a bill, notice of which was given earlier that day.[2] Leave is discussed further under SO 76 – Leave of the House and SO 198 – Suspension of standing orders.

Members also routinely move motions without notice where other provisions of the standing orders provide the authority to do so. For example:[3]

- SO 154 provides that when a number of bills are received from the Assembly for the first time, the President may seek leave to put the procedural motions for the first reading, printing, suspension of standing orders for consideration through all stages, and fixing of the day for the second reading on one motion without formalities.
- SO 45 authorises a member to postpone an item of business by motion without notice.
- SO 57 provides that on a document being tabled, a motion may be moved that a day be appointed for its consideration, or that it be printed.
- SO 190 provides for a motion to be moved without notice that a member be suspended from the service of the House (in particular circumstances laid out under the standing order).

Background

The provisions of SO 73 have applied consistently since 1856.[4] While the standing orders in force at that time did not specify that motions could be moved in accordance with other standing orders, other standing orders did provide for certain procedural motions which could be moved without notice. For example, 1856 SO 31 provided that it shall be in order, on the presentation of a document, to move, without notice, that it be printed, and to appoint a day for its consideration. However, there were far fewer standing orders exempting motions from the requirement for notice. Consequently, a wide variety of motions were moved by leave, as provided by the standing orders, including the adjournment of the House.[5] Motions were alternatively moved according to contingent notice, including amendments to motions[6] and the recommittal of bills.[7]

In 1870, SO 37 was amended to specify that the requirement for prior notice did *not* apply to a motion to adjourn the House (to terminate the sitting) and the 1895 standing orders exempted a number of motions from the requirement for notice, including a vote of thanks or condolence (SO 59), a motion for precedence of an adjourned debate (SO 58) and division of a complicated question (SO 110).

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2 *Minutes*, NSW Legislative Council, 24 May 2011, pp 120-121.
3 This is not an exhaustive list.
4 1856 SOs 27 and 30; 1870 SOs 37 and 40; 1895 SO 56.
5 *Minutes*, NSW Legislative Council, 5 September 1894, p 15. The motion comprised of two parts – the first being a special adjournment motion, the second being a motion to adjourn the House.
6 See, for example, *Minutes*, NSW Legislative Council, 23 May 1893, p 307.
7 See, for example, *Notice Paper*, NSW Legislative Council, 1 March 1893, p 169.

1895 SO 56, the immediate precursor to SO 73, also included provision for a motion without notice to be moved that any resolution of the House be communicated by message to the Assembly – this provision is now captured by SO 125.

74. PRECEDENCE OF MOTIONS

(1) Motions shall be called on each day in the order shown on the Notice Paper.

(2) Any motions on the Notice Paper each day which have not been dealt with by the adjournment on that day will be set down on the Notice Paper for the next sitting day, at the end of any business already set down for that day.

(3) A motion for a special adjournment or which relates to the privileges or business of the House will take precedence of all other motions or orders of the day.

(4) A motion may be moved without notice by a Minister:

(a) for a special adjournment of the House, or

(b) expressing appreciation, thanks or condolences of the House.

Development summary		
1856	Standing order 32	Precedence of motions
	Standing order 38	Lapsing of notices, &c.
1870	Standing order 42	Precedence of motions
	Standing order 47	Lapsing of notices, &c.
1895	Standing order 55	Motions taking precedence
	Standing order 56	Not to be made without previous notice – exceptions
	Standing order 59	Precedence to vote of thanks or condolence
	Standing order 66	Remanets
1922	Standing order 59	Precedence to vote of thanks or condolence
2003	Sessional order 74	Precedence of motions
2004	Standing order 74	Precedence of motions
2011–2016	Sessional order	Expiry of private members' business notices of motions

All motions are called on in the order in which they are listed on the Notice Paper, unless otherwise determined by an order of the House, or unless otherwise provided for under the standing orders. Matters listed but not dealt with are carried over to the Notice Paper for the next day, and reordered in accordance with the order of precedence that applies for that day under standing and sessional orders. Numerous standing and sessional orders operate to vary the precedence of business each sitting day – these are discussed below.

Operation

Motions are called on in the order shown on the Notice Paper for that day (SO 74(1). If an item is called on and the member in whose name the item stands is not present in

the chamber to move the item, the item will lapse (SO 75(3)), unless another member moves the item on the member's behalf. The order in which items are listed on the Notice Paper is subject to various standing orders and resolutions of the House, including the precedence afforded to government and general business (SO 40), business of the House (SO 39), matters of privilege (SO 77), motions to disallow statutory instruments (SO 78) and sessional orders fixing particular times for debate on committee reports and budget estimates.[8] SO 74(3) also notes that a motion for a special adjournment or that which relates to the privileges or business of the House will take precedence of all other motions or orders of the day.

Any items which have not been dealt with by the adjournment that day are set down on the Notice Paper for the next sitting day, at the end of any business previously afforded priority for that day (SO 74(2)). It is rare for items to be afforded earlier priority, however, on occasion members have postponed the consideration of an item until a particular day.[9] This practice is informed by the 'remanet system', which is discussed further under SOs 81 and 184.

In addition to the provisions of SO 74(2), since 2011, the House has agreed to a sessional order to provide that a private members' business notice of motion outside the order of precedence that has remained on the Notice Paper for 20 sitting days without being moved will be removed from the Notice Paper.[10] The rule applies only to notices for motions; notices for bills are exempt. The sessional order was adopted following a recommendation of the Procedure Committee, the background to which is discussed under SO 184.

Notices of motions take precedence of orders of the day for all categories of business, except for the practice for private members' business, where each item is allocated a number which it retains either in or outside the order of precedence, regardless of whether the item is a notice of motion or an order of the day. (This practice, and the background to the practice, are discussed in more detail under SOs 81 and 184).

Under SO 74(3), a motion for a special adjournment or that which relates to the privileges or business of the House will take precedence of all other motions or orders of the day. This provision reflects the parallel provisions of SO 39 and SO 77. Matters concerning the privileges of the House are infrequently raised, though they do arise (see SO 77), however, matters falling within the category of business of the House – which include motions to disallow statutory rules and instruments, motions relating to the business of the chamber such as sessional orders, and motions for the adoption of a citizen's right of reply to comments made by a member – are frequently considered by the Council, and take precedence of other government or general business listed for that day. These categories of business are discussed further under SOs 39 and 77. SO 74(3) similarly provides that a motion for a special adjournment will take precedence of other types of business.

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8 For example, *Minutes*, NSW Legislative Council, 6 May 2015, p 56; 9 September 2014, pp 7 and 12.

9 See discussion of recent practice of reordering business of the House on the Notice Paper in accordance with the remanets system under SO 81.

10 *Minutes*, NSW Legislative Council, 21 June 2011, p 232; 9 September 2014, p 10; 6 May 2015, p 58.

Under SO 74(4), a motion may be moved without notice by a minister for a special adjournment of the House, or to express appreciation, thanks or condolences of the House.[11] Special adjournments moved under SO 74(4) typically seek to alter the date or time that the House will adjourn to at the end of that day. For example, until 2016, in order to facilitate the sitting calendar set by the government, each Thursday a minister moved a 'special adjournment' motion to set the next meeting of the House for a Tuesday in either the following week or later week in order to circumvent a sessional order which would otherwise require the House to meet the next day, being a Friday.[12] However, with the adoption of a formal sitting calendar, this practice was dispensed with in 2016.

Motions of thanks or condolence can only be moved by private members with prior notice as a private members' motion, under SO 186, or dealt with as formal business under SO 44.

Resolution of the House to move a motion without notice at a fixed time

In some cases, the House may resolve to afford precedence to a particular item of business on a particular day. For example, on 19 September 2012, the House resolved to interrupt business the following day to allow a minister to move a motion without notice regarding an apology for the past practice of forced adoption. The resolution afforded the debate on the apology precedence of all other business listed on the Notice Paper for that day and also set out time limits for debate on the apology motion.[13] The motion was agreed to on notice, and moved by the minister in the usual manner.

Similarly, on 7 September 2010, the House agreed to a motion to afford debate on the Adoption Amendment (Same Sex Couples) Bill 2010 (No 2) precedence of all other business on the Notice Paper for that day until concluded.[14] Unlike the example above, precedence was afforded to the item by the member moving a contingent notice for the conduct of business, which members routinely gave until 2015, following which the practice was superseded by a sessional order varying the conduct of business under SO 37. This practice is discussed further under that chapter. Contingent notices are discussed further under SOs 71 and 198.

Background

The provisions of SO 74(1) and (2) have applied consistently since 1856.[15] However, although the provisions of the standing orders have been consistent, practice has varied. In the early years of the Council, all items were listed on the Notice Paper in the order given and called on in that order, whereas in more recent years certain categories of

11 For example, *Minutes*, NSW Legislative Council, 31 August 2010, p 1997; 14 November 2006, p 337; 23 November 2006, p 437; 16 September 2011, p 454.

12 See, for example, *Minutes*, NSW Legislative Council, 29 August 2013, p 1948; 18 September 2014, p 101; 25 June 2015, p 246; 29 October 2015, p 532.

13 *Minutes*, NSW Legislative Council, 19 September 2012, p 1247.

14 *Minutes*, NSW Legislative Council, 7 September 2010, pp 2027-2028.

15 1856 SOs 32 and 38; 1870 SOs 42 and 47; 1895 SO 66.

business have been given priority over others under various standing and sessional orders (see for example SOs 39, 40 and 41).

The provisions of SO 74(3) have applied since 1895 – for the background to these provisions, see SOs 39 and 77.

Provision for precedence for the special adjournment was first made in 1895 (SO 55), taking the terms of the Assembly's equivalent new standing order.[16] The form in which the motion was moved developed over the years. While for some years ministers tended to move the special adjournment as the first of two motions adjourning the House for that day (the first to set the day of the next sitting, the second to adjourn the House),[17] from the 1990s, the motion was sometimes moved earlier in the day and the House then proceeded to the consideration of other items before adjourning later that day.[18] Provision for a special adjournment to be moved without notice by a minister was first formalised in 2004.

Provision for motions of thanks or condolence was first made in 1895 (SO 59). The standing order as adopted originally afforded precedence to such motions over all other business. However, the standing order was later amended on the recommendation of the Standing Orders Committee in 1922 to provide that motions for a vote of thanks or condolence could be moved without notice.[19] While the committee did not canvass the reasons for the amendment in its report, in speaking to the proposed amendment during consideration of the report in committee of the whole, the Chair stated that there had been instances where doubt had arisen in the minds of members as to whether there was a necessity to comply with the forms of the House and standing orders by giving notice of a motion for thanks or condolence. The committee intended that the amendment would clarify that such motions may be moved without notice, and without the concurrence of every member, and the motion would immediately have precedence over all other business.[20] The new provision was readopted for the purposes of the 2004 rewrite of the standing orders.

75. MOVING OF MOTIONS

(1) Motions, other than the motion for the address in reply, do not require a seconder.

(2) A member at the request of another member who has given notice may move the motion of which notice has been given.

(3) If a motion on the Notice Paper is not moved when it is called on, it will be withdrawn from the Notice Paper.

16 Assembly 1894 SO 108.

17 For example, *Minutes*, NSW Legislative Council, 14 May 1942, p 182; 6 June 1956, p 36; 26 February 1987, pp 694-695.

18 For example, *Minutes*, NSW Legislative Council, 27 May 1999, p 107.

19 *Minutes*, NSW Legislative Council, 2 August 1922, pp 33 and 36-77.

20 *Minutes*, NSW Legislative Council, 3 August 1922, p 794.

(4) A motion which has been moved is in the possession of the House, and may only be withdrawn by the mover by leave of the House.

(5) A motion which has been superseded or withdrawn by leave of the House may be moved again during the same session.

(6) Once an amendment has been proposed to a motion, the original motion may not be withdrawn, unless the amendment has been withdrawn or negatived.

Development summary		
1856	Standing order 25	Seconding of motions
	Standing order 26	Proposing or withdrawing the same
	Standing order 32	Precedence of motions
1866	Standing order 36	Proposing, altering or withdrawing motions
1870	Standing order 36	Proposing, altering or withdrawing motions
	Standing order 42	Precedence of motions
1895	Standing order 60(a)	Withdrawal of motions – Consent required
	Standing order 60(b)	May be brought on again
	Standing order 60(c)	After amendment proposed
	Standing order 64	No seconder needed
2003	Sessional order 75	Moving of motions
2004	Standing order 75	Moving of motions

SO 75 outlines the various rules that apply to the moving, lapsing and withdrawal of motions.

Operation

The procedures provided under SO 75 reflect the longstanding practice of the Council concerning the moving of motions. The most substantial amendment made to the rules has been the removal of a requirement that previously applied for motions to be seconded, although motions for the Address-in-Reply to the Governor's opening speech continue to require a seconder (SO 8).

A member may move a motion on another member's behalf at that member's request (SO 75(2)). The practice is not uncommon, particularly for the purposes of motions considered as formal business at the commencement of the sitting day.[21]

If a motion on the Notice Paper is not moved when it is called on, the item will lapse and be removed from the Notice Paper (SO 75(3)). This rarely occurs, the last occasion being in 2006 when a member suspended standing orders under SO 198 to bring on an item

21 For example, multiple motions moved as formal business on behalf of the same member, *Minutes*, NSW Legislative Council, 24 November 2011, pp 623-629.

listed in the name of an absent member who had recently changed political parties.[22] This practice of 'ambushing' a member is rarely used because it runs the risk of members falling into a repetitive cycle of retaliation.

Once moved, a motion is in the possession of the House and may only be withdrawn by the mover with the leave of the House (SO 75(4)).[23] This applies to any motion, whether it be a substantive motion or a subsidiary motion, such as an amendment to a bill in committee of the whole. If debate on the item has been adjourned and set down on the Notice Paper, the item may only be removed from the Notice Paper on motion, which may be moved without notice, requiring a vote of the House (SO 81(4)). Once an amendment has been proposed to a motion, that motion may not be withdrawn unless the amendment is first withdrawn or negatived (SO 75(6)).

Under SO 75(5), a motion which has been superseded or withdrawn by leave of the House may be moved again during the same session. This provision provides an exemption to the rule that would otherwise apply under SO 103, which prohibits a motion proposing a question the same in substance as a question which has been determined during the same session, unless the order, resolution or vote on the question was determined more than six months previously or has been rescinded.

Background

One of the most fundamental principles reflected in SO 75 has applied consistently since 1856: a motion, once moved, is in the possession of the House and may not be withdrawn without the leave of the House (SO 75(4)).

Other provisions, such as the ability for a member to move a notice in the name of another member (SO 75(2)), and the rule that a motion listed on the Notice Paper not moved when it is called on will be withdrawn from the Notice Paper (SO 75(3)), were first formalised in 2004 but operated as a matter of practice since 1856.

The 1856 standing orders additionally required that motions be seconded (1856 SOs 25 and 26), and provided that 'any member may, without motion, require any order of the Council to be enforced' (SO 25). While seconders to motions were not recorded in the Minutes of Proceedings, the practice was recorded in the *Sydney Morning Herald*'s record of proceedings until 1866, when the provision was rescinded.[24] Following a point of order being taken that a motion for the second reading of a bill had not been seconded, the practice of seconding motions had been referred to the Standing Orders Committee.[25] The committee found that in accordance with a previous ruling of the President in 1862, the second reading of the bill, not seconded, was in order. However, to remove any doubt in future and bring the Council's rules into line with the House of Lords, the

22 *Minutes*, NSW Legislative Council, 11 May 2006, p 2027.
23 For example, *Minutes*, NSW Legislative Council, 25 October 2006, pp 303-304; 16 September 2004, p 994; 2 June 2011, p 179; 10 May 2012, pp 971-972; 8 September 2011, p 409.
24 For example, *Sydney Morning Herald*, 19 December 1856, p 4; 5 June 1858, p 5; 20 October 1860, p 13.
25 *Sydney Morning Herald*, 2 August 1866, p 6; *Minutes*, NSW Legislative Council, 1 August 1866, pp 11-12.

Committee recommended that SOs 35 and 36[26] be rescinded and replaced with new provisions for motions which omitted reference to the seconding of motions and to the ability of members to require that an order be enforced.[27] The revised standing order, together with 1856 SO 32, was continued in 1870 (SOs 36 and 42).

The 1895[28] and 2004 standing orders replicated the provisions of the 1856 standing orders, or formalised the procedures listed above that had operated as a matter of practice, with several additional provisions.

- 1895 SO 60(a) provided that, if the House was unanimous in consent, a member may withdraw, in whole or in part, a motion on behalf of another member, with that member's permission. This provision was omitted from the 2004 rewrite.
- 1895 SO 60(b) provided for a motion which had been withdrawn by leave of the House, to be moved again during the same session. This provision was readopted as SO 75(5).
- 1895 SO 60(c) provided that when an amendment had been proposed to a motion, the original motion could not be withdrawn until the amendment had been withdrawn or negative. This provision was readopted as SO 75(6).
- 1895 SO 64 specified that a seconder was not required for an order of the day or an amendment. SO 75(1) makes a similar provision, but additionally specifies that this does not apply to motions for the Address-in-Reply, which do require a seconder (see SO 8 – Address-in-reply).

76. LEAVE OF THE HOUSE

(1) A motion which requires notice may be moved without notice by leave of the House.

(2) Leave is granted when no member present objects to the moving of the motion or other course of action for which leave is sought.

Development summary		
1856	Standing order 30	Unopposed motions
1870[29]	Standing order 40	Unopposed motions
1895	Standing order 56	Not to be made without previous notice – exceptions
2003	Sessional order 76	Leave of the House
2004	Standing order 76	Moving of motions

26 The rules had been renumbered following the addition of new standing orders in preceding years.

27 Report tabled *Minutes*, NSW Legislative Council, 4 September 1866, p 39. Recommendations adopted *Minutes,* NSW Legislative Council, 12 September 1866, p 51.

28 1895 SOs 60(b) and (c) replicate 1894 Assembly SO nos 111(b) and (d), however 1895 SOs 60(a) and 64 varied from the provisions adopted by the Assembly.

29 Renumbered on adoption of additional standing orders prior to 1870.

Under SO 73, a member may only move a motion: if notice has been given at a previous sitting of the House; by leave; or as provided by the standing orders. SO 76 reiterates that a motion which would normally require notice can be moved by leave and provides the definition of leave.

Operation

A member may move a motion which would otherwise require notice by seeking the leave of the House. SO 76 also provides the definition of leave – when no member present objects to the moving of the motion or other course of action for which leave is sought.

It is rare for members to move a motion by leave as such practice is at variance with the fundamental principle that members provide their colleagues with due notice of their intention to move a motion. This ensures that members have requisite time to consider their views on the motion and prepare their contribution to debate. However, so long as all members present agree, a motion can be moved with no notice. For example, on several occasions members have by leave moved a motion for the introduction of a bill, notice of which was given earlier that same day.[30] Members have also sought leave to move a motion relating to the membership of a committee;[31] and to move a motion forthwith to amend a resolution of the House for an order for papers agreed to at a previous sitting of the House.[32]

Background

The provisions of SO 76 have applied consistently since 1856 (while the practice of seeking leave to move motions without notice has never been encouraged). The practice of seeking leave has been utilised for a variety of purposes since the early years of the Council.[33]

77. RAISING MATTERS OF PRIVILEGE

A matter of privilege, unless suddenly arising in proceedings before the House, may only be brought before the House in accordance with the following procedures:

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30 *Minutes*, NSW Legislative Council, 24 May 2011, p 120; 23 August 2011, p 355; 30 January 2014, p 2306.

31 *Minutes*, NSW Legislative Council, 23 November 2011, p 618.

32 *Minutes*, NSW Legislative Council, 13 November 2013, p 2191.

33 See, for example, *Minutes*, NSW Legislative Council, 27 October 1892, p 53 (leave to add a member to the Library Committee); December 1895, p 171 (leave to suspend standing orders to set down the 2nd reading of a bill to a later hour, following the bill being restored to the Notice Paper); 21 February 1899, p 5 (leave to move a motion for membership of the Standing Orders Committee); 10 October 1950, p 23 (leave to move a motion to invite a visitor in the chamber to take a chair on the dais, followed by a motion of congratulations, also moved by leave); 29/5/2001 p 769 (leave to move a motion to vary the time for Questions that day).

(1) A member intending to raise a matter of privilege must inform the President of the details in writing.

(2) The President will consider the matter and determine, as soon as practicable, whether a motion should have precedence of other business.

(3) The President's decision will be notified in writing to the member, and if the President thinks it appropriate, or determines that a motion relating to the matter should have precedence, to the House.

(4) While a matter is being considered by the President, a member must not take any action or refer to the matter in the House.

(5) Where the President determines that a motion relating to a matter should be given precedence of other business, the member may, at any time when there is no business before the House, give notice of a motion to refer the matter to the Privileges Committee, and that motion will take precedence of all other business on the day for which notice is given.

(6) If the President decides that the matter should not take precedence, a member is not prevented from referring to the matter in the House or taking action in accordance with the practices and procedures of the House.

(7) If notice of a motion is given under paragraph (5), and the House is not expected to meet within one week after the day on which the notice is given, the motion may be moved at a later hour of the sitting as determined by the President.

Development summary		
1991-2003	Resolution	Standing Committee upon Parliamentary Privilege and Ethics
2003	Sessional order 77	Raising matters of privilege
2004	Standing order 77	Raising matters of privilege

Standing order 77 provides that where a matter of privilege has arisen since the previous sitting of the House the matter may be referred to the Privileges Committee by motion on notice if the President determines that it should have precedence. The procedure derives from Senate SO 81 and was originally adopted by the Council in 1991 in the resolution establishing the Privileges Committee. It does not apply to matters of privilege suddenly arising, which may be raised immediately. Further, it does not regulate how the Privileges Committee considers the matter, such consideration being governed by the standing orders on committees and the resolution establishing the committee.

In addition to the procedures under SO 77, a member can raise a matter concerning the privileges of the House:

- by interrupting business under SO 95 and taking a point of order concerning a matter of privilege suddenly arising or
- by giving a notice of motion in the usual way and having the matter set down without precedence as general business or government business.

Under the resolution establishing the Privileges Committee, the committee may also consider and report on any matter relating to privilege referred to it by the House or the President. Such matters could include an inquiry into the citizen's right of reply process, to consider a privileges bill, or to consider matters referred under SO 77.

On occasion, the independence of the Council has been raised as a matter of privilege.

In 1873, on the first reading of the Legislative Council Bill No 2, a point of privilege was made by the President that bills affecting the privileges or proceedings of either House should commence in the House to which it relates. A reasoned amendment was agreed to and a message returned to the Assembly that 'this Council declines to take into consideration any Bill repealing those sections of the Constitution Act which provide for the Constitution of the Legislative Council unless such Bill shall be originated in this Chamber'.[34]

In 1879, the House considered a motion that certain notices of motions given in the Legislative Assembly impugned the action of the Legislative Council in regard to legislative measures, and expressed its disapproval of the 'violation of the rule that proceedings intending to affect a House of Parliament should originate in that House'. The motion required the Council's resolution to be transmitted by Address to His Excellency the Lieutenant-Governor and to be by him forwarded to Her Majesty's Principal Secretary of State for the Colonies.[35]

Later in 1879, the Council had cause to send a message to the Assembly concerning a request by the Assembly as to steps taken by the Council on the report of the managers for the Council to a free conference on the Parliamentary Powers and Privileges Bill. The Council had earlier negatived the motion 'That the President do now leave the Chair, and the House resolve itself into a Committee of the Whole for consideration of the Report of the Council's Managers…'.[36] The order of the day was later restored and the order discharged,[37] but prior to the order being restored, the Council received a message from the Assembly seeking to be informed of the steps taken by the Council on the report of its managers.[38] The motion to consider the Assembly's message in committee of the whole was amended to refer the matter to a select committee to ascertain the practice of Parliament for sending messages from one House to the other requesting information as to their votes and proceedings.[39] Having received the report of the select committee the Council returned a message to the Assembly advising as follows:

> The Legislative Council now informs the Legislative Assembly that on the 17th day of April the Council declined to resolve itself into a Committee of the Whole

34 *Minutes,* NSW Legislative Council, 2 April 1873, pp 110-111.
35 *Minutes,* NSW Legislative Council, 16 July 1879, p 293; 22 July 1879, pp 299-300.
36 *Minutes,* NSW Legislative Council, 17 April 1879, p 174.
37 *Minutes,* NSW Legislative Council, 6 May 1879, p 200; 20 May 1879, p 227.
38 *Minutes,* NSW Legislative Council, 29 April 1879, p 192.
39 *Minutes,* NSW Legislative Council, 6 May 1879, pp 199-200.

> for the consideration of its Manager's Report, 'as will appear from an Extract from the Minutes of the Council's Proceedings forwarded herewith.'
>
> But the Legislative Council having been led to infer from the Report of 'its Committee' that the Message from the Legislative Assembly of the 24th of last month does not seem to be in accordance with the mode sanctioned by Parliamentary usages of obtaining information with reference to any Bill while it is pending in the Legislative Council, requests that this answer to the Assembly's Message, which is now made out of the Council's unfeigned respect for the Assembly, may not be drawn into a precedent.[40]

In 1959, the first reading of the Constitution Amendment (Legislative Council Abolition) Bill was superseded by a motion moved as a matter of privilege for a message to be returned to the Assembly advising that the Council declined to consider the bill as 'where any alteration is to be made in the constitution of one House of Parliament that alteration must originate in the House immediately affected by it'.[41] When the bill was again received by the Council in accordance with Section 5(B) of the *Constitution Act 1902*, a motion moved as a matter of privilege was again agreed to and a message returned to the Assembly advising that the Council declined to consider the bill.[42]

Operation

SO 77 provides that the President must determine whether the matter should have precedence of other business but does not prescribe the factors which must be taken into account by the President.

In the Senate, when determining whether a matter of privilege should have precedence, the President is required to have regard to 'the criteria set out in any relevant resolution of the Senate'. The criteria, adopted by resolution in 1988, provide that the Senate's power to deal with contempt should be used only in cases of improper acts tending substantially to obstruct the Senate, its committees or its members and to the availability of any other remedy.[43]

Under SO 77(3), the President's decision in relation to the precedence of the matter must be notified to the member concerned. The President must also inform the House if the matter is to take precedence but has a discretion to inform the House or not if it is determined that the matter should not have precedence.

If the President determines that a motion should have precedence under SO 77, the member may, at any time where there is no business before the House, give notice of

40 *Minutes,* NSW Legislative Council, 14 May 1879, pp 220-221.
41 *Minutes,* NSW Legislative Council, 2 December 1959, p 137; 2 December 1959, pp 2549-2561.
42 *Minutes,* NSW Legislative Council, 6 April 1960, p 203; *Hansard,* NSW Legislative Council, 6 April 1960, pp 3631-3643.
43 Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 92.

motion to refer the matter to the Privileges Committee. The notice of the motion appears first on the Notice Paper for the relevant day under the heading 'Matter of privilege'. The motion is then dealt with before all other business on the Notice Paper for that day. If the House is not expected to meet within a week of the day on which the notice is given, the motion may be moved at a later hour of the sitting as determined by the President (SO 77(7)). If the motion is agreed to by the House, the Privileges Committee investigates and reports to the House with any findings and recommendations. These do not bind the House, which has the ultimate authority to determine the matter.

If the President decides that the matter should not have precedence, the member concerned is not prevented from raising the matter in the House or taking such action as is permitted by the practices and procedure of the House. This may include proposing a debate on the matter by giving notice of a motion in the usual manner, or referring the matter to a committee including the Privileges Committee.

If a member does not wish to seek precedence under SO 77, the member may give notice of a motion in the usual way but the motion will not have precedence as a matter of privilege.

Of the small number of occasions on which the House has considered a possible breach of privilege or contempt, only once have the procedures set out in SO 77 been followed. In that case, which concerned the seizure of documents from a member's office under a search warrant, the member wrote to the President under SO 77,[44] the President advised the House that she had determined that the matter should have precedence and tabled the correspondence from the member and her reply,[45] the member gave notice of a motion to refer the matter to the Privileges Committee,[46] which was placed on the Notice Paper as a matter of privilege with precedence over all other business on the paper,[47] and moved the motion the next day.[48]

On another occasion, which concerned the possible omission of documents from a return to an order of the House and the publication of documents relating to the order in an ICAC inquiry, the minister raising the matter did not write to the President as provided in SO 77. Instead, on relevant correspondence being tabled by the President, the minister moved, as a matter of privilege, that under SO 77 the Privileges Committee inquire into and report on the matter.[49] Subsequently, after the Privileges Committee had reported, the minister gave notice of a motion to refer a further inquiry to the Committee

44 The letter is reproduced in Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and the seizure of documents by ICAC*, December 2003, pp 74-75.

45 *Hansard,* NSW Legislative Council, 14 October 2003, pp 3719-3720; *Minutes,* NSW Legislative Council, 14 October 2003, p 326.

46 *Minutes,* NSW Legislative Council, 14 October 2003, p 326.

47 *Notice Paper,* NSW Legislative Council, 15 October 2003, p 540.

48 *Minutes,* NSW Legislative Council, 15 October 2003, p 332.

49 See, for example, *Hansard*, NSW Legislative Council, 14 March 2013, p 18630; *Minutes,* NSW Legislative Council, 14 March 2013, pp 1537-1538.

concerning the failure to provide documents in the return to order.[50] This notice was listed on the Notice Paper as a matter of privilege and took precedence of other business on the next sitting day.

On other occasions, the House has referred inquiries to the Privileges Committee by motion on notice of the Chair of the committee after the committee had resolved to seek a reference on the issue,[51] by government motion on notice,[52] by motion on notice of a private member following the suspension of standing and sessional orders[53] or by a motion given precedence as business of the House according to an earlier resolution of the House.[54]

Background and development

Prior to 1991, there was no special procedure for referring matters of privilege to a committee for inquiry and report. SO 19 of 1856 provided that at any time a question of order or privilege was taken, the matter then under consideration would be suspended until the matter was determined.[55] This provision was readopted in 1895 SO 87. Under 1895 SO 55 a motion relating to the privileges of the House had precedence of all other notices of motions and orders of the day. (See SO 95 for procedures for matters of privilege suddenly arising).

In 1984, the Joint Select Committee on Parliamentary Privilege in the Australian Parliament found that the provisions for raising matters of privilege then in practice in that Parliament, which accorded with the practice which had previously been used by the House of Commons, had serious defects. Under the Senate and House of Representative rules, a member was permitted to interrupt proceedings to raise a matter of privilege which had arisen since the last sitting of the House, and to then move a motion without

50 *Notice Paper*, NSW Legislative Council, 7 May 2013, p 8494; *Minutes,* NSW Legislative Council, 7 May 2013, pp 1675-1676.

51 *Notice Paper*, NSW Legislative Council, 6 April 2005, p 4663; *Minutes,* NSW Legislative Council, 6 April 2005, p 1313 (protocols for the execution of search warrants in members' offices); *Notice Paper*, NSW Legislative Council, 10 September 2009, pp 7525-7526; *Minutes,* NSW Legislative Council, 10 September 2009, p 1362 (memorandum of understanding with ICAC concerning the execution of search warrants on members' offices); *Notice Paper*, 22 February 2012, p 3295; *Minutes*, 22 February 2012, pp 716-717 (review of the right of reply procedure).

52 *Minutes,* NSW Legislative Council, 8 June 2006, pp 117-118; *Notice Paper*, NSW Legislative Council, 8 June 2006, p 264 (consideration of Assembly messages concerning the Committee on Parliamentary Privilege and Ethics and the Code of Conduct for Members); *Notice Paper*, 12 October 2011, p 2258; *Minutes*, 12 October 2011, pp 478, 479-480 (statements by Mr David Shoebridge).

53 *Notice Paper*, 25 September 2002, pp 1343-1345; *Minutes*, 25 September 2002, pp 383-391 (failure of a member to register pecuniary interests).

54 *Minutes,* NSW Legislative Council, 4 December 2003, pp 493-495; *Notice Paper*, NSW Legislative Council, 25 February 2004, p 992; *Minutes*, NSW Legislative Council, 25 February 2004, p 542.

55 In 1870, SO 19, which by then had been renumbered 22, was reordered on the recommendation of the Standing Orders Committee as SO 8. *Minutes,* NSW Legislative Council, 10 November 1870, p 66.

notice that a breach of privilege had been committed and that some action should be taken. The business under consideration would be suspended until the matter had been determined. Precedence was only granted to the motion if the Presiding Officer was of the opinion that a *prima facie* case of breach of privilege had been made and that the matter had been raised at the earliest opportunity.

According to the joint select committee both criteria were problematic. The determination by the presiding officer that a *prima facie* case of a breach of privilege had been made could be interpreted as a ruling against the person or organisation subject of the matter, rather than merely a determination that the matter should be examined. The earliest opportunity rule could result in ill-considered and rushed decisions and could also result in the matter not being accorded precedence when members delayed raising the matter in order to clarify facts. If the Presiding Officer was not of the opinion that there was a *prima facie* case or that the matter had been raised at the earliest opportunity, the matter could only be considered by motion on notice in the usual way.[56]

The committee recommended that instead of determining whether there was a *prima facie* case, the Presiding Officer should rule as to whether the matter should be given precedence, and, if precedence was accorded, the member would then give notice of a motion for referral of the matter for consideration, which notice would be given precedence of all other business on the Notice Paper for the next sitting day. The recommendation was ultimately adopted by the Senate in SO 81.

In 1991, the resolution establishing the Council's Standing Committee upon Parliamentary Privilege included a procedure for the referral of matters by the House modelled on Senate SO 81.[57] The procedure was similar to that now contained in SO 77 except:

- There was no provision concerning the President notifying the House of his or her decision as to whether the matter should have precedence (as in SO 77(3) and Senate SO 81).
- If the President decided that the matter should have precedence, the notice was to take precedence 'under SO 55 on the day stated in the notice', whereas SO 77(5) simply provides that that motion will take precedence 'of all other business on the day for which notice is given'.
- There were minor differences in wording such as the use of 'desiring' instead of 'intending' and 'must' instead of 'will'.

The same procedure was included in the resolutions appointing the Standing Committee on Parliamentary Privilege and Ethics in 1995 and 1999.[58] The resolution

56 Joint Select Committee on Parliamentary Privilege, Final Report, October 1984, p 102; Rosemary Laing, *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009), p 298.

57 *Minutes,* NSW Legislative Council, 16 October 1991, pp 184-185.

58 *Minutes,* NSW Legislative Council, 24 May 1995, pp 42-43; 25 May 1999, pp 83-84.

adopted in the 2003 omitted reference to SO 55 and instead provided that 'The notice will take precedence over all other business on the day stated in the notice'.[59] In 2007, at the commencement of the 54th Parliament, the resolution appointing the renamed Privileges Committee was adopted again in the same terms as that adopted in 2003, despite the procedure for the referral of matters by the House having by then been adopted as SO 77.[60]

The procedure for raising matters of privilege with precedence determined by the President does not appear to have been used before the adoption of SO 77. Where inquiries were referred to the Privileges Committee, the motion was dealt with as business of the House,[61] government business[62] and private members' business.[63] Amendments to a government or general business motion have also referred matters to the Privileges Committee.[64] For example, on 11 November 1997, the Clerk announced receipt of the report of the Special Commission of Inquiry into Allegations made in Parliament by the Hon Franca Arena, MLC, dated 7 November 1997. Later in the sitting, the Attorney General moved, as a matter of privilege and without notice, that Mrs Arena be adjudged guilty of conduct unworthy of a member of the Legislative Council and her seat in the Legislative Council declared vacant. The motion was amended to refer the matter to the (then named) Standing Committee on Parliamentary Privilege and Ethics and for the resumption of debate on the original motion to stand an order of the day on the Notice Paper for the first sitting day in 1998, or when the Standing Committee on Parliamentary Privilege and Ethics had reported, whichever was the later.[65] Following the committee's report being tabled in June 1998,[66] the matter was placed on the Notice Paper as a 'Matter of Privilege – Order of the Day' for further consideration of the original motion.[67]

There were also cases in which a special report from another committee was referred to the Privileges Committee on the motion of the Chair of the other committee and set

59 *Minutes,* NSW Legislative Council, 4 September 2003, pp 270-275.

60 *Minutes,* NSW Legislative Council, 10 May 2007, pp 53-54.

61 *Notice Paper,* NSW Legislative Council, 22 September 1992, p 510 (review of broadcasting and rebroadcasting of excerpts of the House's proceedings).

62 *Notice Paper*, NSW Legislative Council, 24 June 1997, p 1716 (inquiry regarding sections 13 and 13B of the *Constitution Act 1902*).

63 *Notice Paper,* NSW Legislative Council, 15 November 2001, p 4892 (inquiry into possible intimidation of witnesses before GPSC3 and unauthorised disclosure of committee evidence).

64 *Minutes,* NSW Legislative Council, 14 November 1995, pp 301-304 (Director of Public Prosecutions and other officers of departments or government instrumentalities as witnesses); 12 November 1997, pp 169-173 (allegations made by a member in Parliament).

65 *Minutes,* NSW Legislative Council, 12 November 1997, pp 169-173.

66 *Minutes,* NSW Legislative Council, 29 June 1998, p 613.

67 *Notice Paper,* NSW Legislative Council, 1 July 1998, p 1334.

down as business of the House[68] or on the motion of a private member agreed to as formal business.[69] In other cases, motions relating to the privileges of the House were moved on notice[70] or without notice as a matter of privilege[71] and determined by the House without referral to the Privileges Committee.

On 25 February 1969, the Leader of the Government in the Legislative Council tabled a copy of the judgment in the case of *Barton v Armstrong and Ors*, No. 23 of 1968 in the Supreme Court. Immediately following the tabling, the Leader of the Government moved, as a matter of privilege, that in view of the evidence given by the Hon Alexander Armstrong MLC and comments made by His Honour Mr Justice Street in the judgment, Mr Armstrong be adjudged guilty of conduct unworthy of a member, and that he be expelled from the House and his seat declared vacant. Mr Armstrong raised consecutive points of order neither of which were upheld. In the first, Mr Armstrong claimed that the motion was *sub judice* as the evidence he had given was at that time subject to a Court of Appeal. The President ruled that he was satisfied that the decision the House made on the motion would not prejudice or influence the courts in any way and therefore he would not uphold the point of order. The second point of order sought to have the motion declared out of order on grounds that it was unconstitutional as the Council only possessed such powers as were necessary to enable the orderly conduct of the Legislature and any other power was 'dangerously liable to excess'. The President referred to three similar cases in the Legislative Assembly in which the power of that House was not challenged, and stated that as there was conclusive evidence that the Council had the same powers as the Assembly, he could not uphold the point of order. An amendment to the motion to have the matter referred to a select committee was negatived on division, and the original motion then agreed to. The President directed the Usher of the Black Rod to escort Mr Armstrong from the House and its precincts.[72]

In 1980, a motion moved without notice as a matter of privilege was ruled out of order as the assault of the member, the subject of the motion, had not prevented the member from coming or going from the House and was not as a result of his behaviour in Parliament.[73]

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68 *Journal of the Legislative Council*, 8 November 1988, p 204 (Special Report of the Select Committee on the Police Regulation (Allegations of Misconduct) Amendment Bill on possible contempt); *Notice Paper*, NSW Legislative Council, 29 April 1998, p 738 (Special Report of General Purpose Standing Committee No. 2 on a possible contempt); 28 June 2001, p 3884 (Special Report on possible breaches of privilege arising from the inquiry into Cabramatta policing).

69 *Notice Paper,* NSW Legislative Council, 19 June 1996, p 412 (Special Report of Estimates Committee No. 1 on possible contempt).

70 See, for example, *Minutes,* NSW Legislative Council, 20 October 1998, pp 773-776 (Contempt for failure to table documents).

71 See, for example, *Minutes,* NSW Legislative Council, 14 May 1996, pp 125-126 (action of President and Usher of the Black Rod in arranging legal representation in *Egan v Willis*); *Minutes,* NSW Legislative Council, 14 May 1996, p 126 (in view of commencement of legal proceedings in *Egan v Willis* the order of the House for the Treasurer to attend in his place and explain his failure to table documents be postponed).

72 *Minutes*, NSW Legislative Council, 25 February 1969, pp 318-320; *Hansard*, NSW Legislative Council, 25 February 1969, pp 3858-3890.

73 *Minutes*, NSW Legislative Council, 12 August 1980, p 13.

78. MOTIONS FOR DISALLOWANCE OF STATUTORY INSTRUMENTS

(1) A notice of motion to disallow:

(a) a statutory instrument under section 41 of the Interpretation Act 1987, or

(b) any other statutory instrument or document made under the authority of any Act and which is subject to disallowance by either or both Houses of the Parliament,

is to be placed on the Notice Paper as business of the House.

(2) When the order for disallowance of a statutory instrument is called on, the House will first decide on a question proposed without amendment or debate – That the motion proceed as business of the House.

(3) If the question is agreed to, the House will then decide, on motion, when the matter will proceed.

(4) The debate on any motion moved under this order as business of the House is to be conducted as follows:

(a) the member moving the motion and the Minister first speaking may speak for not more than 15 minutes,

(b) any other member and the mover in reply may speak for not more than 10 minutes,

(c) if the motion is not sooner disposed of, after a total time of one and a half hours debate, the President is to interrupt proceedings to allow the mover of the motion to speak in reply, and

(d) the President will then put all the questions necessary to dispose of the motion and any amendments.

(5) When the House determines that a motion for disallowance will not proceed as business of the House, it will be set down as private members' business outside the order of precedence.

Development summary		
1988-1991	Sessional order	Notices for disallowance of statutory rules
1995	Sessional order	Notices for disallowance of statutory rules
1996-2003	Sessional order	Disallowance of statutory instruments
2003	Sessional order 78	Motions for disallowance of statutory instruments
2004	Standing order 78	Motions for disallowance of statutory instruments

Standing order 78 provides the procedure for debating a motion for the disallowance of a statutory instrument.

The standing order applies to the disallowance of statutory rules under section 41 of the *Interpretation Act 1987*, or any other statutory instrument or document made under the

authority of any Act and which is subject to disallowance by either or both Houses of Parliament.

Prior to the enactment of the *Interpretation Act 1987*, the disallowance power was provided for by section 41 of the *Interpretation Act 1897*. The provision was inserted in 1969[74] to simplify the statutory provisions for disallowance,[75] as prior to 1969 such provisions were provided in each empowering Act.[76]

Some statutory instruments are instead disallowable under provisions of the principle Act under which they are made.[77]

Operation

Before a motion for the disallowance of statutory instrument is moved, the House must first agree to two questions.

Under SO 78(1), a notice of motion for the disallowance of a statutory rule is placed on the Notice Paper as business of the House and, when that notice is called on, the President puts the question, without amendment or debate 'That the motion proceed as business of the House'.

If the question is negatived, the notice is placed at the end of private members' business outside the order of precedence after any notices already given that day, and is dealt with in the same manner as any other private members' motion, aside from the time limits on debate set by SO 78(4).[78] If the question is agreed to, the House must then determine on motion moved without notice 'when the matter will proceed' (SO 78(3)). Usually, the motion is 'That the matter proceed forthwith' although there are precedents of a motion for the matter to proceed on a particular date.[79] As it is for the House to determine when the matter should proceed, the motion moved under SO 78(3) can be debated and amended. However, SO 78 does not prescribe the consequences of a motion moved under SO 78(3) being negatived. Under the sessional order in force prior to 2003, the only question put to the House was 'That the matter proceed forthwith', and the provision under SO 78(5) applied to that motion.[80]

74 *Interpretation (Amendment) Act 1969* No 36, section 2(i).

75 *Hansard,* NSW Legislative Council, 18 March 1969, pp 4578-4579.

76 For example, *Minutes,* NSW Legislative Council, 11 December 1947, p 81 (motion to disallow certain regulations according to section 16(3) of the *Rural Workers' Accommodation Act 1926*).

77 For example, section 14 of the *Ombudsman Act 1974*.

78 For example, *Minutes*, NSW Legislative Council, 25 May 2006, p 48; *Notice Paper,* NSW Legislative Council, 6 June 2006, p 184; *Minutes*, NSW Legislative Council, 10 March 2010, p 1690; *Notice Paper,* NSW Legislative Council, 11 March 2010, p 10256.

79 See *Minutes*, NSW Legislative Council, 1 September 2010, p 2005.

80 See, for example, *Notice Paper,* NSW Legislative Council, 18 September 1997, p 4; *Minutes,* NSW Legislative Council, 18 September 1997, p 53; *Notice Paper,* NSW Legislative Council, 23 September 1997, p 33.

When the notice of motion is called on, the motion is moved and debate commences, time limits applying. Under the standing order, the member proposing the motion and a minister first speaking may speak for 15 minutes each and all other members for not more than 10 minutes each. After one and a half hours, the President interrupts debate to allow the mover to speak in reply for not more than 10 minutes. The question on any amendment and the substantive motion is then put.

In 1996, three motions for the disallowance of separate regulations were considered together, by leave, and the questions taken in globo. This precedent suggests that the regulations must relate to a common subject in order to be considered together.[81] This procedure was again used in 2016 to allow two motions for the disallowance of parts of two related regulations to be considered together. The questions on the motions were put separately.[82]

A motion for the disallowance of a regulation can be amended, but the regulation itself cannot. Amendments have proposed to:

- limit the scope of disallowance to exclude certain transport providers from the operation of the regulation[83]
- omit the number of regulations originally listed to be disallowed[84]
- limit the scope of disallowance to certain portions of the regulation (and an amendment to the amendment proposed to establish a select committee on the regulation)[85]
- limit the scope of disallowance to certain portions of the regulation and propose substitute provisions to the Governor for consideration[86]
- defer consideration of disallowance until after the Minister had tabled a report on the impact of the regulation[87]
- refer the regulation to the Committee of Subordinate Legislation for consideration and report.[88]

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81 *Minutes*, NSW Legislative Council, 16 May 1996, p 144 (All three regulations related to fees payable to a court: Supreme Court (Fees and Percentages) Regulation, Local Court (Civil Claims) Rules and the District Court (Fees) Regulation).

82 *Minutes*, NSW Legislative Council, 10 March 2016, pp 718-719 and 719-722 (motion to disallow lines within item [22] of Schedule 2 of the Petroleum (Onshore) Legislation Amendment (Harmonisation) Regulation 2016 and motion to disallow lines within item [21] of Schedule 2 of the Mining Legislation Amendment (Harmonisation) Regulation 2016).

83 *Minutes*, NSW Legislative Council, 8 May 1930, p 254; *Hansard*, NSW Legislative Council, 8 May 1930, pp 4943 and 4947.

84 *Minutes*, NSW Legislative Council, 11 December 1947, p 81.

85 *Minutes*, NSW Legislative Council, 4 December 1996, pp 537 and 540-544.

86 *Minutes*, NSW Legislative Council, 4 December 1930, p 30; *Hansard*, NSW Legislative Council, 4 December 1930, p 178.

87 *Minutes*, NSW Legislative Council, 20 October 1998, pp 776-777

88 *Minutes*, NSW Legislative Council, 28 August 1969, pp 60-61 (three separate motions concerning fluoridation).

Background and development

Although the Legislative Assembly had adopted a standing order giving precedence to motions for the disallowance of statutory rules in 1964, and there had been a long history of motions for the disallowance of statutory instruments being proposed in the Council, no rules were adopted for the procedure for considering such motions in the Council until 1988. Notices of motions to disallow a statutory rule were given in the normal manner and set down on the business paper for consideration as general business. There are examples of disallowances motions being agreed to as formal business.[89]

In April 1988, a sessional order was adopted on the motion of the Hon Elisabeth Kirkby, Australian Democrats, moved as formal business, which provided that a notice of a disallowance motion was to be placed on the Notice Paper as business of the House and would take precedence of government and general business for the day on which it was set down for consideration.[90] The same sessional order was adopted in August 1988, in 1990 and in 1991, on motions by the Liberal/National Party Government.[91]

The sessional order was not proposed during the next four sessions of Parliament. In 1995, after a change in government, the sessional order was adopted on the motion of a member of the Liberal/National Party coalition, now in opposition.[92]

In 1996, the Opposition again proposed the sessional order, but amended the notice by leave prior to moving it to include time limits for debate, which, according to the mover were designed to ensure that matters would be dealt with expeditiously while also allowing members reasonable time to speak.[93] The Leader of the Government, Mr Egan, proposed an amendment to remove the time limits and insert a provision that the disallowance motion would only proceed as business of the House if the House first agreed to the motion 'That the motion proceed forthwith', which was to be put without amendment or debate. According to Mr Egan, instead of giving automatic precedence to disallowance motions, this procedure would give the House 'an opportunity to test whether there is sufficient support for a disallowance motion to be debated immediately', and avoid the possibility of a one and a half hour debate taking place on a motion that only one or two members would support.[94] Revd Mr Nile moved an amendment to Mr Egan's amendment to reinsert the time limits proposed in the original motion.[95] The original question was agreed to as amended by Mr Egan and Revd Nile and was adopted in that form each subsequent session until 2003.[96]

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89 See, for example, *Minutes*, NSW Legislative Council, 5 March 1930, p 182.

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

91 *Minutes*, NSW Legislative Council, 18 August 1988, p 24; 8 May 1990, p 118; 21 February 1991, p 28.

92 *Minutes*, NSW Legislative Council, 18 October 1995, p 230.

93 *Minutes*, NSW Legislative Council, 18 April 1996, pp 45-47; *Hansard*, NSW Legislative Council, 18 April 1996, p 175.

94 *Hansard,* NSW Legislative Council, 18 April 1996, pp 172-173.

95 *Minutes*, NSW Legislative Council, 18 April 1996, pp 44-47.

96 *Minutes*, NSW Legislative Council, 17 September 1997, p 41; 12 May 1999, pp 48-49; 8 September 1999, pp 29-30; 12 March 2002, p 39; 30 April 2003, p 40.

In October 2003, the provision for debate on a motion for the disallowance of statutory instruments was one of the new standing orders proposed to the House by the Standing Orders Committee.[97]

The proposed new standing order contained two changes to the sessional order previously adopted. Under the standing order, a notice of motion would be placed on the Notice Paper as business of the House. When called on, the House would first decide on a question proposed by the President without amendment or debate 'That the motion proceed as business of the House'. If that question was agreed to, the House would then decide, on motion, 'when the matter would proceed'. The new provision not only introduced an extra step before the substantive matter could proceed but also omitted the prohibition on amending or debating the motion by which the House decides when the matter is to proceed. The proposed new standing order was adopted in May 2004.[98]

79. RESOLUTIONS OF CONTINUING EFFECT

The House may adopt resolutions which have continuing effect until such time as they are amended or rescinded.

Development summary		
2003	Sessional order 79	Resolutions of continuing effect
2004	Standing order 79	Resolutions of continuing effect

This standing order authorises the House to adopt resolutions which have ongoing effect until amended or rescinded. Most resolutions adopted by the House have a one-off or singular effect, but on occasion there is a need for the opinion or declaration of the House to have ongoing effect.

The term 'resolution' is often used to describe almost any decision of the House. However, there are important differences between resolutions and orders. *Erskine May* describes orders and resolutions as follows:

> Every question, when agreed to, becomes either an order or a resolution of the House. By its orders the House directs its committees, its Members, its officers, the order of its own proceedings and the acts of all persons who they concern; by its resolutions the House declares its own opinions and purposes.[99]

Orders result in something occurring or some action, such as a bill being read a second time, orders for state papers or a committee appointed.

97 *Minutes*, NSW Legislative Council, 14 October 2003, p 324.

98 *Minutes*, NSW Legislative Council, 5 May 2004, p 676.

99 Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011), p 424.

Resolutions, on the other hand, are an expression of the view or opinion of the House to acknowledge a sporting team, congratulate an achievement, note a community event, condemn a minister and so on.

Operation

Most resolutions of the House have singular or one-off effect, but many are intended to have an ongoing application.

Since the adoption of SO 79, motions for resolutions intended to have continuing effect have concluded with the paragraph: 'That this resolution have continuing effect until amended or rescinded', for example:

- rules for conduct in the President's and visitors' galleries[100]
- authority for the Clerk to enter into a memorandum of understanding with the State Records Authority for the transfer of records of the Legislative Council[101]
- the Code of Conduct for Members.[102]

Background and development

There is no predecessor to SO 79.

Although the standing orders provided for sessional orders to be made, and committees to be appointed for a whole session, or a whole parliament, until 2003 there was no authority for resolutions to apply indefinitely. Nevertheless, there are examples of the House adopting such resolutions. In 1993, the House resolved that the Parliamentary Precincts would be smoke-free, a resolution which has continued to have effect since.[103] In 1994,[104] the House authorised the sound and video broadcasting of its proceedings within the precincts of Parliament House and to certain other persons, which resolution continued to have effect until it was replaced in 2007.[105] In 1997, the House agreed to a motion of the Leader of the Government for the establishment of a procedure for a citizen's right of reply similar to that adopted by the Senate.[106] The resolution remained in force until 2004, when it was replaced by SOs 202 and 203.

100 *Minutes,* NSW Legislative Council, 10 November 2009, pp 1487-1488.
101 *Minutes,* NSW Legislative Council, 23 November 2006, p 432.
102 *Minutes,* NSW Legislative Council, 21 June 2007, pp 150-152.
103 *Minutes,* NSW Legislative Council, 9 November 1993, pp 363-364.
104 *Minutes,* NSW Legislative Council, 11 October 1994, p 279.
105 *Minutes,* NSW Legislative Council, 28 June 2007, p 197.
106 *Minutes*, NSW Legislative Council, 13 November 1997, pp 176-178.

Traditionally, unless otherwise provided, resolutions that did not have a singular or one-off effect were considered to exist only for the term of the session in which they were adopted. In 1991, the Senate passed a resolution following a recommendation of its Procedure Committee to the effect that any future resolution which was to have continuing effect was to include words to make that intention clear.[107]

Similarly, SO 79 adopted by the Legislative Council in 2004 removed any doubt as to the duration of resolutions adopted by the Legislative Council.

107 *Journals of the Senate*, 13 February 1991, p 739.

CHAPTER 15

ORDERS OF THE DAY

80. DEFINITION

An order of the day is a bill or other matter which the House has ordered to be taken into consideration on a particular day.

Development summary		
1895	Standing order 61	Definition
2003	Sessional order 80	Definition
2004	Standing order 80	Definition

SO 80 defines an 'order of the day' as an item of business already under the consideration of the House – that is, an item which has progressed past the notice of motion stage and on which debate has commenced. In some cases, an item comprised of multiple stages, such as a bill, may be set down as an order of the day even though debate on that particular stage has not yet commenced. For example, the first, second or third reading of a bill, or consideration in committee of the whole, may be set down as an order of the day for a future time even if debate on that stage has not commenced.

Operation

A 'notice of motion' is an item of business on which debate has not yet commenced. Members give a notice of motion to indicate that they intend to propose a matter for discussion. The item becomes an 'order of the day' once the notice has been moved and debate has been adjourned or interrupted, and set down for a particular time – either a later hour or a future day. This terminology reflects that used in other parliamentary jurisdictions.

Some types of business will comprise of more than one stage, which do not require notice, but which are listed as an order of the day once the original notice has been moved. For example, while a bill originates as a notice of motion, the first, second or third reading, or consideration in committee of the whole is set down as an order of the day, even if debate on that stage has not yet commenced.

Background and development

The precursor to SO 80 was first adopted in the same terms in 1895 as SO 61. The standing order replicated the terms of the newly adopted Legislative Assembly SO 114. Orders of the day have consistently been defined as items of business that have progressed past the notice stage and on which debate has commenced throughout the life of the Council or, in the case of bills, items that have progressed past the notice for leave to introduction the bill and for which consideration of a particular stage of the bill has been set down for future consideration.

81. DISPOSAL OF ORDERS

(1) Unless otherwise ordered, orders of the day will be called on and disposed of in the order in which they are shown on the Notice Paper.

(2) Any orders of the day on the Notice Paper each day which have not been dealt with at the adjournment of the House will be set down on the Notice Paper for the next sitting day at the end of any business already set down for that day.

(3) An order of the day may be moved or postponed by any other member in the absence of the member in charge of it or at the request of that member.

(4) An order of the day may be discharged by motion without notice.

Development summary		
1856	Standing order 32 Standing order 38	Precedence of motions Lapsing of notices, & c.
1870	Standing order 42 Standing order 47	Precedence of motions Lapsing of notices, & c.
1895	Standing order 57 Standing order 63 Standing order 66	Precedence of motions – Formal Business May be discharged or postponed Remanets
2003	Sessional order 81	Disposal of orders
2004	Standing order 81	Disposal of orders

SO 81 outlines the order in which items will be called over on the Notice Paper, and the procedure that applies where an item listed on the paper for that day is not considered before the House adjourns.

A member may move or postpone an order of the day standing in the name of another member, at that member's request. An order of the day must be discharged by motion – that is, it cannot be withdrawn, however, the motion to discharge the order may be moved without notice.

Operation

Calling on orders of the day

As noted under SO 80, orders of the day are items of business already under the consideration of the House (i.e. the item has progressed beyond the notice of motion stage). Under SO 81(1), orders of the day are called on and disposed of in the order in which they are shown on the Notice Paper, unless otherwise ordered. Items can be reordered via a number of different procedural mechanisms, including by motion for postponement (SO 45), by suspending standing and sessional orders to give a particular item precedence over other items (SO 198), by moving the motion as formal business (SO 44), by motion on notice[1] (SO 71), or by seeking the leave – that is, unanimous consent – of the House (SO 73).

Orders of the day not dealt with

Under SO 81(2), any orders of the day not dealt with on the adjournment of the House will be set down on the Notice Paper for the next sitting day, at the end of any business already set down for that day. In practice, this often results in items which have been set down as orders for a particular named day being given precedence over an item that is simply set down for 'next sitting day', a system referred to as remanets.

However, the rules for the disposal of orders under SO 81 need to be read in conjunction with other standing orders that govern the ordering of business. While most items of business that are adjourned or postponed until a particular day are initially listed at the back of the Notice Paper as 'Business for Future Consideration', the standing orders may apply additional rules that dictate the ordering of the item on the day nominated for consideration. For example, private members' business is governed by the system for the private members' draw, which prioritises those items drawn in a ballot in an 'order of precedence' (see SOs 183-189). Where an item of private members' business is adjourned or postponed until a particular day in the future, it is initially listed at the back of the Notice Paper under 'Business for Future Consideration', then when the day named is reached, the item is reinserted back into the list of business in the order in which it previously appeared, rather than being afforded priority over items which have simply been carried over from day to day because they had not been dealt with.

In contrast, other categories of business are not subject to additional rules, so the ordering of those items is determined according to the provisions of SO 81(2). This is the case with items categorised as 'Business of the House' (see SO 39). Where such an item is adjourned or postponed to a particular day, the item is initially placed at the end of the Notice Paper under 'Business for Future Consideration' and when the day named

1 An example of changing the order of business by providing notice would be the Leader of the Government placing a notice on the Notice Paper that, on a particular day, government business will take precedence on a day that would otherwise be allocated for the consideration of private members' business. If that motion is subsequently moved and agreed to, the order of business will be reordered on the day named and priority given to government items.

is reached, the item is listed as the first item of business in that category, above notices given or orders set down the previous sitting day for 'the next sitting day'.[2] This system is referred to as 'remanets'. Prior to the adoption of the system for the private members' draw in 1999, items of private members' business were also subject to the remanet system, which led to significant complication when members sought to set down their item of business for a particular day in an effort to 'trump' one another. This practice, and the adoption of a new system, is discussed in greater detail under SO 184.

While orders of the day for the consideration of take note debates on committee reports are not governed by additional rules to that in SO 81(2), over successive years the practice has developed in the Council of listing committee reports in the order in which the motions are moved in the House. If an order of the day is adjourned or postponed to a future day, it is listed at the back of the paper under 'Business for Future Consideration', then on the named day reinserted into its original place in the order, in keeping with the practice for consideration of private members' business. While this practice runs contrary to the procedure set out in SO 81, the practice has developed with the acquiescence of successive Councils over a number of years.

Orders of the day moved or postponed by another member

An order of the day may be moved or postponed by any other member in the absence of the member in whose name the item is listed on the Notice Paper, or at the request of that member. (SO 81(3)). In practice, while it is fairly commonplace for members to move motions for postponement on behalf of a member who is not present, it is quite rare for members to move motions on another's behalf.[3] In recent years, the practice has usually only occurred where an item has been listed for consideration as formal business (SO 44) at the commencement of the sitting day and the member with carriage was not present in the chamber at the time of it being called over,[4] or where a government minister or parliamentary secretary has moved an item of government business listed in the name of another government minister.[5] It would be highly irregular for members of different political parties to move motions on behalf of one another, however, the practice has

2 See the order in which business of the House was listed on the Notice Paper for items held by Mr Gay and Mr Veitch on the following dates: notice no. 1 of Mr Gay, *Notice Paper,* NSW Legislative Council, 30 May 2012, p 4846; notice postponed by Mr Gay until 12 June 2012, *Minutes*, NSW Legislative Council, 30 May 2012, p 1017; two new notices given by Mr Veitch; Mr Gay's notice has been listed at the back of the paper following postponement, *Notice Paper*, NSW Legislative Council, 31 May 2012, pp 4900 and 4957; Mr Veitch postponed his notices until next sitting day, *Minutes*, NSW Legislative Council, 31 May 2012, p 1028; *Notice Paper,* NSW Legislative Council, 12 June 2012 lists Mr Gay's notice first, followed by Mr Veitch's notices, *Notice Paper,* NSW Legislative Council, 12 June 2012, p 4960. Also see ordering of business of the House on *Notice Paper*, 21 June 2016, pp 4888-4889, then postponement of business in *Minutes*, NSW Legislative Council, 21 June 2016, pp 958-959 and subsequent reordering of business of the House in *Notice Paper,* 22 June 2016, pp 5042-5043.

3 *Minutes,* NSW Legislative Council, 8 November 1979, p 203.

4 *Minutes,* NSW Legislative Council, 24 November 2011, pp 623-629.

5 For example, *Minutes,* NSW Legislative Council, 18 October 2006, p 274; 1 December 2009, p 1590.

occurred at the request of or with the knowledge of the other member.[6] Similarly, it would be highly irregular for a member to 'ambush' a member by moving a motion standing in their name without their consent because it runs the risk of members falling into a repetitive cycle of retaliation (see discussion under SO 75).

In the case where a sitting member has passed away, another member may take carriage of an order of the day standing in the deceased member's name on the Notice Paper. This occurred when, following the passing of the Hon Roy Smith (Shooters and Fishers Party), the Hon Robert Borsak (Shooters and Fishers Party) took carriage of proceedings on the Firearms Legislation Amendment Bill 2010, which was listed on the Notice Paper at the second reading stage.[7] Where this occurs, there are no procedural motions moved in the House, however, the House acquiesces to the member taking up the item on the understanding that they do so with the support of the deceased member's party. If proceedings on the item are further adjourned or interrupted, the item will be listed on the Notice Paper in the name of the member who has taken carriage of the item.

An alternative practice was adopted following the passing of Dr John Kaye (The Greens) in 2016, when Mr David Shoebridge (The Greens) moved a motion on notice that, notwithstanding anything to the contrary in the standing or sessional orders, notices of motions standing in the name of Dr Kaye on the Notice Paper be reallocated to other members of The Greens according to instructions set out in the motion.[8] The motion was agreed to without debate.

Discharging an order of the day

Although a member retains carriage of an item of business throughout its consideration, once a motion has been moved, it is in the 'possession' of the House. To remove the item from the Notice Paper, an order of the day must be discharged from the Notice Paper, by motion without notice, which requires a vote of the House (SO 81(3)). This contrasts to the procedure for removing a notice, which can be withdrawn by the member with carriage during the call for notices (SO 72). Motions to discharge an order of the day have been moved on a number of occasions under the current standing orders.[9] It is in order for a member to debate the motion to discharge an order of the day.[10]

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6 For example, in 2014, the Hon Adam Searle (Lab) moved a motion regarding a disputed claim of privilege on a return to order on behalf of Revd the Hon Fred Nile (CDP) because they were both members of a committee that required the documents to assist the committee in its deliberations (*Minutes*, NSW Legislative Council, 6 March 2014, pp 2346-2347). During the 53rd to 55th Parliaments, it was also common for members of different crossbench parties to move for the postponement of business on behalf of one another.

7 *Minutes,* NSW Legislative Council, 23 September 2010, pp 2080 and 2083-2084; *Notice Paper*, NSW Legislative Council, 23 September 2010, p 13945.

8 *Minutes,* NSW Legislative Council, 5 May 2016, pp 860-861.

9 For example, *Minutes,* NSW Legislative Council, 8 June 2006, p 118, discharging a motion to amend the Code of Conduct for Members; 13 September 2006, pp 1550 and 1551, discharging orders of the day for the second reading, or resumption of debate on the second reading, for bills.

10 Ruling: President Primrose, *Hansard,* NSW Legislative Council, 2 September 2009, p 17064. Also see debate on motion to discharge order of the day regarding a reference to a committee, *Minutes,* NSW Legislative Council, 13 March 2002, p 52.

On occasion, a motion to discharge an order of the day has been moved by leave, however, this practice is discouraged as it runs contrary to the standing order.[11] SO 81 now makes it clear that the motion does not require notice, but can be moved when the item is called on.

Other provisions for an order of the day to be discharged

SO 140 provides that on the order of the day being read for the second reading of a bill, the question may be proposed that the order be postponed or discharged.

Motions in a similar form

The discharge procedure has also been used to address the circumstance where two notices of motions are given in a similar form. In 1968, two members gave notices of motion proposing that different members be appointed the Chairman of Committees. The President advised that the two notices should be moved concurrently. When the questions were then put and the first motion was agreed to, the second motion was discharged from the Notice Paper.[12]

Background and development

Prior to 2004, the provisions of SO 81 generally applied in practice – orders of the day, like other business, were called on in the order in which they were listed on the Notice Paper,[13] subject to the use of other procedural mechanisms to change the order of business. Orders of the day not dealt with on the adjournment of the House were set down for the next day (1856 SOs 32 and 38; 1870 SOs 42 and 47; 1895 SO 66), and orders of the day were required to be postponed or discharged, on motion (1895 SO 63), though, prior to 1895, postponements were moved by leave (SO 1856 32). However, a number of principle differences applied:

- Business not considered and set down for a future day was subject to the 'remanet' system (1895 SO 66), which afforded particular items priority over one another. This system is discussed above, and in greater detail under SO 184.
- Under 1895 SO 63, an order of the day could be read and discharged or postponed on motion. Prior to 1895 the same applied in practice, though was not explicitly provided for in the standing orders. The current standing order instead provides that such a motion can be moved on motion *without notice*.
- 1895 SO 64 provided that an order of the day or amendment need not be seconded. The requirement for a motion to be seconded applied only between 1856 and 1866, when it was then rescinded[14] on the recommendation of the

11 *Minutes,* NSW Legislative Council, 28 February 2001, p 854.
12 *Minutes,* NSW Legislative Council, 28 March 1968, p 23.
13 1895 SO 57, 1870 SO 42 (amended in 1890 to incorporate provision for formal business, later found in 1895 SO 57 – see commentary on current SO 44), 1856 SO 32.
14 1856 SOs 25 and 26 rescinded, *Minutes,* NSW Legislative Council,12 September 1866, p 51.

Standing Orders Committee in order to bring the Council's practice into line with the House of Lords and make clear that neither motions moved on notice, nor procedural motions, required a seconder. The committee inquiry was prompted by a complicated point of order taken during debate on the second reading of a bill, in which a member argued that the motion for the second reading required a seconder.[15]

- Since 1866, motions have only been seconded if they related to an Address-in-Reply, or to the election of the President. As the practice has been well and truly dispensed with, the current standing orders make no reference to seconding a motion.[16]
- Prior to 2004, the standing orders did not make reference to the ability of a member to move or postpone an order of the day on behalf of another member. Nevertheless, the practice did occur,[17] though the practice is used considerably more often today as a consequence of the increase in the number of crossbench members in the House, and the increase in the volume of private members' business considered by the House.

82. PRE-AUDIENCE

A member who is in charge of a bill has pre-audience when the order of the day is read.

Development summary		
1895	Standing order 62	Member in Charge to have Pre-audience
2003	Sessional order 82	Pre-audience
2004	Standing order 82	Pre-audience

A member has 'pre-audience', that is, an entitlement to speak first on an order of the day, in two circumstances. Under SO 82, a member who is in charge of a bill has pre-audience when the order of the day is read. This allows the member to manage the progress of the bill through its various stages by postponing consideration of the bill or moving for its withdrawal. On the resumption of debate, pre-audience is also given to a member on whose motion a debate was adjourned (SO 101(4)), and to a member whose speech has been interrupted (SO 46(3)), which entitles that member to speak first when debate resumes.

Operation

The member in charge of a bill has pre-audience when the order of the day on the bill is read. Depending on the stage of the bill which has been set down as an order of the

15 *Minutes,* NSW Legislative Council, 1 August 1866, pp 11-12; *Sydney Morning Herald,* 2 August 1866, p 6.

16 Except in relation to a motion for an Address-in-Reply to the Governor's speech, under SO 8.

17 *Minutes,* NSW Legislative Council, 4 May 1994, p 162; 21 October 1999 p 137; 17 September 2003, p 301; 17 December 1880, p 11.

day, the member has the right to move the second or third reading of the bill, postpone consideration of the bill or move that the order of the day on the bill be discharged.

The member in charge of a bill is the member responsible for the carriage of the bill through its various stages in the House. This is usually the member who gave notice of motion for leave to bring in the bill in the case of a Council bill or the member who has taken carriage of an Assembly bill. Ministers are responsible for bills according to the Allocation of the Administration of Acts made under section 50B of the *Constitution Act 1902*, which provides for the Governor to allocate to ministers the administration of Acts and other portfolio responsibilities. Ministers in the Council represent ministers in the Assembly and take responsibilities for the carriage of bills in the Council for the ministers they represent. Where a parliamentary secretary or other minister moves the introductory motions on a bill on behalf of the responsible minister, the responsible minister remains the member in charge of the bill. However, in practice, ministers and parliamentary secretaries take responsibility for the carriage of bills on behalf of one another as a matter of convenience.

In committee of the whole, a member in charge of a bill is entitled to propose amendments at a point in the bill before other members are able to propose amendments at the same point in the bill.[18]

If the member with pre-audience is absent when the order of the day on the bill is read, another member may move or postpone the order of the day on that member's behalf (SO 81(3)).

If the order of the day relates to the resumption of debate rather than a particular stage of the bill, pre-audience is given to the member on whose motion debate was adjourned (SO 101(4)) or the member whose speech was interrupted (SO 46(3)).

The Notice Paper records the stage the bill has reached, the member with carriage of the bill, and the member who has pre-audience under SO 101(4).

Background

There was no equivalent provision in the 1856 standing orders. SO 62 adopted in 1895, based on SO 118 of the Legislative Assembly, provided that: 'A Member who is conducting an Order of the Day through the House shall have pre-audience when the Order of the Day is read'. While former SO 62 applied to all orders of the day, current SO 82 is confined to orders of the day on bills, and SOs 46 and 101 now govern pre-audience in other circumstances.

18 See SOs 109, 100, 111 and 144 for detailed discussion on moving amendments in committee of the whole.

CHAPTER 16

RULES OF DEBATE

83. ORDER MAINTAINED BY PRESIDENT

(1) The President will maintain order in the House.

(2) Whenever the President rises during a debate all members including the member speaking must sit down, and the House must be silent so that the President can be heard without interruption.

(3) When the President is proposing a question a member may not enter or leave the chamber.

Development summary		
1856	Standing order 6	Duty of President
1895	Standing order 83	Order to be maintained when the President rises
	Standing order 97	Order to be maintained by the President and Chairman of Committees
2003	Sessional order 83	Order maintained by President
2004	Standing order 83	Order maintained by President

A fundamental role of the President is to maintain order in the House. The standing orders have articulated this role since 1856. SO 83 provides that when the President rises, all members must take their seats and be silent. This provision ensures that members give their full attention to the Chair who may then be heard in silence.

Operation

Whenever the President rises during debate, all members including the member speaking must sit down and the House must be silent so that the President can be heard without interruption. This provision enables the President to gain the immediate attention of members present. In practice, the President is usually able to maintain order by calling the House to order, and it is only on rare occasions that the President is required to rise for such a purpose.

Although the standing order refers to the President rising during a debate, there is also an established practice that if the President rises at any time, all members must take their seats and remain seated until the President sits. This tradition ensures that members give their attention to the Chair in order that the proceedings of the House are conducted efficiently and expeditiously. This tradition also serves to convey the gravity or importance of what the President is saying. For example, since August 2014, on the Tuesday of each sitting week, the President has risen to make a statement to commemorate the 100th anniversary of World War I and to mark a particular aspect of the war.[1]

Under SO 83(3), when the President is proposing a question, a member may not enter or leave the chamber. The provision articulates a courtesy that should be extended by all members to the House and to the President when a question is put to the House for a decision. In practice, members are generally free to move about the chamber even when procedural matters are put to the House. However, if a member, in leaving the chamber while the President was proposing a question, was being deliberately discourteous, a point of order could be taken or the President could rule on the breach of order.

Background and development

Since 1856, the standing orders have included the provision that the President is to maintain order in the House. The 1856 and 1870 standing orders provided for the role of the President as follows: 'It shall be the duty of the President to preserve Order; taking the sense of the Council, nevertheless, on any disputed point'. Although the standing order did not include a provision for members to take their seats when the President rises, the rule was observed in practice.[2]

The provision that the Speaker shall preserve order, 'taking the sense of the Council on any disputed point of order', was included in the Council's standing orders even prior to responsible government and the adoption of new standing orders in 1856. The provision that the President preserve order, but with the advice or concurrence of the House, may have been based on the House of Lords where the Lord Speaker has no power to rule on matters and the maintenance of rules and order is the responsibility of the House itself.

In 1858, an amendment to a motion was proposed which, in the opinion of the President, was not in order. Debate having ensued as to the competency of the House to entertain the proposed amendment, the President, in accordance with SO 6, put the question to the House: 'Is it competent for the House to entertain Mr Holden's Motion?' The question that

1 *Minutes,* NSW Legislative Council, 12 August 2014, p 2640; *Hansard,* NSW Legislative Council, 12 August 2014, p 30262.

2 See, for example, ruling of President Hay, *Hansard,* NSW Legislative Council, 19 March 1884, p 2357; ruling of President Willis, 7 May 1997, p 8137.

the House was competent to consider the amendment was resolved in the affirmative, and the amendment was considered and negatived on division.[3]

In 1889, the President ruled:

> If at any time Members should think that the rules and orders and practice of Parliament to a material extent cripple their desire to be useful in any way, the Chair will be very willing to take the opinion of the House, and to bow to its decision.[4]

In 1895, the new standing orders omitted the provision for the President to 'take the sense of the Council' (SO 83), instead providing for a motion of dissent to a President's ruling (SO 89), maintaining the principle that the House remains the final arbiter on any question of order or procedure.[5] (See SO 96 for dissent to President's rulings).

This principle was applied in an example in 2006. Following a member moving a motion for the suspension of standing orders on contingent notice, the President was informed that the member had not given the necessary contingent notice. President Burgmann made a statement to the effect that, although the motion was moved in the absence of notice and therefore in a manner contrary to the standing orders, as it had been the will of the House that the matter proceed, it was not necessary to overturn the actions of the member or the House.[6]

Standing order 83 adopted in 1895 also introduced the provision that when the President rises any member speaking must sit down and the House must be silent so that the President can be heard without interruption. The standing order was in similar terms to SO 154 adopted in the Legislative Assembly the previous year. The current standing order retains this provision.

The standing orders adopted by the Legislative Assembly in 1894 also provided:

> When the Speaker is putting a Question, no Member shall walk out of or across the Chamber; nor, when a Member is speaking, shall any Member hold discourse to interrupt him.

Although this provision was not adopted by the Legislative Council in 1895, a similar provision was included in the revised standing orders adopted in 2004. Standing order 83(3) provides that when the President is proposing a question, a member may not enter or leave the chamber. SO 83(3) is in identical terms to the equivalent standing order in the Senate.

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3 *Minutes,* NSW Legislative Council, 28 July 1858, p 57.

4 See ruling of President Hay, *Hansard,* NSW Legislative Council, 28 August 1889, p 4540.

5 See ruling of President Hay, *Hansard,* NSW Legislative Council, 11 March 1880, p 1462.

6 *Minutes,* NSW Legislative Council, 26 September 2006, p 219; *Hansard,* NSW Legislative Council, 26 September 2006, p 2159.

84. CONDUCT OF MEMBERS

(1) A member should acknowledge the Chair on entering or leaving the chamber.

(2) A member may not pass between the Chair and a member who is speaking, or between the Chair and the Table.

(3) A member not addressing the House may not converse aloud or make any noise or disturbance during debate.

(4) Any member persisting in such conduct after being called to order by the President may be dealt with for disorderly conduct.

Development summary		
1895	Standing order 28 Standing order 93	No member to pass between the Chair and Table No noise or interruption allowed in debate
2003	Sessional order 84	Conduct of members
2004	Standing order 84	Conduct of members

SO 84 provides rules for the conduct of members in the chamber, the basis of which is to facilitate the orderly conduct of business, respectful interactions in the chamber and courtesy to other members and the Chair. The rules serve to acknowledge the responsibility of the Chair in maintaining order, the requirement for orderly conduct of members, and an unobscured view from the Chair of members in the chamber.

Operation

Under SO 84(1), members should acknowledge the Chair on entering or leaving the chamber. Acknowledgement usually takes the form of a short bow or nod to the Chair. Showing obeisance to the Chair is a mark of respect to the office but is also a courtesy to the House as a whole. In 1884, President Hay ruled:

> … it is according to the practice of the Imperial Parliament and our own that honourable members on entering and leaving the Chamber make their obeisance to the Chair, and also observe the same ceremony on passing from one side of the Chamber to the other. Honourable members know that I am not rigorous about matters of mere form; but it is desirable that these practices should be observed, as they conduce to the orderly conduct and demeanour of honourable members in the House. I maintain the rule as one which exists for the benefit of the Council as a body.[7]

However, the practice also has practical purpose. The President is more likely to know who is in the chamber if members acknowledge the Chair when they enter or leave the chamber.

7 *Hansard,* NSW Legislative Council, 19 March 1884, p 2357.

It has been ruled that a member cannot expect the protection of the Chair if that member does not acknowledge and address the Chair.[8]

Under SO 84(2) a member may not pass between the Chair and a member who is speaking, or between the Chair and the Table of the House. This rule serves to ensure that the Chair's view of the member with the call is not obscured and that when speaking, the member is able to look at and address their remarks to the Chair, as required by SO 85, and that the ability of the Chair to seek and receive advice from the Clerk is not hindered. In practice, it is also disorderly for members to pass between the Chair and a member seeking the call as this would similarly obstruct the line of sight between the Chair and the member.

SO 84(3) and (4) provide that members must not converse loudly or otherwise disturb debate. A member doing so can be called to order and ultimately dealt with for disorderly conduct. Presidents have applied these rules in practice and have required that members wishing to converse should do so outside the chamber[9] and placed members whose phone rings aloud in the chamber on a call to order.[10]

Background and development

SO 84(1) was adopted in the Legislative Council for the first time in 2003 and is in the same terms as Senate standing order 185(1). Although only codified in 2003, the rule that a member should acknowledge the Chair on entering or leaving the chamber is longstanding and has been the subject of Presidents' rulings from time to time.[11]

Similarly, the rule that a member must not pass between the Chair and a member speaking was established practice although was not a standing order until 2003.

The second part of SO 84(2) relating to the Chair and the Table was contained in 1895 SO 28, although that standing order was expressed to apply only when the President was in the chair. Standing order SO 84(2) is also in the same terms as Senate standing order 185(2).

The provisions of paragraphs (3) and (4) were formerly contained in 1895 SO 93.

There were no standing orders for the conduct of members in any of these terms prior to 1895.

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8 See ruling of Deputy President Willis, *Hansard,* NSW Legislative Council, 13 June 1990, p 5426.

9 See, for example, *Hansard,* NSW Legislative Council, 15 November 2007, p 4216; 28 February 2008, p 5634; 18 June 2008, p 8577; 25 March 2009, p 13659; 25 March 2009, p 13666; 2 April 2009, p 14349; 3 December 2009, p 20569.

10 *Hansard,* NSW Legislative Council, 10 March 2010, p 21132 (statement by President Fazio); 12 May 2010, p 22485; 20 May 2010, p 23176; 1 June 2010, p 23317; 19 October 2010, p 26135; 20 October 2010, p 26284; 21 October 2010, p 26508; 28 October 2010, p 27065; 1 December 2010, p 28639.

11 See, for example, *Hansard,* NSW Legislative Council, 19 March 1884, p 2357.

85. MEMBERS TO ADDRESS PRESIDENT STANDING

(1) A member who wishes to speak must rise in their place and address the President.

(2) A member unable to stand because of sickness or infirmity may speak when seated.

Development summary		
1856	Standing order 9	Address in debate
1870	Standing order 11	Address in debate
1895	Standing order 68 Standing order 69	Member to speak standing and uncovered Indulgence to Member unable to stand
2003	Sessional order 85	Members to address President standing
2004	Standing order 85	Members to address President standing

Standing order 85 is practical in nature. It provides that a member wishing to speak must rise in their place and seek the call. If a member cannot rise due to sickness or infirmity the member may speak while seated.

Operation

Members wishing to speak in debate, raise a point of order, or make a personal explanation rise in their place and 'seek the call'. To do so, members call out aloud 'Mr/ Madam President' or 'Mr/Madam Chair' and wait to be given the call. When two or more members seek the call, and none have pre-audience under SOs 46, 82 or 101, the Chair will call on the member who, in the Chair's opinion, rose first, which is known as being 'first recognised' by the Chair. The President must hear the member and see the member rise in their place in order to be recognised. In 1981, the President ruled that the onus is on members who want to speak to attract the Chair's attention[12] and Presidents have also ruled in this regard that they do not have the powers of clairvoyance,[13] or of a mind reader.[14]

In 1982, the President advised members:

> …there is little purpose in their simply standing in their places to seek the call. I expect them to address the Chair. If they do so, and if they attract my attention first, they will be given the call in conformity with the standing orders.[15]

In 1946, the President ruled:

> I do not want any hon. member to miss his opportunity to speak, but if he does not rise, I cannot know that it is his desire to address the Chair. My objective is to

12 *Hansard,* NSW Legislative Council, 1 December 1981, p 1102; see also 18 September 2003, p 3544.
13 *Hansard,* NSW Legislative Council, 21 March 1979, p 2875; 21 June 2007, p 1459.
14 *Hansard,* NSW Legislative Council, 25 May 2006, p 372.
15 *Hansard,* NSW Legislative Council, 21 September 1982, p 902 (President Johnson).

> protect the rights of hon members, and hon. members who wish to protect their own rights should, when they wish to speak, rise at once and address the Chair.[16]

Under SO 97, the allocation of the call by the Chair may be challenged by a member moving without notice that a member who rises to address the House 'be now heard'. The Chair must immediately put the question without amendment or debate.

The member with the call moves to one of the lecterns at the Table.[17] Although members may speak from any lectern, and Presidents have ruled that a member may speak from any position in the chamber[18], it is customary for members of the government to speak from the lectern on the right of the President, opposition members to speak from lecterns to the left of the President and crossbench members to speak from any lectern, occasionally from the side of the Table which would indicate support or opposition to the subject matter of the debate.

Members must address their remarks through the President or Chair. This practice acknowledges the role of the Chair in maintaining order and minimises the likelihood of members making personal reflections on other members during debate. Presidents and Chairs have consistently ruled that members must address their remarks through the Chair and not to members across the chamber.[19] However, it has also been ruled that it is not necessary for a member to look at the Chair while making a speech.[20]

If a member is unable to stand due to sickness or infirmity, they may speak when seated.[21] There have been only a few recorded incidences of this occurring. For example, in 1993, before giving the call to the Hon Fred Nile, the President stated:

> I would like to point out for the purpose of the record that [the Hon Fred Nile] has been admitted to the floor of the House in a wheelchair, clothed as he is, this being the result of his hospitalisation due to an injury caused by accident. I understand that there is precedent for this from the 1930s and or 1940s and, therefore, Reverend the Hon. F. J. Nile's circumstances so permit him to address the House from a seated position.[22]

On another occasion, in 1996, after prayers were read, the President informed the House:

> The Hon. Elisabeth Kirkby has the indulgence of the House, in view of her temporary incapacity, to speak from a seated position. I entreat her, when she wants the call, not only to raise the white flag but also to raise her voice in the manner that she has been trained to do.[23]

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16 *Hansard,* NSW Legislative Council, 3 September 1946, pp 220-221 (President Farrar).

17 The exception to this practice frequently occurs during Question Time when members ask questions from their place on the benches.

18 *Hansard,* NSW Legislative Council, 24 May 1989, p 8397.

19 See, for example, ruling of Deputy President Willis, *Hansard,* NSW Legislative Council, 13 June 1990, p 5426.

20 Ruling of President Primrose, *Hansard,* NSW Legislative Council, 30 October 2008, p 10900.

21 See, for example, *Hansard,* NSW Legislative Council, 28 September 1967, p 1712 (Hon Edna Roper).

22 *Hansard,* NSW Legislative Council, 17 November 1993, p 5517 (President Willis).

23 *Hansard,* NSW Legislative Council, 19 November 1996, p 6081 (President Willis).

Background and development

Standing order 85 provides fundamentally the same rules as standing orders 68 and 69 adopted in 1895. The requirement that members speak 'uncovered' has been removed from the standing orders, the wearing of hats being no longer a matter requiring a rule of the House. However, if a member were to attempt to wear a hat into the chamber the President could draw on former practice to rule on the appropriateness of such behaviour.[24]

The 1856 and 1870 standing orders also provided that members, when speaking, must address the Chair but did not require a member to rise in their place, although this was the practice. There was also no provision for a member unable to stand to speak when seated.

86. PRESIDENT OR DEPUTY PRESIDENT TAKING PART IN DEBATE

The President or Deputy President may take part in any debate, but they must speak from the floor of the House and address the House generally.

Development summary		
1856	Standing order 9	Address in debate
1870	Standing order 11	Address in debate
1895	Standing order 72	President or Deputy taking part in debate
2003	Sessional order 86	President or Deputy President taking part in debate
2004	Standing order 86	President or Deputy President taking part in debate

Under the *Constitution Act 1902,* the President or member presiding may take part in any debate or discussion which may arise in the Legislative Council.[25] Standing order 86 provides that when the President or Deputy President takes part in debate they must speak from the floor of the House and must address the House generally.

Operation

While it is normal for the Deputy President to exercise his or her right to take part in any debate, and to regularly do so from the floor of the House in the usual manner, it is less common for the President to do so.

Although the President has the same rights as other members to participate in debate, because the President is, under the *Constitution Act 1902* and by tradition, the independent and impartial representative of the Legislative Council, it is relatively rare that the President has participated in debate, particularly in the House, but even in committee of the whole.

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24 Under SO 117, when a member takes a point of order during a division they must remain seated. To assist in drawing the attention of the Chair, the member is required to be 'covered', which is achieved by holding a sheet of paper above their head while seeking the call.

25 See s 22G *Constitution Act 1902.*

There are examples of the President taking part in debate in the decades after the advent of responsible government. The Minutes of Proceedings of 2 December 1857 record that, on the order of the day for the second reading of the Impounding Bill being read, and no member being present to move the motion, the President 'descended from the Chair and moved, That the second reading of this Bill stand an Order of the Day for Friday next, intimating his intention of communicating, in the meantime, with the Member who introduced the Bill'. The President then resumed the chair and put the question to the House, which was agreed to.[26] In 1883, President Hay spoke on the second reading of the Inscribed Stock Bill[27] and on the Retired Judges' Pensions Bill[28] and also spoke on a number of motions during his time as President between 1873 and 1892. In 1915, President Flowers took part in debate on the second reading of the Newcastle District Abattoirs and Saleyards (Further Amendment) Bill and the Meat Industry Bill.[29] However, following President Flowers contributions in 1915, there was not another occurrence of the President taking part in debate in the House until 1988.

In 1988, President Johnson took part in debate on a motion concerning abortion. In commencing his speech, President Johnson noted that it was 73 years since a President of the New South Wales Legislative Council had taken to the floor of the House to address members generally.[30]

President Johnson had earlier that year commented during debate on a motion for his removal from office:

> Before I call on the Leader of the Government in this House to reply, it is clear that under Standing Order 72 the Presiding Officer has the right to address the Council. It is not my intention to do so. It may be taken that I am not impartial.[31]

In 1989, President Johnson also participated in debate on the second reading of the Industrial and Commercial Training Bill and cognate bills,[32] doing so from a lectern to the side of the dais, the chair remaining vacant during his speech. There have been no further occasions on which the President has spoken in debate in the House.

In 2003, President Burgmann exercised a deliberative vote in division on the third reading of the Workers Compensation Amendment (Insurance Reform) Bill. A Temporary Chair of Committees, the Hon Jenny Gardiner, was in the chair and conducted the division.[33] Under SO 102(7) all questions in the House are decided by a majority of the members present other than the President or other member presiding who may only exercise a casting vote.

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26 *Minutes,* NSW Legislative Council, 2 December 1857, p 31.
27 *Hansard,* NSW Legislative Council, 7 February 1883, p 266.
28 *Hansard,* NSW Legislative Council, 18 April 1883, p 1597.
29 *Hansard,* NSW Legislative Council, 14 December 1915, pp 4605-4606; 15 December 1915, pp 4727-4730.
30 *Hansard,* NSW Legislative Council, 2 June 1988, pp 1333-1335.
31 *Hansard,* NSW Legislative Council, 28 April 1988, p 99.
32 *Hansard*, NSW Legislative Council, 10 May 1989, p 7884-7885.
33 *Minutes*, NSW Legislative Council, 19 November 2003, p 441.

Presidents have also presented petitions. In 1968, the President presented a petition relating to fluoridation of public water supplies,[34] and, in 2011, the President presented a petition from the chair, followed by another member moving the motion 'That the petition be received'.[35]

While it is relatively uncommon for the President to participate in debate in the House, it is more common for the President to participate in debate,[36] and vote in committee of the whole.[37] In 2010, President Fazio crossed the floor on a vote in committee of the whole.[38]

Background

The predecessor to the *Constitution Act 1902* adopted in 1855, had provided that 'it shall be at all Times lawful for the said President to take part in any Debate or Discussion which may arise in the said Legislative Council'.[39] SO 9, adopted by the Council the following year, first clarified that when the President, or other member presiding, takes part in debate they must do so from the floor of the House and address the Council generally.

Between 1856 and 1870, Presidents quite regularly moved amendments and initiated business. However, in 1870 on the President seeking to move a motion of general business in his name, a point of order was taken as to the power of the President to initiate business. The matter was referred to the Standing Orders Committee,[40] which reported that in its opinion the President had the same rights as any other member in that regard.[41] However, the motion to adopt the report was defeated on division.[42] During debate on the motion, a number of members referred to evidence to the committee from the Clerk of the Parliaments which questioned both the legality and the expediency of the idea of the President initiating business.[43]

The provision under SO 86 was contained in SO 72 of 1895 and SO 9 of 1856. A provision in the 1856 and 1870 standing orders provided that when the President, or the Chairman presiding, took part in debate, they would speak on the floor of the House, and address himself to the Council generally. This provision was contained in SO 72 of 1895 and remains in current SO 86.

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34 See, for example, *Minutes*, NSW Legislative Council, 7 November 1968, p 176; 10 December 1968, p 288.

35 *Minutes*, NSW Legislative Council, 4 August 2011, p 304.

36 See, for example, *Hansard,* NSW Legislative Council, 22 April 1936, pp 3165 and 3172 (Companies Bill); 10 November 2010, p 27503 (Election Funding and Disclosures Amendment Bill); 16 April 1991, pp 2091-2092 and 2096-2097 (Nurses Bill).

37 *Hansard,* NSW Legislative Council, 11 May 1989, p 1396 (Industrial and Commercial Training Bill); 5 December 1989, pp 14086, 14134 and 14146 (State Bank Corporatisation Bill).

38 *Hansard*, NSW Legislative Council, 19 October 2010, p 26178 (Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2010).

39 Section *7 Constitution Act 1855*.

40 *Minutes,* NSW Legislative Council, 24 August 1870, p 12.

41 *Minutes,* NSW Legislative Council, 19 October 1870, p 51.

42 *Minutes,* NSW Legislative Council, 17 November 1870, p 71.

43 *Sydney Morning Herald*, 18 November 1870, p 2.

The provision under SO 72 had included the Acting President, which was dropped from the 2003 standing order.

87. RIGHT TO SPEAK

(1) Except where expressly provided, a member may only speak once:

(a) on any question before the House, or
(b) on an amendment.

(2) In committee of the whole House members may speak more than once on a question.

Development summary		
1856	Standing order 15	Speaking twice
1870	Standing order 17	Speaking twice
1895	Standing order 71	No member to speak more than once – exceptions
	Standing order 221	Members may speak more than once (in committee of the whole)
2003	Sessional order 87	Right to speak
2004	Standing order 87	Right to speak

Except in the case of limited exceptions provided under the standing orders, a member may only speak once to any question before the House. Members may speak more than once in committee of the whole, reflecting the more informal and flexible nature of debate in committee.

Operation

It is the practice of most Westminster parliaments[44] that a member may speak only once to any question before the House, except in limited circumstances provided under the standing orders. These include:

- *Committee of the whole:* The House routinely refers certain matters, particularly bills on which amendments are proposed, for consideration in committee of the whole to enable consideration in detail and a more free-flowing debate. Given the nature of proceedings in committee, and in order to allow members the freedom to reason in debate with one another and deliberate, members may speak more than once (SO 87(2)). Traditionally, there has been no time limit applied to contributions in committee, however, under a sessional order adopted since 2011, each contribution made by a member in committee on a government bill is limited to 15 minutes

44 For example, the House of Commons and House of Lords (Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011) pp 434 and 516); Australian Senate (Rosemary Laing, *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009) p 526).

(although members continue to be able to make multiple contributions on any question in committee).[45]

- *To an amendment to the question, in certain circumstances*: A member may speak a second time during the same debate when an amendment has been moved after the member has already spoken, and the member wishes specifically to address the proposed amendment. This is because the amendment is seen as a separate question before the Chair, in addition to the original motion.[46] In speaking a second time to a motion, a member may also propose an amendment to the amendment, or their own further amendment.[47] When speaking a second time to an amendment, the member must confine their remarks only to the content of any amendments moved after their contribution to the substantive motion.[48] A member who speaks to the substantive question after an amendment has been moved may only speak once and must address both the substantive question and the amendment moved during their contribution. Likewise, the mover of a substantive motion must use the opportunity afforded to them to speak in reply to that motion (SO 90) to also address any amendments moved to the motion.[49]
- *The reply of a member who has moved a substantive motion or the second or third reading of a bill*: Under SO 90, a reply is allowed to a member who has moved a substantive motion, or the second or third reading of a bill. There is no reply afforded to the mover of a non-debatable motion, such as the motion that a petition be received; a subsidiary motion, such as the adjournment of debate; an amendment to a motion; or a procedural motion, such as the suspension of standing orders. In 2005, the Deputy President ruled that it was out of order for a member to move an amendment when speaking in reply, as other members would not have an opportunity to speak to the amendment, given that the speech in reply closes debate on a question.[50]

45 *Minutes* NSW Legislative Council, 3 August 2011, pp 296-298; 9 September 2014, p 11; 6 May 2015, p 59.

46 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 302.

47 *Minutes*, NSW Legislative Council, 22 June 2011, p 261.

48 Ruling: President Harwin, *Hansard*, NSW Legislative Council, 31 May 2012, p 12385; Ruling: Deputy President Maclaren-Jones, *Hansard*, NSW Legislative Council, 10 May 2012, p 11468; Ruling: Deputy President Solomons, *Hansard*, NSW Legislative Council, 17 November 1988, p 3599.

49 Ruling: President Harwin, *Hansard*, NSW Legislative Council, 31 May 2012, p 12383.

50 Ruling: Deputy President Fazio, *Hansard*, NSW Legislative Council, 17 November 2005, p 19934. There are, however, several precedents to the contrary. In 2010, standing orders were suspended to allow a motion to be moved that a speech in reply be interrupted to allow a member to speak a second time and move an amendment, and for the speech in reply to then resume for no more than 10 minutes (*Minutes*, NSW Legislative Council, 21 October 2010, p 2125). In 2014, two members, by leave, spoke to the motion after the mover had spoken in reply and an amendment was moved. The mover then spoke again (*Minutes*, NSW Legislative Council, 19 March 2014, p 2380).

- *Explanation of a speech:* Under SO 89, a member who has spoken on a question may speak a second time to explain a matter on which the member has been misquoted or misunderstood.[51]
- *By leave*: Though not provided for under the standing orders, on occasion members have been granted leave to speak a second time in debate.[52] Leave to speak a second time requires the unanimous agreement of all members. While leave has been granted for this purpose when special circumstances have warranted it, the practice is very much considered to be an exception to the accepted practice of the House.[53]

A second opportunity to speak is not afforded to a member for the purpose of moving an amendment (though members have been permitted to do so when speaking to an amendment moved by another member, as discussed above);[54] nor to a member for the purpose of making a contribution to a bill or motion to which they have earlier made their inaugural speech;[55] nor to a member who has lost the call owing to their removal from the chamber under SO 192.[56]

Unlike the practice in some other parliaments, it is commonplace for members in the Council to speak more than once to a point of order.

There are some questions on which no debate is permitted. These include the question on a motion moved as formal business (SO 44); the question on the first reading and printing of a bill (SO 137); the question that a future day be fixed for the third reading of a bill (SO 148); the questions 'That the petition be received' or 'That the petition be read by the Clerk' (SO 68); the motion 'That the member be now heard' (SO 97); and the motion 'That the member be no longer heard' (SO 98).

Background

The provisions of SO 87 have remained fairly consistent over time, however, the form of the standing orders have varied considerably. From 1856, members were prohibited from speaking twice to a question, except in committee of the whole, except for the purpose of speaking in explanation on some material point on which they had been misquoted or misunderstood, or for the purpose of allowing the mover of a question the 'liberty of reply' (1856 SO 15). In 1870, these provisions were readopted, however, the right of reply was specifically restricted to the mover of a 'main' question (1870 SO 17).

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51 For example, *Minutes*, NSW Legislative Council, 7 November 2007, p 329; 2 June 2011, p 174; 29 May 2013, p 1779.

52 For example, *Minutes*, NSW Legislative Council, 25 June 2003, p 171; 23 March 2005, p 1297; 26 May 2005, p 1410; 13 November 2007, p 340; 8 May 2008, p 576; 13 October 2011, p 496; 31 May 2012, p 1030; 19 June 2013, p 1836.

53 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, p 302.

54 *Erskine May,* 24th ed, p 434.

55 *Hansard*, NSW Legislative Council, 27 August 2013, p 22722.

56 *Minutes*, NSW Legislative Council, 8 May 2013, pp 1688-1689; *Hansard*, NSW Legislative Council, 8 May 2013, p 20115.

From 1895, the right of reply and right to speak more than once in committee of the whole were moved to separate standing orders (1895 SOs 74 and 221), however, the remainder of the original provision was readopted (1895 SO 71). The 1895 standing order also specifically authorised the President, 'without waiting for the interposition of the House', to 'call to order any member speaking a second time, except as aforesaid' (1895 SO 71).

From 2004, provision for a member to speak a second time in explanation and the right of reply were confirmed under SOs 89 and SO 90, while provision for members to speak more than once in committee was confirmed under SO 87.

88. PERSONAL EXPLANATIONS

When there is no question before the House a member may, by leave of the House, make a personal explanation. The subject of a personal explanation may not be debated.

Development summary		
1895	Standing order 70	Personal explanation
2003	Sessional order 88	Personal explanation
2004	Standing order 88	Personal explanation

SO 88 provides the procedure for a member to make a personal explanation to the House. Certain parameters apply to the subject matter of a personal explanation.

Operation

A member may make a personal explanation when there is no other question before the House. The member must have the leave of the House to make an explanation – that is, the unanimous agreement of all members present. The member is not required to inform the House of the subject of the explanation when seeking leave,[57] so it is not uncommon for a member to be given leave, only to have leave withdrawn once they have commenced their explanation, particularly if the explanation relates to the comments or actions of another member.[58] Leave can be withdrawn at any time.[59] However, where that occurs, the member could seek to address the matter through other mechanisms available for debate such as a motion or a contribution to the adjournment debate.

57 It is customary for the member to informally notify the President of their intention to make a personal explanation prior to seeking leave. At the member's discretion, this may extend to also advising the subject matter of the personal explanation.

58 For example, *Minutes*, NSW Legislative Council, 4 December 2008, p 977; 14 November 2012, p 1371; 20 February 2013, p 1469; 18 June 2013, p 1817; 30 October 2013, p 2135; 4 March 2014, p 2325; 27 May 2015, p 133.

59 Ruling: President Johnson, *Hansard*, NSW Legislative Council, 21 September 1988, p 1533; Ruling: President Harwin, *Hansard*, NSW Legislative Council, 15 November 2012, p 16928.

The principal difference between SO 88 and SO 89, which provides for explanations of speeches, is that SO 88 provides the member an opportunity to introduce matters onto the record that relate to comments or actions by other members, or to matters that occur outside the chamber. For this reason, leave is required to make a personal explanation.[60] SO 89, on the other hand, permits a member to speak a second time only for the purposes of explaining a matter on which the member has been misquoted or misunderstood during the debate on a question then before the House. The member may not introduce any new matter and does not, therefore, require leave.

SO 88 does not speak to the matters that may be canvassed during a personal explanation, however, the intended purpose of such explanations, and the latitude of the matters discussed, has been addressed in numerous rulings of the President:

- a member may make a personal explanation to correct some wrong statement that has been made and which casts some reflection on him (or her),[61]
- personal explanations should allow the member concerned to explain a matter reflecting on the honour, character or integrity of that member,[62]
- personal explanations should not be used to explain matters on behalf of any other person,[63]
- a personal explanation should not canvass views expressed by another member,[64]
- in making a personal explanation a member is entitled to defend themself, but not others,[65]
- discussion and justification cannot be part of the personal explanation.[66]

Personal explanations have sought to respond to a comment made about a member in the media[67] or by another member, particularly comments made during Question Time.[68] However, personal explanations have also canvassed matters such as documents seized from the office of a member by the Independent Commission Against Corruption,[69]

60 Laing, *Annotated Standing Orders of the Australian Senate*, pp 532-533.
61 Ruling: President Budd, *Hansard*, NSW Legislative Council, 11 September 1975, p 1009.
62 Ruling: President Johnson, *Hansard*, NSW Legislative Council, 27 February 1986, p 521; Ruling: President Primrose, *Hansard*, NSW Legislative Council, 23 October 2008, p 10468.
63 Ruling: President Johnson, *Hansard*, NSW Legislative Council, 27 February 1986, p 521; Ruling: Deputy President Solomons, *Hansard*, NSW Legislative Council, 12 October 1988, p 2057.
64 Ruling: President Willis, *Hansard*, NSW Legislative Council, 17 November 1994, p 5188.
65 Ruling: President Johnson, *Hansard*, NSW Legislative Council, 26 February 1986, p 383.
66 Ruling: President Burgmann, *Hansard*, NSW Legislative Council, 2 June 2004, p 9278.
67 For example, *Hansard*, NSW Legislative Council, 21 November 2000, p 733; 19 May 2010, p 1825; 7 September 2010, p 2027.
68 For example, *Hansard*, NSW Legislative Council, 5 May 2011, p 57; 15 September 2011, p 446; 19 October 2011, p 527; 29 May 2013, p 1781; 20 June 2013, p 1845; 17 September 2014, p 91.
69 *Minutes*, NSW Legislative Council, 14 October 2003, p 326.

comments made during debate on a bill or other matter earlier in the day or on a previous day,[70] and comments made about a member by the Premier.[71]

On 23 June 2015, a member proceeded to make a personal explanation and attempted to identify the location of a highway discussed during Question Time. Before the member could do so, the President ruled that the member was abusing the procedure and the member was prevented from continuing his remarks.[72]

A personal explanation is not subject to a formal time limit, however, Presidents have ruled that members should ensure that their comments are concise and confined purely to correcting the record,[73] and provocative or disruptive language should not be used.[74]

The making of a personal explanation does not preclude a new member from making what would be his or her inaugural speech at some later stage.[75]

Under SO 88, the subject of a personal explanation may not be debated – that is, other members may not rise to speak to the matters raised by the member during the explanation. However, another member would be at liberty to seek leave at a later time to give their own personal explanation in relation to the comments made. It is not uncommon for a member to make a personal explanation in regards to comments made about that member during a personal explanation given by another member.[76]

Background

Provision for personal explanations was first made in 1895 (SO 70), taken from the terms of the Assembly's equivalent new standing order (Assembly 1894 SO 137). The 2004 standing order is a continuation of the same provision, in slightly amended terms.

Prior to 1895, the standing orders only made provision for an explanation of a speech to be made under the equivalent terms of current SO 89 – that is, the explanation of a point on which they had been misquoted or misunderstood (1856 SO 15; 1870 SO 17). However, personal explanations were nevertheless a common practice, canvassing a broad range of subjects[77] and most often made during informal debate on the motion to

70 *Minutes*, NSW Legislative Council, 2 June 2011, p 186; 22 June 2011, p 264; 14 October 2011, p 505.
71 *Minutes*, NSW Legislative Council, 14 November 2000, p 703; 6 March 2001, p 868.
72 *Hansard*, NSW Legislative Council, 23 June 2015, p 1596.
73 Ruling: President Harwin, *Hansard*, NSW Legislative Council, 20 February 2013, p 17646.
74 Ruling: President Johnson, *Hansard*, NSW Legislative Council, 27 February 1986, p 521.
75 Ruling: President Johnson, *Hansard*, NSW Legislative Council, 27 February 1986, p 521.
76 *Minutes*, NSW Legislative Council, 4 December 2008, p 976; 24 October 2002, p 429; 30 October 1996, p 414.
77 The subject of personal explanations included an accusation that a member had read from and used another member's notes (*Hansard*, NSW Legislative Council, 7 July 1886, pp 1192-1193); a response to an accusation that a petition read by a member had been a hoax (*Hansard*, NSW Legislative Council, 9 March 1893, pp 5016-5017); the misrepresentation of a member's remarks in the *Sydney Morning Herald* (*Hansard*, NSW Legislative Council, 10 July 1889, p 2897); incorrect pairing procedure (*Hansard*, NSW Legislative Council, 7 February 1893, p 3849; 16 February 1892, p 5261).

adjourn the House,[78] which often led to other members debating the explanation made, contrary to the practice set out under the current standing order.

89. EXPLANATIONS OF SPEECHES

A member who has spoken on a question may only speak a second time to explain a matter on which the member has been misquoted or misunderstood. The member may not introduce any new matter.

Development summary		
1856	Standing order 15	Speaking twice
1870	Standing order 17	Speaking twice
1895	Standing order 71 Standing order 73	No member to speak more than once – exceptions Explanation
2003	Sessional order 89	Explanation of speeches
2004	Standing order 89	Explanation of speeches

Under SO 87, a member may only speak once on any question before the House. However, SO 89 provides an exception to that rule to enable a member to speak a second time to explain a matter on which they have been misquoted or misunderstood. The member may not introduce any new matter.

Operation

The principal difference between SO 88, which provides for personal explanations, and SO 89, is that SO 88 provides the member an opportunity to speak to matters that relate to the comments or actions of other members, or to matters that occur outside the chamber. For this reason, leave is required to make a personal explanation. SO 89, on the other hand, permits a member to speak a second time only for the purposes of explaining a matter on which the member has been misquoted or misunderstood during the debate on a question then before the House. For this reason, the member is able to provide their explanation without seeking leave.

A member seeking to make an explanation under SO 89 should do so immediately on the reference being made, or as soon as possible after that time, and should not allow a significant period of time to lapse before the explanation is made.[79] An explanation under SO 89 cannot be made once the question has been put and debate has concluded, however, the member could try to seek leave to make such an explanation under SO 88 at a later time in order to correct a misunderstanding.

78 *Hansard*, NSW Legislative Council, 7 April 1886, pp 1192-1193; 9 March 1893, pp 5016-5017; 7 February 1893, p 3849. For a precedent to the contrary, see *Hansard*, NSW Legislative Council, 20 April 1893, pp 6272-6273.

79 Ruling: President Hay, *Hansard*, NSW Legislative Council, 11 April 1889, p 576.

While personal explanations under SO 88 have become fairly commonplace in the Council, requests to speak a second time under SO 89 are less so.[80]

Background

Provision for a member to speak a second time for the purpose of explaining a matter on which they had been misquoted or misunderstood was first adopted in 1856. The provision was then readopted in amended terms in 1870 (SO 17), 1895 (SO 71) and finally 2004 (SO 89).

Under 1895 SO 73, a member could interrupt another member then speaking for the purpose of making an explanation, though only if the member already speaking 'shall give way', however, though this provision was not carried over to the 2004 standing orders.

90. Reply

(1) A reply is allowed to a member who has moved a substantive motion or moved the first, second or third reading of a bill. A reply is not allowed to a member who has moved an amendment.

(2) The reply of the mover of the original question closes any debate.

Development summary		
1856	Standing order 15	Speaking twice
1870	Standing order 17	Speaking twice
1895	Standing order 74	Reply
2003	Sessional order 90	Reply
2004	Standing order 90	Reply

A right to speak in reply is granted to a member who has moved a substantive motion so that arguments put by other members in favour or against the motion can be answered. It is also a final opportunity to put the case in favour of the motion. A speech in reply closes debate.

Operation

There are a number of motions of a procedural or subsidiary nature on which there is no right to speak in reply:

- to amend a motion
- for a special adjournment
- that the [disallowance] motion proceed forthwith

80 Recent examples include, *Minutes*, NSW Legislative Council, 7 November 2007, p 329; 2 June 2011, p 174; 29 May 2013, p 1779.

- that an order of the day be discharged
- that an item be postponed
- to dissent from a Chair's ruling
- for the suspension of standing and sessional orders
- that debate be adjourned.

Although motions for the first, second or third readings of a bill are in one sense subsidiary, as they rely on other motions having been agreed to, they are nevertheless regarded as substantive motions and the mover of the first reading of a Council bill, and the mover of the second and third readings of both Council and Assembly bills has a right of reply (see below for further detail).[81]

A member speaking in reply should endeavour to speak only to matters that have been raised in the debate by other members and should not introduce new material.[82]

While contrary to this principle that a speech in reply closes debate, there are examples of a member speaking by leave after a member has spoken in reply;[83] a mover of the second reading of a bill moving an amendment to refer the bill to a committee;[84] and debate being adjourned during the reply.[85] In 2005, the President ruled that it is highly irregular for the mover of a motion to seek leave to amend a motion when speaking in reply and such an amendment is inadmissible.[86]

Background and development

The 1856 standing orders included in SO 15 the provision that:

> No members (except in committee of the whole House) shall speak twice on the same question, unless in explanation on some material point on which he has been misquoted or misunderstood: Provided that the mover of any question shall be allowed the liberty of reply.

In 1870, SO 15, by then renumbered SO 16, was amended, on the recommendation of the Standing Orders Committee, to limit the right of reply to the mover of any 'main' question, and was renumbered SO 17.[87]

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81 Under SO 137 there is no debate on the motion for the first reading of a bill.

82 Ruling: President Primrose, *Hansard,* NSW Legislative Council, 10 September 2009, p 17686.

83 *Minutes,* NSW Legislative Council, 16 September 1999, p 67.

84 *Minutes,* NSW Legislative Council, 5 May 1994, pp 174-176 (Privacy and Data Protection Bill).

85 *Minutes,* NSW Legislative Council, 2 March 1961, p 145; 19 April 1994, pp 128-129; 12 October 2005, pp 1624-1625; 9 September 2010, pp 2049-2050; 12 September 2012, pp 1225-1226.

86 *Hansard,* NSW Legislative Council, 17 November 2005, p 19934.

87 *Sydney Morning Herald*, 11 November 1870, p 2; *Minutes,* NSW Legislative Council, 10 November 1870, p 66; *Journal of the Legislative Council,* 1870-1871, vol 19, Part 1.

The 1895 SO 74 continued the rule that a mover of a substantive motion had a right of reply but also included the right of reply to the mover of the second or third reading of a bill.

Although there was no provision for a reply on the first reading under the 1895 standing order, there was practice permitting this to occur.[88] The first reading was always regarded as a substantive motion which could be debated and, as such, a reply could be made, even though the standing orders only referred to reply on the second or third reading.

SO 90 includes a provision to speak in reply to the motion for the first reading of a bill. However, SO 137 adopted in 2004 provides that the question on the first reading is to be put by the President immediately after the bill has been received, and be determined without amendment or debate. Read in conjunction with Presidents' rulings of 1899[89] and 1922[90] (see SO 137), the first reading of an Assembly bill cannot be debated, but the first reading of a Council bill can be, and the mover can speak in reply.

The general rule that a member may only speak once is now contained in SO 87.

91. RULES OF DEBATE

(1) A member may not reflect on any resolution or vote of the House, unless moving for its rescission.

(2) A member may not refer to the Queen or the Governor disrespectfully in debate, or for the purposes of influencing the House in its deliberations.

(3) A member may not use offensive words against either House of the Legislature, or any member of either House, and all imputations of improper motives and all personal reflections on either House, members or officers will be considered disorderly.

(4) A member may read reasonable lengths of extracts from books, newspapers, publications or documents.

(5) When an objection is taken to the reading of a list of names of individuals or organisations who have made representations in relation to the matter the subject of the debate, without distinguishing the comments or views of those individuals or organisations, the member must confine their remarks to:

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88 See, for example, debate and reply on Assembly bills: *Minutes,* NSW Legislative Council, 25 July 1939, p 216; 3 December 1940, p 91 (Theatres and Public Halls (Amendment) Bill); 29 April 1981, p 506 (Election Funding Bill); 30 June 1982, p 7 (Business Franchise Licences (Petroleum Products) Bill); 12 June 1984, p 242 (Public Hospitals (Visiting Practitioners) Amendment Bill); 2 April 1987, p 772 (City of Sydney Bill).
Debate and reply on Council bills: *Minutes,* NSW Legislative Council, 23 October 1997, p 148 (Crimes Amendment (Sexual Offences) Bill); 24 June 1998, p 584 (De Facto Relationships Amendment Bill).

89 Ruling: President Hay, *Hansard,* NSW Legislative Council, 26 September 1889, p 5467.

90 Ruling: President Flowers, *Minutes,* NSW Legislative Council, 16 August 1922, p 46; *Hansard,* NSW Legislative Council, 16 August 1922, pp 1038-1043 (Eight Hours (Amendment) Bill).

(a) a statement of the comments or views of those individuals or organizations, and

(b) the number of individuals or organizations making similar representations.

Development summary		
1856	Standing order 16	Irregularities in debate
1858	Standing order 17	Reading extracts from newspapers
1870	Standing order 18	Irregularities in debate
	Standing order 19	Reading extracts from newspapers
1895	Standing order 77	Reading extracts from newspapers
	Standing order 78	Reflections upon votes of the House
	Standing order 79	Use of the Queen's or Governor's name
	Standing order 80	Offensive words against either House or any Statute
	Standing order 81	Digressions, Imputations, and Reflections.
2002	Sessional order	Reading lists of names
2003	Sessional order 91	Rules of debate
2004	Standing order 91	Rules of debate

Standing order 91 incorporates a number of provisions in previous standing rules and orders and retains the principles contained in the standing orders since 1856. The rules are intended to ensure orderly and respectful debate, to maintain comity between the Houses and to protect the Legislative Council from being brought into disrepute.

Operation

The rules of debate are frequently the subject of points of order and numerous Presidents' rulings have confirmed the principles upon which the rules are based.

Reflection on a vote of the House

Paragraph (1) expresses the principle that members must not reflect on or criticise the actions and decisions of the House, or suggest that the House was wrong, to the effect that the worth and effectiveness of the Council as a House of review is degraded in the estimation of the public.

While there have been a number of President's rulings that members must not reflect on the integrity of the House,[91] the rule that a member must not reflect on a vote of the House has been rarely invoked and members are not practically prevented by the standing order from reflecting on actions of the House, so long as the reflections are not critical of the action taken by the House.[92] A motion, or a contribution in debate, which conveys community

91 See, for example, *Hansard,* NSW Legislative Council, 14 November 1989, p 12106; 2 June 2011, p 1734.

92 *Hansard,* NSW Legislative Council, 5 December 2003, p 6029 (President Burgmann).

reaction critical of a decision of the House, but which does not indicate support for that community reaction, is not contrary to the standing order.[93]

However, in 1964 during debate on a motion that the Attorney General lay on the table of the House all correspondence with the Chief Justice relating to the disallowance of certain Supreme Court rules, a point of order was taken that the mover, in stating that the House should be fully informed of the correspondence so that it could 'resolve itself as to the wisdom of the action it took in disallowing the Supreme Court Rules', was reflecting on a vote of the House. The President upheld the point of order and ruled that the members' remarks were out of order.[94]

Reference to the Queen or the Governor

Paragraph (2) of the standing order provides that members must not refer to the Queen or the Governor 'disrespectfully' rather than 'irreverently' as had been provided in 1895 standing order 79. The same amendment was made to the equivalent Senate standing order in 1903, on the basis that 'irreverence' was defined as the want of due regard for the supreme being and that 'disrespect' was more appropriate in relation to human beings.

The rule extends to the Governor-General. In 1975, the President upheld a point of order that a member was reflecting irreverently on the Governor-General in stating he had made an 'infamous decision' and later 'was a party to a conspiracy'.[95]

Use of offensive words, imputations and reflections

Under paragraph (3), members may not use offensive words against either House or any member of either House or make imputations of improper motives about or cast personal reflections on either House of the Legislature or any member of either House. The distinction between offensive words, imputations of improper motives and personal reflections can be summarised as follows:

- offensive words are words that are offensive to the common person, or that a member personally claims to have found offensive
- imputations of improper motives are statements or references that imply that a member has acted with the wrong motives, such as for political gain. The words used in the implication may not be offensive in their everyday use
- personal reflections are comments or statements that reflect negatively on a member's character or reputation in some way. An example might be a suggestion that a member has been lazy or appears to have been drinking alcohol.

93 *Hansard,* NSW Legislative Council, 29 October 1996, p 5392 (President Willis).

94 *Minutes,* NSW Legislative Council, 27 February 1964, p 379; *Hansard,* NSW Legislative Council, 27 February 1964, pp 7272 -7276.

95 *Minutes,* NSW Legislative Council, 12 and 13 November 1975 am, p 179.

Although not referred to in the standing order, by convention and practice, reflections on members of the judiciary are also disorderly and should only be made by way of a substantive motion.[96]

Offensive expressions, or expressions to which members take offence, are regularly the subject of Chairs' rulings. It is for the Chair to determine, considering the context, whether remarks made are offensive or unparliamentary. The Chair can compel a member to withdraw an offensive remark without qualification or reservation.

In October 1989, the Chair ruled that the Hon Marie Bignold had used offensive words and called upon the member to withdraw the remarks. Having refused to comply with the President's order, Mrs Bignold was named by the President under then SO 259, and a motion then moved by the Leader of the Government was agreed to, suspending Mrs Bignold from the service of the House for 24 hours.[97]

Reading extracts during debate

The principle expressed in paragraph (4) is intended to prevent members from reading on to the record extracts from publications already available to members. The principle is also intended to maintain the cut and thrust of debate, which relies on members responding to speakers before them, rather than reading from a prepared speech. However, there are a number of generally accepted exceptions including second reading speeches by ministers and parliamentary secretaries and inaugural speeches. For the same reason, members are expected to remain in their places after speaking.

Reading of lists of names

Under SO 91(5), if a member seeks to read a list of names of individuals or organisations who are of the same view and have made representations on the matter the subject of the debate, a member can object to the reading of the list and the member is then confined to stating the number of individuals or organisations who have made representations and the comments or views of those individuals or organisations.

The matter of reading lists arose in 1991 and in 2002. Later in 2002, the House adopted a sessional order in the same terms as SO 91(5) (see below for detail). However, since 2002 there have been no instances of the provision being invoked.

Background

The rule under SO 91(1), that a member may not reflect on any resolution or vote of the House, unless moving for its rescission, was first adopted as a standing order as SO 78 in 1895, but had previously been the subject of President's rulings.[98] The adoption of

96 *Hansard,* NSW Legislative Council, 4 May 1880, p 2136; 19 December 1889, p 478; *Minutes,* NSW Legislative Council, 12 December 1928, p 134; 25 February 1941, p 112; 14 September 1949, p 174.

97 *Minutes,* NSW Legislative Council, 18 October 1989, p 977.

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

SO 78 followed the adoption of SO 148 in the Legislative Assembly in 1894. Similarly, SO 79 adopted in 1895 for the appropriate use of the Queen's or Governor's name, now in SO 91(2), followed the adoption of a similar standing order in the Assembly in 1894.

The rules in SO 91(3) and 91(4) have been provided in the standing orders since 1856. Other rules in SO 91 have developed as a result of President's rulings, or were adopted in 1895 following the Legislative Assembly's adoption of similar rules in 1894. However, the rule in 1895 SO 80 that no offensive words were to be used against any statute was omitted from SO 91.

The rule that all imputations of improper motions and all personal reflections on members are disorderly was first adopted in the Legislative Council in 1843. In 1856, SO 16 was readopted in the same terms. While there was no reference to the Legislative Assembly or its members in these early standing orders, Presidents' rulings clearly established that it was not in order to say anything that may be offensive to the other House or to any member thereof and that members should be referred to with due respect and not in a derogatory manner.[99] The rule maintains the principle of comity between the Houses and that the business of the Houses are their own concern and are not to be taken note of except by way of formal communication by message. The same rule was adopted as SO 18 in 1870. The 1856 and 1870 standing orders also provided a rule in relation to relevance, now in SO 92, and a rule that members must not comment on the words used by any other member in a previous debate, restricted to debates 'in the same session' in 1870, which was later omitted from the 1895 standing orders.

The first standing order to restrict the extent to which members could speak to notes or from publications was adopted in 1858. During debate on the Electoral Law Amendment Bill on 8 October 1858, the Chairman of Committees reported to the House that a point of order had arisen during committee as to the right of members to read extracts from newspapers in the House. In the House, an amendment to refer the issue to the Standing Orders Committee was negatived and the original motion, that members be allowed to read extracts from newspapers, was agreed to.[100]

A week later, the House referred the issue to the Standing Orders Committee, as it was believed that the resolution adopted by the House did not reflect the practice in the House of Commons.[101] On 28 October 1858, the committee tabled its report which found that since 1840 it had become commonplace for newspapers to be read in the House of Commons, subject to limitations and restrictions. The report tabled on 28 October 1858[102] recommended that a similar course be adopted in the Legislative Council and a standing order to that effect was agreed to on the next sitting day.[103]

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

100 *Minutes,* NSW Legislative Council, 8 October 1858, p 87.

101 *Minutes,* NSW Legislative Council, 15 October 1858, p 89; *Sydney Morning Herald,* 16 October 1858, p 7.

102 *Minutes,* NSW Legislative Council, 28 October 1858, p 91.

103 *Minutes,* NSW Legislative Council, 29 October 1858, p 94.

In 1870, SO 19 continued in the same terms as the earlier standing order. SO 77 of 1895 extended the restriction to reading extracts from books and other publications or documents and replaced the reference to cases arising in the British House of Commons with reference to the Imperial Parliament. In 2003, the standing order omitted the reference to the Imperial Parliament.

The rule in SO 91(5) restricting the reading of lists of names was first adopted as a sessional order in 2002. The matter had arisen earlier in 1991 when the Chair of Committees ruled that members should not attempt to read onto the record comprehensive lists, but instead give a précis of a number of examples.[104] However, during debate on the Game Bill in 2002 a member who had been denied leave to incorporate in Hansard the names of 400 people who had signed postcards in protest against the bill, sought to read the names. On a point of order being taken, the Deputy President ruled that 'it would be undemocratic, and a dangerous precedent, to rule out of order a member who seeks to read a list, even if it were a long list'.[105]

On 29 August 2002, the House considered a sessional order to provide that if objection was taken to a member attempting to read onto the record a list of names, the Chair was to direct the member to confine their remarks to a statement of the comments or views of those individuals or organisations and the number of individuals or organisations making identical representations. According to the mover, the proposed sessional order was based on the rules for petitions, under which the member presenting a petition, was to confine their remarks to a statement of the parties from whom it came and the number of signatures attached to it.[106] The motion was agreed to with the support of the Government and a number of Crossbench members.

The sessional order was readopted the next session[107] before being incorporated in the revised standing orders adopted in 2004.

92. RELEVANCE AND ANTICIPATION

(1) A member may not digress from the subject matter of any question under discussion; or anticipate the discussion of any matter shown on the Notice Paper, except an item of private members' business outside the order of precedence, unless, in the opinion of the President there is no likelihood of the motion or order of the day being called on within a reasonable time.

(2) This standing order does not prevent debate of any matter on the address-in-reply.

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104 *Hansard,* NSW Legislative Council, 23 October 1991, p 3075.

105 *Hansard,* NSW Legislative Council, 27 June 2002, p 3970.

106 *Minutes,* NSW Legislative Council, 29 August 2002, p 321; *Hansard,* NSW Legislative Council, 29 August 2002, pp 4331-4332.

107 *Minutes,* NSW Legislative Council, 30 April 2003, p 48.

Development summary		
1856	Standing order 16	Irregularities in debate
1870	Standing order 18	Irregularities in debate
1895	Standing order 81	Digressions, Imputations, and Reflections.
2003	Sessional order 91	Rules of debate
2004	Standing order 91	Rules of debate

SO 92 is intended to prevent inefficient use of the time of the House by providing that debate must be relevant to the question before the House, and that debate must not anticipate debate on another matter already on the Notice Paper.

Operation

Anticipation

The anticipation rule is intended to prevent the House from the inefficient use of time in unnecessarily duplicating debate on a matter. It is also intended to protect matters which are already on the Notice Paper for imminent consideration and decision from being pre-empted by debate on the question under discussion.

The rule is rarely applied, and is liberally interpreted, as to do otherwise could unnecessarily restrict the rights of members to debate important matters.

Standing order 92 exempts the application of the rule to debate on a matter the subject of an item of private members' business outside the order of precedence, unless, in the opinion of the President, there is no likelihood of the motion or order of the day being called on within a reasonable time, and to debate on the Address-in-Reply.

Two other standing orders refer to the rule of anticipation:

- SO 65 provides that a question seeking information must not anticipate debate on an order of the day or other matter on the Notice Paper, except an item of private members' business outside the order of precedence or an order of the day relating to the budget estimates. The standing order additionally provides that a question directed to a chair of a committee must not attempt to interfere with the committee's work or anticipate its report.
- SO 181, which provides for instructions from the House to committee of the whole, provides that debate on an instruction must not anticipate discussion of a clause in the bill.

The standing orders applying the anticipation rule must be read in the context of Presidents' rulings which have interpreted the rule.

It is a well-established principle that it is not anticipation if debate is on a more effective form. For example, it is not anticipation to debate a bill if there is a notice of motion or order of the day for resumption of debate on a motion on the Notice Paper relating to the

same matter, as a bill is a more effective form of proceeding.[108] A substantive motion is more effective than a motion for the adjournment of the House[109] or an amendment, and a motion is more effective than a question without notice[110].

When ruling on a point of order that a member is anticipating debate, the Chair will consider President's rulings and precedents as well as the following principles:

- the probability of the matter being discussed within a reasonable time[111]
- that if too strictly applied the rule would unduly restrict members in raising important matters
- that a members' remarks may not be out of order if they are expressed in general terms and do not anticipate or refer to a particular bill or motion on the notice paper.

Relevance

The rule of relevance is fundamental to the efficient use of time and to the orderly conduct of debate in the Council. Standing order 92 provides that debate must be relevant to the question before the House.

A further exemption from the rule of relevance is provided in SO 31(4)(b), under which any member may speak for five minutes on the motion for the adjournment of the House on matters not relevant to the question, but may not refer to matters which are otherwise not in order.

Numerous Presidents have applied the rule of relevance and have sought to clarify the latitude allowed in various debates.

Debate on the Address-in-Reply

SO 92(2) exempts the rules of relevance and anticipation from applying to debate on the Address-in-Reply. Prior to the adoption of SO 92(2) as a sessional order in 2003, the rule that wide latitude is allowed in debate on the Address-in-Reply had applied in practice, Presidents consistently ruling that wide latitude was allowed so long as members' remarks were in some way relevant to the Governor's speech.[112]

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108 See Ruling of President Burgmann for an explanation of the principles of the anticipation rule, *Hansard,* NSW Legislative Council, 4 April 2001, pp 13075-13076. See also, *Hansard,* NSW Legislative Council, 16 September 2015, p 3712 (Deputy President Green).

109 *Hansard,* NSW Legislative Council, 11 August 1886, p 3934; 10 April 1908, p 991.

110 *Hansard,* NSW Legislative Council, 18 March 1970, p 4397; 12 October 1971, p 1731.

111 *Hansard,* NSW Legislative Council, 19 March 1992, p 1373.

112 See President's rulings, *Hansard,* NSW Legislative Council, 28 October 1879, p 7 (President Hay); 23 July 1912, p 15 (President Suttor); 8 September 1920, p 700 (President Flowers); 20 September 1983, p 852 (President Johnson); 23 August 1989, p 256 (Deputy President Solomons); 1 March 1990, p 546 (President Johnson); 14 March 1991, p 957 (President Johnson).

Background and development

Standing order 92 adopted in 2003, codified, for the first time, the longstanding rule concerning anticipation. The provision in SO 92 concerning relevance is substantially the same as that provided in earlier standing orders.

SO 16 adopted in 1856, also provided that 'No Member shall digress from the subject matter of any Question under discussion, or comment upon the words used by any other Member in a previous Debate'. The standing order was readopted in 1870 with the addition of the words 'in the same session' after 'in a previous Debate'. The amended standing order followed consideration by the Standing Orders Committee of all standing orders relating to conduct of business, however, there was no reference in the committee's report to the reason for amending this particular standing order.[113]

SO 76 adopted in 1895, which also restricted reference to previous debates but limited the restriction to quoting debates of either House of the same session, except for the purposes of personal explanation, was omitted from the 2003 revised standing orders.

SO 81 adopted in 1895 provided that members must not digress from the subject matter of any question under discussion. The additional provisions in SO 81, that imputations of improper motives and all personal reflections on members are disorderly, is now in SO 91.

SO 92(2) adopted in 2004, codified practice consistently applied in the Council that allowed wide latitude in the debate on the Address-in-Reply. An amendment to the equivalent Senate standing order agreed to in 1909 exempted the rule of anticipation from debate on the Address-in-Reply on the basis that senators should be able to discuss any matter on the Address-in-Reply and not be limited by the impact of matters already on the Notice Paper.[114]

93. QUESTION MAY BE READ

A member may request that the Clerk read the question at any time during a debate, but may not interrupt a member speaking.

Development summary		
1895	Standing order 82	Member may request that Question be stated
2003	Sessional order 93	Question may be read
2004	Standing order 93	Question may be read

SO 93 requires the Clerk, at the request of a member, to read the question before the House. The purpose of the standing order is to allow a member to seek clarification as to the question before the House.

113 *Sydney Morning Herald,* 23 September 1870, p 2.

114 See Laing, *Annotated Standing Orders of the Australian Senate,* p 539. The Senate standing order further provides that any matter on the Notice Paper not discussed during the preceding four weeks is able to be discussed on the Address-in-Reply.

Operation

The standing order is virtually obsolete as printed copies of matters before the House are readily available.

However, in 2011, during a speech on the Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011 which continued for nearly six hours, when the member speaking paused, another member requested that the Clerk read the question. The Clerk read the question including an amendment to refer the bill to a committee for inquiry and report.[115] The procedure was not recorded in the Minutes of Proceedings. Although there may have been other occasions on which a member requested that the question be read, like the occasion in 2011, they have not been recorded.

Background and development

Prior to 1895 there was no provision for the question to be read.

SO 82 adopted in 1895 is in identical terms as the equivalent Legislative Assembly standing order adopted in 1894. SO 82 provided that 'A Member may request that the Question or matter in discussion be stated for his information at any time during the debate, but not so as to interrupt a Member speaking'.

SO 93 adopted in 2004 differs to its predecessor in two ways: the current standing order omits the reference 'or matter in discussion' and refers only to the 'question' being read, and specifies that it is the Clerk who is to read the question at the request of the member.

94. CONTINUED IRRELEVANCE OR TEDIOUS REPETITION

(1) The President or the Chair of Committees may call the attention of the House or the committee to continued irrelevance or tedious repetition of a matter already presented in debate, and may direct a member to cease speaking.

(2) A member directed to cease speaking may request that the question be put 'That the member be further heard'. The question must be put without amendment or debate.

Development summary		
1895	Standing order 85	Continued irrelevance or tedious repetition
2003	Sessional order 94	Continued irrelevance or tedious repetition
2004	Standing order 94	Continued irrelevance or tedious repetition

SO 94 allows the President to call attention to continued irrelevance or tedious repetition and direct a member who has been irrelevant or tediously repetitious to cease speaking. The irrelevance and tedious repetition can be in regard to the member's own arguments, or in refuting or referring to the arguments of another member. After being directed

115 *Hansard,* NSW Legislative Council, 2 June 2011, p 1849; *Minutes,* NSW Legislative Council, 2 June, 3 June and 4 June 2011, p 180.

to cease, the member can continue speaking if the House agrees to a motion that they should be further heard.

Operation

It is not uncommon for points of order to be taken that a member is straying from the question before the House or repeating points already made. Usually, the Chair reminds the member of the rules and allows them to continue,[116] or upholds the point of order and orders the member to return to the matter of the debate.[117] The Chair does not have to wait for a point of order to be taken and may call attention to the continued irrelevance or tedious repetition at any time.[118]

In cases where a member has continued to be irrelevant or repetitive, SO 94 allows the President or Chair of Committees to interrupt the member, call attention to the member's continued irrelevance or tedious repetition and may direct the member to cease speaking. The member has the choice of concluding their speech or requesting that the question 'That the member be further heard' be put. If that question is agreed to, the member can continue speaking. The question is put without amendment or debate.

The provision has rarely been invoked and not since the adoption of SO 94 in 2003. In one example from 1906, the Chair of Committees, after calling the member to order several times, finally called attention to continued irrelevance and directed the member to discontinue his speech.[119] In 1972, the President noted that a member who had already been speaking for more than three hours was repeating an argument already made and suggested that the member conclude his speech.[120]

In 2004, a point of order was taken that a member was delivering the same speech as that delivered by another member earlier in debate. The Deputy President ruled that it would be out of order if a member was to deliver exactly the same speech as another member but allowed the member to proceed as long as the member was able to deliver a speech that was not identical to one delivered earlier by another member.[121]

Background and development

SO 94 is in the same terms as its predecessor SO 85. SO 85 adopted in 1895 was similar to the equivalent standing order adopted in the Legislative Assembly in 1894.

Although under earlier standing orders members were not to digress from the question before the House, there were no standing orders empowering the Chair to take action in cases of continued irrelevance or tedious repetition. However, the right of the Chair

116 See, for example, *Hansard,* NSW Legislative Council, 3 October 1967, p 1831; 13 December 1988, p 4758; 21 May 1990, p 3819; 7 June 1990, pp 5280-5281.
117 *Hansard,* NSW Legislative Council, 21 October 1991, p 2753.
118 See, for example, *Hansard,* NSW Legislative Council, 20 March 1991, p 1380.
119 *Hansard,* NSW Legislative Council, 29 August 1906, p 1548.
120 *Hansard,* NSW Legislative Council, 1 March 1972, pp 4696-4697.
121 *Hansard,* NSW Legislative Council, 22 September 2004, p 11255.

to intervene when necessary to maintain order was implicit. In 1892, in a warning to a member, the Chair of Committees quoted from *Erskine May*:

> On 14th April 1604 it was agreed that 'if any man speak impertinently or beside the question in hand, it stands with the orders of the House for Mr Speaker to interrupt him; and to have the pleasure of the House whether they will further hear him' Again, on the 17th April 1604 it was agreed for a general rule that if any superfluous motion or a tedious speech be offered in the House the party is to be directed and ordered by Mr Speaker.[122]

95. INTERRUPTION OF SPEAKER: POINTS OF ORDER OR PRIVILEGE

(1) A member may not interrupt another member speaking, except to call attention:

(a) to a point of order or privilege, or

(b) to the lack of a quorum.

(2) A member may draw attention at any time to a point of order or a matter of privilege arising during the proceedings then before the House.

(3) The President may intervene at any time when, in the President's opinion, the speaker is in contravention of the rules and orders of the House.

(4) On a question of order or a matter of privilege being raised, the business under consideration is suspended until the question of order or matter of privilege is determined.

(5) On a question of order being raised, any member speaking or called to order must sit down.

(6) The President or Chair of Committees may hear argument on the question, and may determine it immediately, or at a later time, at the President's or Chair's discretion.

(7) The President or Chair of Committees may also intervene at any time to determine a point of order.

Development summary		
1856	Standing order 19	Questions of privilege and order
1870	Standing order 8	Questions of Privilege and order
1895	Standing order 84	Interruptions not allowed – exceptions
	Standing order 86	Speaking to privilege or to "Point of Order"
	Standing order 87	Precedence or Questions of Privilege and Order
	Standing order 88	Proceedings on Questions of Order
2003	Sessional order 95	Interruption of speaker: points of order or privilege
2004	Standing order 95	Interruption of speaker: points of order or privilege

122 *Hansard,* NSW Legislative Council, 3 March 1892, pp 6104-6105.

SO 95 provides that a member must not interrupt another member speaking, except to call attention to a point or order or privilege or to a lack of a quorum. The standing order is a fundamental rule of debate to ensure that only one member is speaking at any one time and that debate, and questions of order, are dealt with in an orderly and courteous manner.

Operation

Under SO 95(1), a member may not interrupt another member speaking, except to call attention to a point of order or privilege, or to the lack of a quorum. Numerous rulings from the Chair have repeatedly stated that interrupting a member, unless under the circumstances outlined in SO 95, is disorderly at all times.

The most common interruption under the standing order is to raise a point of order. It is the right of any member who considers a breach of order has been committed, to interrupt the member speaking, and direct the attention of the Chair to the matter, provided that the matter is raised when it occurs. Presidents have ruled that when raising a point of order the member must not make debating points and should direct attention to the breach of order, where possible citing the relevant standing order.[123]

Under the *Constitution Act 1902*, the quorum of the Legislative Council is eight members plus the President or other member presiding. Under SO 95(1), a member speaking can be interrupted to draw the Chair's attention to the lack of a quorum. Under SO 30, if the absence of a quorum is drawn to the President's attention either by a member, the Chair of Committees or as the result of a division, the bells are rung for five minutes to summon members to the chamber. Members present may not leave the chamber until the House or committee has been counted. See SO 30 for more detail on the procedures on the absence of a quorum in the House and SO 176 for the procedure in committee of the whole.

Where a matter of privilege has arisen since the previous sitting of the House, the matter is dealt with under SO 77. Under SO 95(2) a member may interrupt business and raise a matter of privilege suddenly arising. There are few examples of a member drawing attention to a matter of privilege suddenly arising during proceedings of the House. In one example, in 1990, after the motion for the adjournment of the House had been moved, a member raised, as a matter of privilege, the failure of the Government to proceed that day with a censure motion against him arguing that it appeared to be an attempt to influence him in the conduct of his duties as a member. The President stated that he would consider the complaint of the member and acquaint the House of his determination at the earliest opportunity.[124] Two sitting days later, the President gave his ruling that there was no breach of privilege and the matter of privilege was not upheld.[125]

123 See, for example, *Hansard,* NSW Legislative Council, 20 September 2012, p 15520 (President Harwin); 11 April 2002, p 1372 (President Burgmann).

124 *Minutes,* NSW Legislative Council, 24 May 1990, p 249.

125 *Minutes,* NSW Legislative Council, 30 May 1990, p 260.

In 2009, a division was called on the motion for the House to resolve into committee of the whole, and the bells were rung. The President interrupted proceedings to make a statement as a matter of privilege. The President stated that the door to the chamber from the Members' Lounge had remained locked following the dinner adjournment, thereby denying a member access to the chamber and the opportunity to speak on the second reading of the bill. The President stated that a breach of the member's privilege had occurred, called off the division and gave the call to the member. Following the member's speech, the question that the House resolve itself into committee of the whole was agreed to.[126]

The President does not have to wait for a member to call attention to a point of order or privilege. Under SO 95(3), the President may intervene at any time when, in the President's opinion, the speaker is in contravention of the rules and orders of the House. However, it is relatively rare that the Chair interrupts a speaker during debate. It is more common for the President to rule on a breach of order during Question Time, and in 2008 it was ruled that a point of order was not required for the Chair to rule that a question was in contravention of the standing orders.[127]

When a member is interrupted under SO 95, the President will request that the member speaking return to their seat in order that the member raising the point of order or privilege can be heard. The matter under debate is temporarily suspended while the point of order is being determined. During timed debates, the clock will continue to count down the members' time remaining unless the President orders the clock to be stopped. In May 2015, the President directed that, for the duration of the 56th Parliament, the Usher of the Black Rod stop the clock whenever a point of order is taken during Question Time.[128]

It is common for the President or Chair of Committees to hear argument on the question and determine the matter immediately. However, where more complex matters of order or privilege are being raised, the Chair may wish to seek advice or consider the matter in greater detail, and defer ruling on the matter until a later time, as provided by SO 95(6).[129]

Under SO 95(7), the President is not required to hear exhaustive argument and may intervene at any time while arguments are being made in order to determine the point of order.

Background and development

SO 19 of 1856 provided that when a question of order or privilege was taken, the matter then under consideration would be suspended until the matter or order of privilege

126 *Minutes,* NSW Legislative Council, 23 June 2009, p 1261.
127 *Hansard,* NSW Legislative Council, 15 May 2008, p 7647.
128 *Hansard,* NSW Legislative Council, 12 May 2015, p 338.
129 See, for example, *Minutes,* NSW Legislative Council, 11 August 2011, pp 338 and 340; 8 November 2011, pp 557 and 558; 9 November 2011, pp 560 and 563.

raised was determined.[130] This provision was readopted in SO 87 of 1895. The provisions of SOs 84, 86, 87 and 88 of 1895 have largely been readopted in SO 95, with some rewording and additions.

Current SO 95(1) retains the provisions of SO 84 of 1895 but omits the provision that no member shall interrupt another member while speaking unless 'to request that his words be taken down'. The words 'to request that his words be taken down' were contained in the Legislative Assembly SO 156 adopted in 1894. There are no records of the provision being called on by members.

The provisions of SOs 95(2) and 95(4) continue provisions first adopted in 1856, that when a matter of order or privilege is raised during a sitting, the business under consideration is suspended until the matter is determined, and clarifies that a member is permitted to interrupt a member speaking in order to raise a matter of privilege suddenly arising. Prior to 1991, this was the only provision for raising matters of privilege in the Council. In 1991, the resolution appointing the Standing Committee on Privilege and Ethics included procedures based on Senate SO 81, adopted in 1989, for the referral of matters of privilege for inquiry and report. These procedures have largely been adopted in SO 77.

The provision of SO 95(3), that the President may intervene at any time if, in the President's opinion, the speaker is in contravention of the rules and orders of the House, was first adopted in 2004, although the rule had been established in practice.[131]

Paragraphs (5), (6) and (7) relate to points of order. SO 88 of 1895 contained the rule that, after a point of order had been raised, the President or Chairman of Committees, after hearing argument, could then give his decision thereon. Current SO 95(6) clarifies that, after hearing argument on a point of order, the President may determine the matter immediately or at a later time, at the President or Chair's discretion. Under SO 95(7), the President may also intervene at any time to determine a point of order, a rule which was codified for the first time in 2004.

If a matter of privilege suddenly arises in committee of the whole, the proper course of action is to report progress and raise the matter in the House.[132]

96. DISSENT FROM PRESIDENT'S RULING

(1) Any member may dissent from a ruling of the President by motion moved immediately "That the House dissent from the ruling of the President".

130 In 1870, SO 19, which by then had been renumbered 22, was reordered in the list of standing orders on the recommendation of the Standing Orders Committee and renumbered SO 8. *Sydney Morning Herald,* 11 November 1870, p 2; *Minutes,* NSW Legislative Council, 10 November 1870, p 66.

131 See, for example, *Hansard,* NSW Legislative Council, 3 March 1892, pp 6104-6105.

132 Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 412; Sir David Lidderdale KCB (ed), *Erskine May's Treatise on the Law, Privilege, Procedure and Usage of Parliament* (Butterworths, 19th ed, 1976), p 346.

(2) Debate on the motion may be adjourned on motion, without amendment, until a later hour of the sitting or to the next sitting day.

Development summary		
1895	Standing order 89	Objections to the Rulings of the President
2003	Sessional order 96	Dissent from President
2004	Standing order 96	Dissent from President

SO 96 provides for any member to move a motion in dissent of the President's ruling immediately on the ruling being made. A dissent motion can be debated and may be adjourned on motion without amendment until a later hour or the next sitting day.

When objection is taken to the Chair's ruling in committee of the whole, the matter is referred to the House for the President's consideration. (See SO 178).

Operation

The President maintains order in the House by enforcing and, when necessary, interpreting the rules of the House. A ruling of the President determines the matter unless the House votes to overturn it.

SO 96 provides that the House may overturn a ruling of the President by agreeing to a motion moved immediately on the ruling being made, without notice, 'That the House dissent from the ruling of the President'. In 1932, the President declined to accept a motion moved without notice as it had not been 'at once made'.[133]

If a motion of dissent is not made immediately, there is nothing in SO 96 to prevent a motion being moved, on notice in the usual way, to seek to overturn a ruling of the President.

A motion moved under SO 96 can be debated forthwith, or the debate can be adjourned until a later hour of the sitting or to the next sitting day. If debate on the matter is adjourned, the original ruling of the President stands until the matter is determined.[134] There are no time limits on the debate or on members' speeches.

There is no requirement for a member to put in writing their objection to a ruling of the President, unlike an objection taken to a ruling by the Chair of Committees which must be reported, in writing, to the House.

As with other motions, a motion for dissent can be withdrawn by leave.[135]

Motions dissenting to rulings of the President are uncommon and those being supported even less so. Rulings to which a dissent motion has been supported and the original

133 *Hansard,* NSW Legislative Council, 11 May 1932, p 9238-9239 (President Peden); *Minutes,* NSW Legislative Council, 11 May 1932, p 536.

134 *Odgers' Australian Senate Practice*, 13th ed, p 268.

135 See, for example, *Minutes,* NSW Legislative Council, 29 November 2001, p 1310.

ruling overturned include: a ruling that a member should not read excessively from a written public document,[136] and a ruling that a question was out of order.[137] Examples of dissent motions which have not been agreed to include: a ruling that reflections must not be cast in debate on the conduct of the Governor-General;[138] a ruling that a question anticipated debate on a motion;[139] a ruling that a motion was out of order;[140] and a ruling that a member was not breaching the *sub judice* convention.[141]

Background and development

While there were no standing orders prior to 1895 providing for members to dissent from a ruling of the President, SO 6 of 1856 provided that it was the duty of the President to preserve Order 'taking the sense of the Council, nevertheless, on any disputed point. On a dispute arising the President would put a question to the House seeking its opinion, such as "Is this House of opinion, that the motion of_____, is in order?".'[142]

SO 89 of 1895 provided that a ruling of the President could be dissented from on motion moved forthwith, but was silent as to whether the motion could be debated. However, various Presidents' rulings established that members who dissent from a ruling of the President should be able to give reasons for their actions,[143] but are bound by the ordinary rules of relevance.[144] The current standing order makes clear the right of members to give reasons for objecting to a President's ruling.

SO 96 adopted in 2003 introduced the provision that debate on a motion for dissent could ensue immediately or be adjourned until a later hour or the next sitting day. There are no records of a motion for dissent being adjourned.[145]

97. MOTION THAT MEMBER BE HEARD

Any member may move without notice, that any member who rises to address the House "Be now heard". The Chair must put the question immediately, without amendment or debate.

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136 *Minutes,* NSW Legislative Council, 2 May 1991, pp 186-188.

137 *Minutes,* NSW Legislative Council, 8 September 1999, p 35.

138 *Minutes,* NSW Legislative Council, 12-13 November 1975, p 179.

139 *Minutes,* NSW Legislative Council, 27 April 1993, p 110.

140 *Minutes,* NSW Legislative Council, 4 April 2001, pp 922-924.

141 *Hansard,* NSW Legislative Council, 28 February 1990, pp 356-368; *Minutes,* NSW Legislative Council, 28 February 1990, pp 45-46.

142 See, for example, *Minutes,* NSW Legislative Council, 6 October 1859, p 21; 25 May 1865, pp 89-90; 28 August 1889, p 190; *Hansard,* NSW Legislative Council, 10 May 1888, p 4634.

143 *Minutes,* NSW Legislative Council, 13 April 1960, p 231; *Hansard,* NSW Legislative Council, 13 April 1960, p 4005; 20 February 1975, p 3702.

144 *Hansard,* NSW Legislative Council, 20 February 1975, p 3703.

145 The equivalent Senate standing order provides that debate on dissent motions are adjourned until the next sitting day unless the Senate decides on motion that the question requires immediate determination.

Development summary		
1895	Standing order 75	Motion that a Member "be now heard", &c.
2003	Sessional order 97	Motion that member be heard
2004	Standing order 97	Motion that member be heard

The allocation of the call is an exercise of discretion and not a ruling. Consequently, it is not appropriate to dissent to the allocation of the call. Instead, SO 97 provides for a member to challenge the allocation of the call by moving without notice that a member 'be now heard', which is resolved by a vote of the House without amendment or debate.

Operation

The allocation of the call is a matter for the President. When two or more members rise and seek the call, the President will give the call to the member who, in the President's view, sought the call first. The exception to this rule is the practice which has developed whereby the President allocates the call to the government, opposition and crossbench members in turn during Question Time, the giving of notices of motions and during the adjournment debate.

If a member wishes to challenge the allocation of the call, they can move a motion without notice that a particular named member 'be now heard'. The question is resolved by a vote of the House without amendment or debate.

The motion is one of few motions that can be moved when there is already a motion before the House.[146]

There are few examples of this procedure. In 1978, it was used to seek a decision of the House as to whether a member had a right to speak. On 24 August 1978, a member proceeded to speak on the motion that the House adjourn. A point of order was taken that the member was not entitled to raise the matter the subject of her speech. At the time, there was no provision for a debate on the adjournment motion and the question on the motion was regularly put without debate.[147] The President ruled that the only matter that could be debated was whether the House should then adjourn. A minister then moved that the member 'be now heard'. A point of order that the member could not move such as motion as there was already a motion before the House was not upheld, the President ruling that SO 75 'permits another motion to be moved while a motion is before the House. There cannot be any debate but the House can vote on whether the Deputy Leader of the Government be now heard'. The motion that the member 'be now heard' was agreed to.[148] One week later, a member again spoke on the adjournment motion, notwithstanding there being no provision to do so. A minister seeking to reply

146 *Hansard,* NSW Legislative Council, 24 August 1978, p 595.

147 A sessional order for debate on a motion for the adjournment of the sitting was first agreed to on *Minutes,* NSW Legislative Council, 19 March 1986, pp 89-90.

148 *Hansard,* NSW Legislative Council, 24 August 1978, p 595; *Minutes,* NSW Legislative Council, 24 August 1978, p 77.

to the member's remarks was ruled out of order on the basis that there was no provision for reply on the adjournment motion. The motion 'That the member be now heard' was then agreed to, allowing the minister to speak, however, the President ruled that the only matter the minister could debate was whether the House should then adjourn.[149]

There is nothing in the standing order to prevent a member moving the motion in respect of himself or herself.

Background and development

Former SO 75, the precursor to SO 97, appears to have been derived from the Legislative Assembly standing orders of 1894. While the Legislative Assembly standing order, and similar standing orders in other Australian jurisdictions suggest that the procedure is for the purpose of allowing a member to challenge the President's allocation of the call, former standing order 75 and current standing order 97 are less explicit in that regard.

1895 SO 75 also included the provision for a motion to be moved that a member speaking 'be not further heard', which is now contained in SO 98.

98. MOTION THAT MEMBER BE NO LONGER HEARD

(1) Any member, except a member who has already spoken in the debate, may move without notice that a member who is speaking "Be no longer heard".

(2) The motion "That the member be no longer heard" may not be debated or amended.

(3) Before putting the question, the Chair will advise the House to consider whether:

(a) the member speaking has had ample opportunity to debate the question,

(b) the member speaking is abusing the standing orders or conventions of the House, or is obstructing business, or

(c) the motion, if carried, would take away the rights of the minority.

Development summary		
1895	Standing order 75	Motion that a Member "be now heard", &c.
2003	Sessional order 98	Motion that member be no longer heard
2004	Standing order 98	Motion that member be no longer heard

SO 98 provides for the House to decide whether the speech of a member with the call of the President should be prematurely ceased. Before putting the question, the Chair will advise the House to consider the consequences of agreeing to such a motion at that time.

149 *Hansard,* NSW Legislative Council, 7 September 1978, p 1162.

Operation

SO 98 allows any member, except a member who has already spoken in debate, to interrupt a member speaking to move that the member 'Be no longer heard'. The question on the motion is put immediately without amendment or debate.

Before voting on the matter, the House is to consider: whether the member speaking has had ample opportunity to debate the question; whether the member speaking is abusing the standing orders or conventions of the House, or is obstructing business; or whether the motion, if carried, would take away the rights of the minority.

If agreed to, the President will call for other members wishing to speak in debate.

The first time a motion was moved to 'gag' an individual member was during debate in committee of the whole on the Australasian Federation Enabling Act Amendment Bill 1897 when the motion was successfully moved multiple times.[150]

In 1900, the motion was negatived during debate on the second reading of the Cobar to Willcania Railway Bill, following which a motion that the question be now put was negatived on casting vote.[151] The motion was negatived in 1901[152] and then not moved again until 1995, when it was negatived twice during one member's speech on the second reading of the Education Reform Amendment (School Discipline) Bill.[153] The provision has not been used since 1995.

Background and development

The provision for a member to move that a member speaking 'be not further heard' was first adopted in 1895 in the same terms as the SO 142 adopted in the Legislative Assembly in 1894.

However, the provision had been the subject of a notice of motion given in March 1892 which proposed to refer to the Standing Orders Committee a provision for the motion 'Whether he be further heard?' in cases of irrelevance and tediousness, as well as a provision for the closure motion. The notice of motion was withdrawn the following day.[154]

In 2003, SO 98, adopted as a sessional order, introduced the provision that before putting the question that the member be no longer heard, the Chair must advise the House to consider whether, if agreed to, the motion would be an abuse of the rules or conventions of the House, would deny the rights of the minority, or be an abuse of the standing orders. Standing order 99 which provides for the closure of debate has a similar provision.

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150 Report of divisions in committee of the whole, *Journal of the Legislative Council,* 1897, vol 56, Part 1, pp 253-257; see, for example, *Hansard,* NSW Legislative Council, 25 November 1897, p 5124.

151 *Minutes,* NSW Legislative Council, 5 September 1900, p 113.

152 *Minutes,* NSW Legislative Council, 28 November 1901, p 180.

153 *Minutes,* NSW Legislative Council, 15 and 16 December 1995 am, p 474 (Revd Mr Nile).

154 *Minutes,* NSW Legislative Council, 8 March 1892 p 263; 9 March 1892, p 265.

The provision is consistent with practice in the House of Commons, where the question on the motion 'That the question be now put' is put forthwith unless it appears to the Chair that the motion is an abuse of the rules of the House, or an infringement of the rights of the minority.[155]

99. CLOSURE OF DEBATE

(1) At any time during debate on a question in the House or in committee of the whole, and whether or not a member is addressing the Chair, a member may move "That the question be now put".

(2) A member, except a Minister, who has spoken in the debate or who has previously moved that motion, may not move a motion that the question be now put.

(3) The motion "That the question be now put" may not be debated or amended.

(4) Before putting the question, the Chair will advise the House to consider whether the motion, if agreed:

(a) is an abuse of the rules or conventions of the House,
(b) would deny the rights of the minority, or
(c) is an abuse of the standing orders.

(5) If the motion "That the question be now put" is carried, the House or committee will vote on the question immediately before it without further debate or amendment, except for the mover in reply, where any reply is allowed, who may speak for 30 minutes before the motion is put.

Development summary		
1895	Standing order 102	Closure – Right of reply.
2003	Sessional order 99	Closure of debate
2004	Standing order 99	Closure of debate

Standing order 99 allows a member with the call to move without notice 'That the Question be now put'. The motion, known as the closure motion or the gag, if agreed to, forces the House, or committee, to immediately vote on the motion before it without further debate, except a reply of the mover who may speak for no more than 30 minutes.

Operation

At any time during debate on a question in the House or in committee of the whole, a member may move 'That the question be now put'. The standing order provides that a member who has already spoken in debate, or who has already moved the closure

155 See *Erskine May*, 24th ed, p 465.

motion, may not move a motion that the question be now put. SO 99(2) specifically exempts a minister from this provision.

The motion can be moved at any time during the debate. A member speaking can be interrupted for the purpose of moving the closure motion or it can be moved when there is no member addressing the Chair.

There is no debate or amendment allowed on the closure motion and, on the motion being moved, the debate before the House is immediately suspended. Before putting the question, the Chair will advise the House to consider whether the motion, if agreed to, would be an abuse of the rules or conventions of the House, would deny the rights of the minority, or be an abuse of the standing orders.

If the closure motion is agreed to, the question before the House or committee will be determined immediately, without further debate or amendment. The exception to this rule is for motions upon which the mover has a right to speak in reply. When the closure motion is agreed to on such debates, the mover is permitted to speak in reply to the original motion for not more than 30 minutes before the question is put.

If the closure motion is not agreed to, the debate on the motion before the House continues.

There is no limit to the number of times a closure motion can be moved during debate on a motion.

The closure motion has been moved relatively few times in the Legislative Council. Its first use was in 1897, during the committee stage on the Federation Enabling Act Amendment Bill.[156] The motion was carried on division.

In 1900, the question was negatived on the casting vote of the President during the second reading of the Cobar to Wilcannia Railway Bill. The President gave as his reason for casting his vote with the 'noes' that it gave an opportunity for further discussion. The closure motion had been earlier moved during the same debate but withdrawn after a member argued, incorrectly, that the motion could not be moved during a member's speech.[157]

The closure motion was also moved twice during consideration of the Women's Franchise Bill in 1901;[158] carried on division during the committee stage of the Fisheries Bill in 1902;[159] and in 1906 during committee stage on the Railway Commissioners Appointment Bill. On that occasion, the motion was resolved in the affirmative when there were no tellers for the 'noes'.[160]

156 *Hansard*, NSW Legislative Council, 25 November 1897, p 5121.
157 *Hansard*, NSW Legislative Council, 5 September 1900, p 260l; *Minutes,* NSW Legislative Council, 5 September 1900, p 113.
158 *Minutes,* NSW Legislative Council, 25 September 1901, p 89.
159 *Hansard*, NSW Legislative Council, 16 December 1902, p 5557.
160 *Hansard*, NSW Legislative Council, 29 August 1906, pp l549-1550.

The closure motion was not moved again until 2011 when it was moved and agreed to three times during consideration of the Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011, firstly during debate on the second reading, then on a motion for an instruction to committee of the whole on that bill,[161] and finally in committee of the whole on a motion that the Chair leave the chair to report an objection to a decision of the Chair.[162]

Background and development

The provision under SO 99 for a motion to curtail debate was first adopted in 1895. SO 102 was adopted in the same terms as SO 157 of the Legislative Assembly adopted in 1894.

The provision had been the subject of a notice of motion given in March 1892, which proposed to refer to the Standing Orders Committee a provision for a motion 'Whether he be further heard?' in cases of irrelevance and tediousness, as well as a provision for the closure motion. The notice of motion was withdrawn the following day.[163]

SO 99 contains three provisions not provided in former SO 102.

The provision in SO 99(2) that a member, except a minister, who has spoken in the debate or who has previously moved that motion, may not move a motion that the question be now put, was new in 2003 and is in terms similar to Senate SO 199(3).

SO 99(4) introduced the provision that, before putting the question 'That the question be now put', the Chair must advise the House to consider whether, if agreed to, the motion would be an abuse of the rules or conventions of the House, would deny the rights of the minority, or be an abuse of the standing orders. Standing order 98 which provides for the gag of an individual member has a similar provision.

The provision is consistent with practice in the House of Commons, where the question on the motion 'That the question be now put' is put forthwith unless it appears to the Chair that the motion is an abuse of the rules of the House, or an infringement of the rights of the minority.[164]

The equivalent standing order adopted in the Senate in 1903 required a special majority to pass. The purpose of the special majority was the protection of the rights of the minority.[165]

SO 99(5) retains the provision in SO 102 that if the closure motion is agreed to, the original motion before the House is put without further debate except a reply of the mover, when a reply is allowed, of not more than 30 minutes.

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161 *Minutes,* NSW Legislative Council, 2, 3, 4 June 2011 am, p 184.

162 *Hansard,* NSW Legislative Council, 2, 3, 4 June 2011 am, pp 2052-2054.

163 *Minutes,* NSW Legislative Council, 8 March 1892, p 263; 9 March 1892, p 265.

164 *Erskine May*, 24th ed, p 465.

165 Laing, *Annotated Standing Orders of the Australian Senate*, p 549 (The provision for a special majority was omitted in 1989 due to the practical difficulty of obtaining a special majority).

100. PUTTING OF QUESTION ENDS DEBATE

A member may not speak to any question after it has been put by the President and the vote commenced.

Development summary		
1895	Standing order 103	No Member to speak after Question put
2003	Sessional order 100	Putting of question ends debate
2004	Standing order 100	Putting of question ends debate

SO 100 articulates a fundamental principal of the rules of debate that, once debate on a question has concluded, the question is put by the President, and members proceed to vote on the matter. Once the President has put the question, there can be no further speakers.

Operation

SO 100 makes clear that once the question on a motion has been put by the President, and the vote has commenced, debate on the matter has concluded and there can be no further speakers.

In practice, there may be occasions on which the House allows a vote to be suspended to allow a member to speak on the motion, such as when a member who was understood to have intended to speak inadvertently missed the opportunity. For example, there have been occasions on which a member has been given leave of the House to speak after the mover had spoken in reply.[166]

On one occasion, following a bill being read a second time, a division was called on the question that the President leave the chair and the House resolve into committee of the whole to consider a bill in detail. The President ordered the bells to be stopped and made a statement indicating that, as a consequence of the entrance to the chamber from the Members' Lounge not being unlocked following the dinner adjournment, a member had been unable to access the chamber in order to speak on the second reading of the bill. The President ruled this to be a breach of the member's privilege, called off the division and gave the call to the member. Following the members' speech on the second reading, the question that the President leave the chair was again put.[167]

Background and development

The standing order is in the same terms as Senate SO 200 and differs from former Legislative Council SO 103, which provided that debate had concluded 'once the voices had been given in the affirmative and negative thereon'.

Prior to 1895, there was no standing order articulating this fundamental rule of debate, however, it was observed in practice.

166 *Minutes,* NSW Legislative Council, 31 August 2006, p 161; 19 March 2014, p 2380.
167 *Minutes,* NSW Legislative Council, 23 June 2009, p 1261.

101. ADJOURNMENT OF DEBATE

(1) A debate may be adjourned on motion to a later hour of the same day or to a future day.

(2) A motion to adjourn a debate may be debated or amended.

(3) When a debate is adjourned, any member may move, without notice, that the order of the day for resumption of the debate take precedence of all other business on the Notice Paper for that day, except government business on a government day.

(4) A member on whose motion a debate is adjourned is entitled to speak first on the resumption of the debate.

(5) If a motion for the adjournment of the debate on a question is negatived, the member moving the motion may address the House at any time during the debate.

Development summary		
1856	Standing order 33	Adjournment of debate
1870	Standing order 43	Adjournment of debate
1890	Standing order 43	Adjournment of debate, precedence to Orders in certain cases
1895	Standing order 58 Standing order 98 Standing order 99	Adjournment of debate Member moving Adjournment of Debate entitled to pre-audience Mover of Adjournment of debate, if Motion negatived, not debarred from speaking
2003	Sessional order 101	Adjournment of debate
2004	Standing order 101	Adjournment of debate

Debate on a motion, including the second and third reading of a bill, can be adjourned and resumed at a later time or on a future day. SO 101 sets out the provisions for adjourning debate.

Operation

Under standing order 101, the House may adjourn a debate on motion to a later hour of the same day or to a future day. Motions have been adjourned until a named day;[168] until another matter has been dealt with by the House;[169] and to a particular time on particular day.[170]

168 *Minutes,* NSW Legislative Council, 15 October 1992, p 357.

169 *Minutes,* NSW Legislative Council, 23 May 2012, p 988 (until after a report had been tabled).

170 *Minutes,* NSW Legislative Council, 31 August 2000, p 618.

Only a member with the call can move that the debate be adjourned. A member can move that the debate be adjourned at any time during their speech, including at its conclusion.[171] A member who has previously spoken cannot adjourn the debate.[172] The member upon whose motion debate is adjourned is entitled to speak first on the resumption of the debate, unless the time available to the member has expired. This is known as 'pre-audience'.[173] Members do not always exercise this right and may speak at some other stage later in debate so long as they had not started speaking when moving the motion for the adjournment of the debate. Pre-audience is discussed further under SO 82.

A motion for adjournment of debate is open to amendment and debate. Amendments may be proposed to change the time or day for resumption of the debate.[174] Debate on the motion and any amendments proposed must be relevant to the motion.[175] In 2013, on ruling on a point of order, the Deputy President referred to an earlier President's ruling that debate on a motion to adjourn debate must be confined to comments as to whether the debate should or should not be adjourned and that the substantive motion cannot be referred to.[176]

The question on a motion for adjournment is put immediately after any debate on the motion. The House can divide on a motion to adjourn debate, and if a division is resolved in the negative debate continues.[177]

When the question that debate be adjourned is agreed to, prior to proceeding to the next item of business on the Notice Paper, any member may move, without notice, that the order of the day for resumption of the debate take precedence of all other business on the Notice Paper for that day, except government business on a government day.[178] A motion for precedence can be debated, but debate cannot canvass the subject matter of the order of the day.[179] This provision has been used infrequently in recent years but was regularly used in the past.

Practice has established that a motion moved under this provision overrides other standing and sessional orders for the precedence of business. In 1967, a point of order was taken that a motion for an adjourned debate to take precedence of all other business on the notice paper for the next sitting day required notice, as the sessional orders had already fixed, precedence for the next sitting day. The point of order was not upheld at the time and, on the next sitting day, the President further stated that there was significant precedent supporting his ruling

171 *Hansard,* NSW Legislative Council, 12 September 1900, p 2822.
172 *Hansard,* NSW Legislative Council, 7 December 1893, p 3485 (President Lackey).
173 See SO 82.
174 See, for example, *Minutes,* NSW Legislative Council, 21 February 2013, p 1478; 21 February 2013, p 1479.
175 *Hansard,* NSW Legislative Council, 5 July 1898, pp 465 and 478 (President Lackey).
176 *Hansard,* NSW Legislative Council, 21 October 2009, pp 18351-18353 (President Primrose).
177 See, for example, *Minutes,* NSW Legislative Council, 29 May 2013, p 1784.
178 See, for example, *Minutes,* NSW Legislative Council, 31 August 2000, p 618; 7 September 2000, p 641.
179 *Hansard,* NSW Legislative Council, 5 June 1890, p 1083 (President Hay).

that the motion did not require notice or the suspension of standing orders, and further noted that the member who had taken the point of order could have opposed the motion at the time it was moved.[180]

Examples of motions to give adjourned debates precedence include:

- in 1980 the House agreed that the adjourned debate on the second reading of the Appropriation Bill would take precedence on the next sitting day, a general business day[181]
- in 1981 the order of the day for the National Companies and Securities Commission (State Provisions) Bill and cognate bills was given precedence of all other business on the Notice Paper on the next sitting day, a day on which general business had precedence[182]
- in 1982, on a day on which general business was to take precedence, the House ordered that the adjourned debate on a private members' bill take precedence of all other business on the Notice Paper for that day[183]
- in 1986 a Government bill was set down for a later hour of the sitting, with precedence over all other business on the Notice Paper for that day and was called on after questions, despite general business taking precedence after questions under sessional order[184]
- in 1987 a motion for the disallowance of a statutory rule to take precedence of all general business on a general business day was agreed to[185]
- in 1991 resumption of the adjourned second reading debate on the Government's Search Warrant's Bill was given precedence of all business on the Notice Paper for next sitting day[186]
- items of private members' business have been given precedence of all other items of private members' business on the Notice Paper.[187]

180 *Minutes,* NSW Legislative Council, 27 September 1967, p 115; *Hansard,* NSW Legislative Council, 27 September 1967, p 1641; *Minutes,* NSW Legislative Council, 28 September 1967, p 118; *Hansard,* NSW Legislative Council, 28 September 1967, pp 1707-1708 (Local Government (City of Sydney Boundaries) Bill) (President Budd).

181 *Minutes,* NSW Legislative Council, 12 November 1980, p 184.

182 *Minutes,* NSW Legislative Council, 8 April 1981, p 435.

183 *Minutes,* NSW Legislative Council, 18 February 1982, p 198 (Crimes (Homosexual Behaviour) Amendment Bill).

184 *Minutes,* NSW Legislative Council, 17 April 1986, p 158 (Insurance (Application of Laws) Bill).

185 *Minutes,* NSW Legislative Council, 24 February 1987, p 667.

186 *Minutes,* NSW Legislative Council, 11 December 1991, p 379.

187 *Minutes,* NSW Legislative Council, 15 October 1992, p 357 (Rural Lands Protection (Amendment) Bill; 19 November 1992, p 441 (Public Hospitals (Conscientious Objection) Bill); 25 May 1995, p 59 (Voluntary Euthanasia); 31 August 2000, p 617 (Summoning of Witnesses to the Bar of the House).

If the motion to adjourn the debate is negatived, debate on the substantive motion continues.[188] The member who moved the motion can continue speaking[189] and can seek to adjourn the matter later during their speech. If the member had not started speaking when moving for the debate's adjournment, they may address the House later in debate.

A motion that debate be adjourned can be moved as a dilatory motion, the difference being that when moving the adjournment of debate as a dilatory motion no time is proposed for the resumption of the debate. If the motion 'That this debate be now adjourned' is agreed to, the motion will lapse and be removed from the Notice Paper (see SO 105).

Background and development

SO 33 of 1856, which continued as SO 43 in 1870, established that a debate could be adjourned until later time on the same day, or a later day. However, under SO 42 adopted in 1870 new motions of which notice had been given would take precedence of orders of the day, including adjourned debates.

In May 1890, Sir Alfred Stephen proposed that the Standing Orders Committee consider the expediency of altering the standing order for adjournment of debate to provide for the 'precedence in certain cases of orders of the day', arguing that, by giving new notices, members could block the progress of a bill.[190] Sir Alfred's motion was amended to require the Standing Orders Committee to consider the provision, then in the Assembly standing orders, which gave precedence to orders of the day over motions on every alternate Thursday. A further amendment was agreed to that the committee consider whether, on the adjournment of a debate, a motion could be moved without notice to give the resumption of the debate precedence on a named date.[191]

The Committee tabled its report on 22 May 1890.[192] On 28 May 1890, the House agreed to the committee's recommendations that SOs 42 and 43 be amended to provide that general business take precedence on days not fixed for government business and be termed 'private days', and on every alternate private day motions would take precedence of orders of the day. The House also agreed to a recommendation that SO 43 be amended to provide that on a debate being adjourned, or a bill being set down for further consideration in committee of the whole, a motion could be moved forthwith and without notice for the order of the day to take precedence of all other business on the Notice Paper for that day, except government business on a government day.[193]

188 See, for example, *Minutes,* NSW Legislative Council, 11 November 1999, pp 211-212.
189 See, for example, *Minutes,* NSW Legislative Council, 17 November 1993, pp 410 and 411 (Anti-Discrimination (Homosexual Vilification) Amendment Bill).
190 *Hansard,* NSW Legislative Council, 14 May 1890, pp 351-353.
191 *Minutes,* NSW Legislative Council, 14 May 1890, p 24.
192 *Minutes,* NSW Legislative Council, 22 May 1890, p 37.
193 *Minutes,* NSW Legislative Council, 28 May 1890, p 42.

In 1895, the provisions for adjournment of debate were adopted in three new standing orders: SOs 58, 98 and 99.

- SO 58 provided for the adjournment of debate and for a motion to be moved forthwith and without notice for the resumption of the adjourned debate to take precedence.
- SO 98 provided that the member moving the adjournment of debate was entitled to pre-audience.
- SO 99 provided that if the motion for adjournment of debate was negatived, the member who had moved the motion was not debarred from speaking.

In 2003, these provisions were combined into SO 101.

The provision under SO 101 that a motion to adjourn debate can be debated and amended was not contained in earlier standing orders – precedent and rulings established that the motion could be debated.[194]

194 See, for example, *Minutes,* NSW Legislative Council, 28 September 1916, p 135; 20 October 1998, p 774; 21 October 2009, p 1428.

CHAPTER 17

QUESTIONS FROM THE CHAIR

102. PUTTING OF QUESTION

(1) When a motion has been moved, the President will propose a question on it to the House.

(2) When the debate on a question is concluded, the President will put the question to the House.

(3) The House may, by motion without debate, order a complicated question to be divided.

(4) When a motion consists of more than one question, the questions should be put sequentially if any member so requests.

(5) A question being put will be resolved in the affirmative or negative, by the majority of voices, "aye" or "no".

(6) The President will state whether the "ayes" or "noes" have it, and if that opinion is challenged the question will be decided by division.

(7) All questions will be decided by a majority of the members present other than the President or other member presiding. When the votes are equal the President or other member presiding will have a casting vote.

Development summary		
1856	Standing order 11	Putting question – Form of
	Standing order 12	Division: – Appointing Tellers
1870	Standing order 13	Putting question – Form of
	Standing order 14	Division: – Appointing Tellers
1895	Standing order 105	Question proposed by the President
	Standing order 106	Resolutions to be put seriatim
	Standing order 110	Previous Question
	Standing order 111	Form of previous Question
	Standing order 112	Previous Question with regard to series of resolutions
	Standing order 130	President gives Casting Vote

Development summary		
2003	Sessional order 102	Putting of question
2004	Standing order 102	Putting of question

Standing order 102 contains the rules for the proposal by the Chair of the question before the House. The provisions include: that a complicated question can be divided, that on a motion consisting of more than one question the questions should be put separately if any member requests, that questions are decided by a majority of members present voting 'aye' or 'no', and that when there is an equality of votes, the President or other member presiding has a casting vote.

Operation

SO 102 contains a number of the procedures for determining the outcome of a debate and the putting of questions by the President or other member presiding.

SO 102(1) provides that when a motion has been moved, the President will propose a question on it to the House. In most cases, rather than repeating what might be a lengthy motion, the question is proposed as 'That the question be agreed to'.

At the end of the debate, the Chair puts the question to the House (SO 102(2)) and asks for all those in favour of the question to say 'aye' and all those against to say 'no' (SO 102(5)). The President will state whether in the President's opinion there was a majority of 'ayes' or 'noes' by saying 'I think the "ayes/noes" have it'. If that opinion is challenged by more than two members, a division is required (SO 102(6)). Divisions are conducted under the procedures outlined in SOs 112 to 119. On occasion, members have indicated their support for a motion by standing in their places[1] and by acclamation.[2] In 1997, as two paragraphs of a reference to a Special Commission of Inquiry would not have effect under the *Special Commissions of Inquiry Act 1983* unless passed by at least two-thirds of the members of the House present and voting, the President put the questions on the paragraphs sequentially. On each question, there were 29 members present and voting, and, as no division was required, all 29 members rose in their places to vote in the affirmative.[3]

Under SO 102(3), the House may, by motion without debate, order a complicated question to be divided. The standing order is in the same terms as former SO 110. There are few examples of this procedure. In 1934, an amendment in committee of the whole was divided by motion on notice. On that occasion, the Chair put the question in divided form – 'that the words proposed to be omitted stand part of the clause' and 'that the

1 See, for example, motions to place on record the deep sense of the loss sustained to the state and the House on the death of a former member: *Minutes,* NSW Legislative Council, 28 October 1981, p 5 (the Hon Fergus John Darling); 22 September 2009, p 1375 (the Hon Virginia Chadwick).

2 *Minutes,* NSW Legislative Council, 23 November 2006, p 437 (Retirement of John Evans).

3 *Minutes,* NSW Legislative Council, 25 September 1997, pp 93-94.

words proposed to be inserted in place of the words omitted be so inserted' and so on.[4] This format of putting the question on amendments was superseded by the adoption of SO 111, which provides that the question on every amendment is 'That the amendment be agreed to'. SO 102(3) allows the old form of putting a question when necessary. This procedure was most recently used in 2012 to deal with a number of amendments moved to a motion concerning marriage equality.[5]

Under SO 102(4), if a motion consists of more than one question, the questions are put sequentially if any member requests, thereby allowing the House to vote differently on each question. SO 102 does not prescribe when the request for a question to be put sequentially should be made, but in 1988 the President ruled that the proper time to ask was at the end of the debate when the question was to be put.[6]

A motion consists of more than one question when the various paragraphs of a motion can stand as a distinct decision of the House. For example, in 2005 the House considered a motion concerning interstate freight on the Pacific Highway which commenced with a common introduction to a motion 'That this House' and was followed by four paragraphs each commencing with a verb: recognises, condemns, notes, calls on. Each paragraph would stand as a question on its own or could be omitted without impacting on the rest of the motion. On a member requesting that the questions be put sequentially, the Chair proceeded to put the four paragraphs sequentially. Paragraph (a) was agreed to, paragraph (b) was agreed to on division, and paragraphs (c) and (d) were negatived.[7]

Other examples of instances where a member has requested a question be put sequentially include:

- questions on amendments allowing members to vote differently on each amendment[8]
- questions on paragraphs of a motion allowing members to divide on, or vote differently on certain paragraphs[9]

4 *Journal of the Legislative Council,* Report of Divisions, 1934-35, vol 112, p 406.

5 *Minutes,* NSW Legislative Council, 31 May 2012, pp 1030-1031.

6 *Hansard,* NSW Legislative Council, 2 June 1988, pp 1335-1336.

7 *Minutes,* NSW Legislative Council, 17 November 2005, pp 1762-1763. See also, *Minutes,* NSW Legislative Council, 26 March 1912, p 140; 16 December 1932, pp 202-205; 28 February 2013, p 1503.

8 *Minutes,* NSW Legislative Council, 13 June 1990, p 317; 26 June 1990, p 331 (paragraphs of amendment to the special adjournment providing for the recall of the House during a recess); 17 April 1997, p 618 (Eastern Distributor); 30 April 1996, p 85 (Estimates Committees).

9 *Minutes,* NSW Legislative Council, 12 October 1993, pp 268-272 (restoration to Notice Paper and precedence of the Anti-Discrimination (Homosexual Vilification) Amendment Bill); 13 November 1995, p 294 (motion for contempt of member for failure to table documents); 19 June 1996, p 234 (Sydney Showground and State Office Block); 1 May 1996, p 104 (censure of member for failure to table documents); 26 November 1998, p 956 (motion adjudging minister guilty of contempt); 10 November 2005, pp 1706-1708 (Plea for clemency from death penalty).

- questions on the second reading of cognate bills allowing some bills to proceed and others to be read 'this day six months',[10] and allowing members to divide on one bill but not another.[11]

In 1999, the House agreed to five notices of motions for the disallowance of statutory rules to be moved and considered together, and for the question on each motion to be put *seriatim* at the conclusion of the debate. Three of the motions were negatived on voices and two negatived on division.[12]

SO 102(7) provides that all questions will be decided by a majority of the members present other than the President or other member presiding. When the votes are equal the President or other member presiding will have a casting vote. The established principles that guide a Chair in exercising a casting vote are discussed in SO 116.

Background and development

Prior to adoption in 1895 of SOs 105, 106, 110, 111 and 112, the only provision in the standing orders was for the form of putting the question, 1856 SO 111 providing that:

> All Questions shall be put in the following form: – "Those who are of that Opinion will say "Aye; – those of the contrary Opinion will say No:" – and the result shall be announced, by the words "The Ayes have it," or "The Noes have it," as the case may be.

The 1895 standing orders omitted the specific requirement for members to vote 'aye' or 'no', although the practice continued. However, 1895 SO 112 provided that the President would state whether, in his opinion, the 'ayes' or the 'noes' have it, and provided for a division when that opinion was challenged.

SO 106 of 1895 provided for any member to request a motion consisting of more than one resolution to be put seriatim. The practice largely fell into disuse after the 1930s, but was revived again when the government of the day lost control of the Council from 1988. From the 1990s to early 2000s, the practice was often used on complicated amendments and the second and third reading of cognate bills. SO 102(4) is in similar terms to 1895 SO 106 but uses modernised language substituting 'sequentially' for 'seriatim'.

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10 *Minutes,* NSW Legislative Council, 23 August 1990, pp 376-378 (Industrial Relations Bill and cognate bills); 3 June 1998, p 534 and 17 June 1998, p 562 (Fair Trading Amendment Bill, Home Building Amendment Bill, Landlord And Tenant (Rental Bonds) Amendment (Penalty Notices) Bill, Motor Vehicle Repairs Amendment Bill, Property, Stock And Business Agents Amendment (Penalty Notices) Bill, Residential Tenancies Amendment Bill, Retirement Villages Amendment Bill, two bills read 'this day six months' and two negatived on division).

11 *Minutes,* NSW Legislative Council, 20 September 1994 p 261; 17 June 1997 p 804 (Appropriation Bills and 6 cognate bills).

12 *Minutes,* NSW Legislative Council, 23 November 1999, p 255 (Motions for the disallowance of Justices (General) Amendment (Fees) Regulation 1999, Supreme Court (Fees and Percentages) Amendment Regulation 1999, Local Courts (Civil Claims) Amendment (Fees) Regulation 1999, Land and Environment Court Amendment (Fees) Regulation 1999, District Court (Fees) Amendment Regulation 1999).

SO 102(5) provides that a question is resolved in the affirmative or negative, by the majority of voices, 'aye' or 'no', and under SO 102(6), the President will then state whether 'the ayes (or noes) have it' consistent with the standing orders prior to 2004.

1895 standing orders 105, 111 and 110 were the precursors to SO 102(1), (2) and (3), respectively, and were in substantially the same terms.

The provision in SO 102(7) for the President or other member presiding to have a casting vote when votes are equal was previously provided for by SO 130.

103. SAME QUESTION

(1) A question may not be proposed if it is the same in substance as any question which has been determined during the same session, unless the order, resolution or vote on such question was determined more than 6 months previously or has been rescinded.

(2) This standing order does not prevent a motion for disallowance of an instrument substantially the same in effect as one previously disallowed.

Development summary		
1895	Standing order 113	Question the same in substance, not to be again proposed
2003	Sessional order 103	Same Question
2004	Standing order 103	Same Question

SO 103 concerns what is known as 'the same question rule'. Under the same question rule, a motion may not be moved if it is the same in substance as a motion that has already been determined by the House in the same session. The rule is intended to avoid the time of the House being wasted on matters on which it has already decided.

Operation

The same question rule is rarely applied as it is seldom that a motion is exactly the same as a motion moved previously, and even if exactly the same, a motion moved in a different context or under different circumstances, such as later the same day, may have a different effect and is therefore not the same question. However, a motion moved immediately after the same motion has been determined in the negative would be out of order.[13] Determining whether a motion is the same in substance is a matter for the Chair.

A motion is not finally determined until it has been resolved in the affirmative or negative. A motion which has been withdrawn has not been finally decided by the House and can be moved again in the same session.

13 See, for example, *Minutes*, NSW Legislative Council, 8 April 1997, pp 580-581 (Motion to suspend standing orders to bring on a take note debate on a report of the Select Committee on Hospital Waiting Lists).

The same question rule does not prevent a motion 'That this bill be *now* read a second [or third] time', if negatived, from being again moved as the House has voted against the bill being read a second time only at that time. The order of the day for the second reading of the bill can be restored to the Notice Paper by motion on notice, and the second reading again proposed.

Under SO 103(2), the same question rule does not apply to a motion for disallowance of a statutory instrument substantially the same in effect as one previously disallowed. Under section 8 of the *Subordinate Legislation Act 1989*, a statutory instrument cannot be remade within four months of the date of disallowance, unless the resolution disallowing the statutory instrument has been rescinded. The four-month provision ensures that a cycle of making and disallowing statutory instruments cannot occur. If a statutory instrument is remade after four months, SO 103(2) ensures that members are not prevented from proposing a motion to again disallow the statutory instrument. A disallowance motion which has been negatived could not be again proposed unless the exemptions under SO 103(1) had been met.

Under SO 103(1), the same question rule can be avoided if the order, resolution or vote on such question was determined more than six months previously or had been rescinded. See SO 104 for motions for the rescission of a resolution.

The same question rule can also be avoided if a motion is introduced in amended form, so long as it has been amended to the extent that it presents an alternative or different package of proposals to the earlier motion.

There is no restriction on the number of notices on the Notice Paper relating to the same subject matter, or even appearing in identical terms.[14] However, once one motion is moved, the other motion on the Notice Paper cannot be proposed, even though the matter has not yet been disposed of, as this would breach the rule of anticipation. Under the rule of anticipation, a member could not move a motion which would anticipate the discussion on an order of the day for resumption of debate on an identical motion. The anticipation rule is intended to prevent the House from the inefficient use of time in unnecessarily duplicating debate on a matter (SO 92).

On the first of two or more notices in the same terms being moved, the other notices remain on the Notice Paper until the first has been withdrawn, discharged, agreed to or negatived. In 2013, several members gave the same notice of motion regarding Government cuts to the health budget. One of the members was drawn in the private members' draw and his motion was placed in the order of precedence. On the member moving his motion, the other motions remained on the Notice Paper but were not able to be moved while the item was under the consideration of the House, and once disposed of, not for six months under SO 103.[15]

There is also nothing to prevent more than one order of the day being on the Notice Paper for bills which seek to address the same issue. On 21 February 2013, the Crimes

14 See, for example, *Notice Paper,* NSW Legislative Council, 21 November 2012, p 7140.

15 See *Notice Paper,* NSW Legislative Council, 20 March 2013, p 7939; 30 April 2013, pp 8256 and 8305.

Amendment (Zoe's Law) Bill was introduced in the Council and adjourned for five calendar days.[16] On 26 November 2013, the Council received the Crimes Amendment (Zoe's Law) Bill 2013 (No 2) from the Assembly and set the second reading down for the first sitting day in 2014 on which private members' business takes precedence.[17] Both orders of the day were on the Notice Paper for 27 November 2013.[18]

In 1923, at the suggestion of the President, two notices of motions on the Notice Paper with the purpose of filling a vacancy on a University Senate, were moved at the same time and debated together. At the end of the debate, the questions were put in the order the items appeared on the Notice Paper.[19]

Background and development

Like SO 103, 1895 SO 113 provided that a question may not be proposed if it is the same in substance as any question which has been determined during the same session. The provisions under SO 103, which exempts from the rule an order, resolution or vote which was determined more than six months previously or that which has been rescinded, were first adopted in 2003. These exemptions have a practical purpose. When SO 113 was adopted in 1895, a parliament was usually punctuated by annual sessions, whereas it is not uncommon nowadays to have only one or two sessions in a four-year parliament. The six-month exemption allows the House to reconsider motions within the same session.

The exemption for motions for the disallowance of statutory instruments is in the same terms as Senate SO 86, providing for the same question rule. This exemption ensures that the House is not prevented from considering a motion to disallow a statutory instrument the same in substance as a motion determined less than six months previously so long as the terms of the *Subordinate Legislative Act 1989* for the remaking of a statutory instrument and notice of motion for disallowance are met.

Standing orders prior to 1895 did not refer to the same question rule. Similarly, the standing orders adopted by the Legislative Assembly in 1894 did not refer to the rule except to provide that a motion which had been withdrawn could be made again during the same session.

However, the rule applied as a matter of practice. At the time of adoption of the Council standing orders in 1895, both Houses of the Parliament of the United Kingdom had standing rules which did not permit a question on a bill to be proposed if it was the same as a bill on which the question had already been determined in the same session.

Debate on a point of order in the Council in 1880 referred extensively to *Erskine May's* interpretation of the same question rule, to the application of the rule since 1606, and in what circumstances the rule prevented a bill from being considered by the House in the

16 *Minutes,* NSW Legislative Council, 21 February 2013, p 1478.
17 *Minutes,* NSW Legislative Council, 26 November 2013, p 2257.
18 *Notice Paper,* NSW Legislative Council, 27 November 2013, pp 11398 and 11440.
19 *Minutes,* NSW Legislative Council, 21 November 1923, p 90.

same session in which it had already been considered. In ruling on the point of order, the President noted that although the Council had returned the Stamp Duties Bill (No. 2) to the Assembly with amendments, it had not received a response from the Assembly. The President stated that, according to parliamentary practice, if a bill is laid aside, it is not considered to have been finally rejected and it was therefore for the House to decide whether it wished to give the bill a first reading, even though it had already been considered and returned to the Assembly. The question was put and the first reading negatived on division, the House seemingly deciding that it had already dealt with the bill.[20]

104. RESCISSION OF ORDER

A resolution, order or vote of the House may not be rescinded, during the same session, unless seven days' notice is given.

Development summary		
1895	Standing order 114	Resolution or vote rescinded
2003	Sessional order 103	Rescission of order
2004	Standing order 103	Rescission of order

Rescission results in a decision of the House being annulled as if it had never been made. SO 104 provides that a motion to rescind a resolution, order or vote of the House requires seven days' notice.

Operation

It is rare that rescission of a resolution or order of the House is required, as in most cases an order or resolution can be amended to change the prospective effect of the resolution. It is only when the consequences of a resolution have already occurred that rescission is necessary.

For example, on 23 October 1996 the Council agreed on division to a motion for the disallowance of the Centre Based and Mobile Child Care Services Regulation 1996, causing the regulation to cease to exist.[21] Although under the *Interpretation Act 1987* a disallowance motion causes the statutory rule repealed by the disallowed rule to be revived, in this case the repealed rules were also subject to the staged repeal of subordinate legislation and were not revived, causing a legal void in the operation of centre-based and mobile child-care services in the state.[22] On 30 October 1996, the House

20 See President's ruling, *Hansard,* NSW Legislative Council,10 March 1880, pp 1425-1428.

21 *Minutes,* NSW Legislative Council, 23 October 1996, p 387.

22 State Crown Solicitor's Office Advice, *Disallowance of Centre-based and Mobile Child Care Services Regulation 1996, 24 October 1996.* In addition, advice was that under the *Subordinate Legislation Act 1989* the rescission of the disallowance resolution would not revive the disallowed regulation, therefore new regulations were required.

agreed to the rescission of the disallowance motion, to allow the minister to introduce new regulations.[23]

It is very rare that the seven days' notice required by SO 104 is given. In most cases standing orders are suspended on notice,[24] on contingent notice,[25] or by leave,[26] to allow a rescission motion to be moved forthwith. Motions have also been moved without notice, and without leave.[27]

The following resolutions have been rescinded:

- that General Purpose Standing Committee No. 4 inquire and report on a matter[28]
- that the second[29] or third reading[30] of bill be set down for a later day
- that the second reading of a bill be adjourned until the next sitting day[31]
- that further consideration in committee of the whole on a bill be set down for the next sitting day on which government business takes precedence[32]
- that the report of committee of the whole regarding the Assembly's message disagreeing to amendments in a bill be adopted[33]
- that a message be forwarded to the Assembly informing the Assembly that a bill had been defeated on the question of the second reading of the bill.[34]

In 1980, contrary to practice, a motion for the rescission of a resolution of the House was moved on the order of the day being read for consideration of a message from the Legislative Assembly. The message informed the House that the Assembly had rescinded an order regarding the Registration of Pecuniary Interests of Members of Parliament and invited the Council to pass a similar resolution. Consideration of the message was set down for a later hour, by leave. When called on, a motion was moved and agreed to

23 *Minutes,* NSW Legislative Council, 30 October 1996, p 410; *Hansard,* NSW Legislative Council, 30 October 1996, pp 5477-5478.
24 See, for example, *Minutes,* NSW Legislative Council, 20 December 1932, p 214; 23 June 1997 pp 848-849; 29 October 1998, p 828.
25 See, for example, *Minutes,* NSW Legislative Council, 22 May 2013, p 1730; 18 June 2014, pp 2596-2597.
26 See, for example, *Minutes,* NSW Legislative Council, 26 November 1953, p 97; 27 November 1980, p 292; 23 March 1983, pp 705-706; 28 October 1987, p 1204.
27 *Minutes,* NSW Legislative Council, 11 April 1996, p 331.
28 *Minutes,* NSW Legislative Council, 23 June 1997, pp 848-849. The issue was then referred to the Standing Committee on State Development.
29 *Minutes,* NSW Legislative Council, 22 June 2011, p 257; 18 June 2014, pp 2596-2597.
30 *Minutes,* NSW Legislative Council, 17 November, 2004, p 1145.
31 *Minutes,* NSW Legislative Council, 24 September, 2008 pp 794-795.
32 *Minutes,* NSW Legislative Council, 12 September, 2012 p 1226.
33 *Minutes,* NSW Legislative Council, 11 June 1942, p 218.
34 *Minutes,* NSW Legislative Council, 11 November 1993, p 388; *Hansard,* NSW Legislative Council, 11 November 1993, p 5191.

that the resolution of the previous year concerning Registration of Pecuniary Interests of Members of Parliament be rescinded.[35]

Background

SO 104 is in the same terms as 1895 SO 114 and as Assembly SO 188 adopted in 1894.

Although there were no standing orders providing for rescission motions prior to 1895, there was nothing to prevent a motion for rescission being moved on notice in the normal way. There are numerous examples of resolutions being rescinded without notice,[36] by motion on notice,[37] by consent[38] and by motion on notice moved as formal business.[39]

105. EVENTS SUPERSEDING A QUESTION

Debate on a question may be superseded by a member moving "That the debate be now adjourned".

Development summary		
2003	Sessional order 105	Events superseding a question
2004	Standing Order 105	Events superseding a question

A superseding motion can be moved to prevent further discussion on a matter before the House and cause the matter to lapse. Although the standing order provides only one form in which a superseding motion may be moved – 'That the debate be now adjourned' – practice developed over time provides for three additional forms in which a superseding motion may be moved: 'That further consideration of the bill be now adjourned', 'That the House do now adjourn', or by using a procedure referred to as 'the previous question' – this final procedure is discussed further under SO 107.

Operation

Except in certain cases, only one question may be before the House at any one time. Exceptions include:

- a matter being interrupted by an order of the House (e.g. a sessional order for the interruption of business at a particular time to allow another category of business to take precedence)
- a motion being moved to amend a question before the House

35 *Minutes,* NSW Legislative Council, 27 November 1980, pp 288 and 291.
36 See, for example, *Minutes,* NSW Legislative Council, 13 October 1870, p 49.
37 See, for example, *Minutes,* NSW Legislative Council, 13 January 1869, p 30.
38 See, for example, *Minutes,* NSW Legislative Council, 27 January 1876, p 54.
39 See, for example, *Minutes,* NSW Legislative Council, 18 August 1881, p 46.

- a motion being moved to adjourn debate on a motion, or
- a superseding motion being moved.

A superseding motion is a dilatory motion, which has the effect of preventing further discussion on a matter currently before the House and of preventing the matter to progress any further. If agreed to, the item will lapse and be removed from the Notice Paper.

Debate on a lapsed question can only be resumed by a motion, on notice, to restore the matter to the Notice Paper. Alternatively, the motion may be moved afresh, on notice, as a new item of business and is not subject to the same question rule (SO 103) which would otherwise prevent the motion being moved again during the same session (SO 75(5)).

SO 105 states that debate on a question may be superseded by a member moving 'That the debate be now adjourned'. The motion can be moved by any member who has not already spoken, at any time during debate when no other member has the call.[40] The form of words in which to move a superseding question is very similar to that to adjourn debate in the usual way, but does not include a time at which debate should resume, such as a later hour or the next sitting day. For this reason, in 2010, the President ruled that a motion to supersede the question must be moved in a manner that makes it clear to the House (or committee) the intention of the person moving the motion.[41]

In addition to the procedure provided for under SO 105, three additional forms of superseding motion may be moved. As with the motion 'That the debate be now adjourned', all are moved as a distinct motion which interrupts and supersedes the question already under consideration, rather than as an amendment to the original question. The first of these is the motion 'That the question be not now put' – this is provided for under SO 107 and discussed further in that chapter. The remaining two procedural motions are not provided for under the standing orders but have instead developed as practice, with reference to the practice of the Westminster Parliament.

- *'That further consideration of the bill/amendments to the bill be now adjourned':* This procedure is taken from practice in the House of Commons. The effect of the motion, if agreed to without specifying a particular day or time, is that the matter lapses and the next item of business is proceeded with.
- *'That this House do now adjourn':* The motion 'That this House do now adjourn' may only be moved by a minister (SO 31(2)). If the question is agreed to, business for the day ends and the House must immediately adjourn, however, under SO 31(4) the provision for 30 minutes of debate on the motion to adjourn the House still applies.[42] *Erskine May* notes that, in order to supersede a question,

40 Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011), p 403; Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 284.

41 *Hansard*, NSW Legislative Council, 25 February 2010 pp 20921-20922.

42 *Minutes*, NSW Legislative Council, 20 September 2005, p 1584.

> the motion 'That the House do now adjourn' cannot be coupled with any other words, and it is not in order to move that the House do adjourn (or that debate be adjourned) to a future specified time, or to move an amendment to that effect to the question for adjournment. If the question is agreed to and the House is adjourned without a time or day being named, the House meets on the next day set for a meeting of the House under the sessional order for 'Sitting days', set in accordance with SO 35. *Erskine May* also notes that when a motion for the adjournment of the House or the debate has been negatived, it may not be proposed again without some intermediate proceeding. A member who has moved a dilatory motion is not entitled to move another in the course of debate on the same question.[43]

A superseding motion for the adjournment of the House cannot be made while a question for the adjournment of the debate is under discussion,[44] and a motion for the adjournment of the House can only be moved in the House. The adjournment cannot be moved in committee of the whole, however, the other forms of dilatory motion may be moved in committee of the whole.[45] In recent years, if a motion to adjourn the House has been agreed to as a superseding question, it is recorded as such in the Minutes of Proceedings under a separate heading and within the text of the motion.[46]

Erskine May notes that the use of the motion for the adjournment of the House to supersede another question must be distinguished from its use as a substantive motion. A dilatory motion cannot therefore be proposed before the orders of the day have been entered upon as a means of superseding debate.[47]

Background

Prior to 2004, the only provision for a dilatory motion to be moved under the standing orders related to the procedure for moving the previous question (see SO 107). Nevertheless, the records of the House reflect examples of the motions 'That this House do now adjourn'[48] and 'That the debate be now adjourned'[49] moved to supersede a question then under consideration. The authority for the practice is derived from the former standing orders that provided that in all cases not provided

43 *Erskine May,* 24th ed, p 403.

44 *Erskine May,* 24th ed, p 403.

45 Other options available to members to terminate proceedings in committee of the whole are discussed under SO 177.

46 See, for example, *Minutes,* NSW Legislative Council, 20 September 2005, p 1584, where the adjournment was moved as a superseding motion to prevent discussion on a question before the House on an urgency motion moved under SO 201.

47 *Erskine May*, 24th ed, p 403.

48 For example, *Minutes,* NSW Legislative Council, 6 August 1902, p 88, moved to terminate proceedings on the Women's Franchise Bill; *Minutes*, NSW Legislative Council, 6 October 1859, p 21, moved to terminate debate on an objection to a President's ruling.

49 For example, *Minutes,* NSW Legislative Council, 17 November 1993, p 411.

for by the standing orders, reference would be had to the rules, forms and uses of the Imperial Parliament.[50]

106. LAPSED QUESTION

(1) If the House is adjourned or committee of the whole is interrupted by the absence of a quorum, the question then under consideration lapses.

(2) Debate on a lapsed question may be resumed, by motion on notice, at the place where it was interrupted.

Development summary		
1856	Standing order 36 Standing order 37	Counting out of House The like, in committee
1870	Standing order 45 Standing order 46	Counting out of House The like, in committee
1895	Standing order 100 Standing order 101	Restoration of lapsed question In Committee
2003	Sessional order 106	Lapsed question
2004	Standing order 106	Lapsed question
2009–2015	Sessional order	Lapsed questions – amendment to SO 106

When debate on a matter is interrupted by a lack of a quorum and subsequent adjournment of the House, the matter lapses. SO 106 sets out the procedure by which an item so interrupted may be restored to the Notice Paper.

However, notwithstanding the provisions of SO 106, under a sessional order adopted in varying forms since 2009, the resumption of debate on an item interrupted by the absence of a quorum is automatically set down as an order of the day on the Notice Paper for the following day, obviating the requirement for a motion to be moved to that effect.

Operation

While SO 106 provides that debate on a matter in the House or in committee interrupted by the adjournment of the House owing to absence of a quorum will lapse but may be restored, SO 176(4) makes a contradictory provision – that a matter in committee interrupted by lack of a quorum and subsequent adjournment of the House will be automatically set down as an order of the day for the next sitting day.

To rectify this anomaly and bring the provisions of the two standing orders into line, since 2009 the House has adopted a sessional order which varies the terms of SO 106 and applies the procedure under SO 176(4) to any matter interrupted by the adjournment of the House owing to the absence of a quorum.

50 1856 SO 1; 1870 SO 1; 1895 SO 2.

Between 2009 and 2014, the sessional order carried over paragraph (2) of the original standing order, providing:

> 1. Debate on a lapsed question may be resumed, by motion on notice, at the place where it was interrupted.
>
> 2. If the proceedings of the House are interrupted by lack of a quorum and consequent adjournment of the House, the resumption of the debate will be an order of the day for the next day of sitting, and, when the order is called on, the proceedings will be resumed at the point where they were interrupted.[51]

The terms of this sessional order caused confusion, as they implied that debate on a lapsed question still required a motion to be moved, on notice, in order to restore the item to the Notice Paper.

From 2015, the terms were amended to provide that:

> If the proceedings of the House are interrupted by a lack of a quorum and consequent adjournment of the House, the resumption of any debate then under discussion will stand an order of the day for the next day of sitting, and when the order is called on the proceedings will be resumed at the point where they were interrupted.[52]

The provisions of the two standing orders now ensure that where an item is interrupted by the adjournment of the House owing to the absence of a quorum, the item will be automatically set down as an order of the day on the Notice Paper for the next sitting day. When the order is called on, proceedings resume at the point where they were interrupted.

The standing orders provide various other circumstances in which a matter may lapse: as a result of a dilatory motion being moved (SO 105), or as a result of the previous question being agreed to (SOs 107 and 108). Such circumstances do not fall within the scope of SO 106, which only applies to matters interrupted by adjournment owing to want of a quorum (see 'Background'). Nevertheless, such matters could be restored to the Notice Paper by motion on notice.

A public or private bill that has lapsed owing to prorogation, may be restored under SOs 159 and 171, while other items on the Notice Paper that have lapsed on prorogation, may be restored by motion on notice, though not expressly provided for under the standing orders.[53]

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51 *Minutes,* NSW Legislative Council, 3 June 2009, pp 1188-1189; 9 May 2011, pp 72-73; 9 September 2014, p 8; 6 May 2015, p 57.

52 *Minutes,* NSW Legislative Council, 6 May 2015, p 57.

53 For example, *Minutes,* NSW Legislative Council, 24 May 2006, p 29; 9 September 2014, pp 12-13.

Background

The provisions of SO 106 have applied consistently since 1856.[54] Any item interrupted by the absence of a quorum in the House or in committee and the subsequent adjournment of the House lapsed, but could be restored by motion on notice. Motions to restore lapsed items were regularly agreed to by the House.[55]

Under the new standing orders adopted in 2004, the provision for a lapsed question in the House in SO 106 continued the provision of previous years that an item interrupted by the absence of a quorum and the subsequent adjournment of the House lapsed, but could be restored by motion on notice The provision for a lapsed question in committee of the whole in SO 176(4) was new and stipulates that where proceedings in committee are interrupted by the lack of a quorum and the subsequent adjournment of the House, the resumption of proceedings will be made an order of the day for the next sitting day. As noted above, the anomaly has been rectified by the adoption of a sessional order varying the terms of SO 106.

107. Form of the previous question

(1) The previous question is put in the form – "That the question be not now put".

(2) The previous question may not be moved to an amendment, nor in committee of the whole House.

(3) The motion "That the question be not now put" may not be amended.

(4) In debating the previous question, the original question and any amendment may be debated.

108. Determination of previous question

(1) If the previous question is carried, the original question and any amendment to it are disposed of, and the House proceeds to the next business.

(2) If the previous question is negatived, the original question and any amendment before the House must be put immediately without amendment or debate.

(3) When a motion consists of a series of motions which are under discussion as one motion, and the questions are to be put separately, the decision of the previous question on the first motion is conclusive for all of the motions.

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54 1856 SO 36 and 37.

55 For example, *Minutes,* NSW Legislative Council, 18 February 1878, p 78; *Notice Paper,* NSW Legislative Council, 5 May 1886, p 92; 3 June 1886, p 136; 16 November 1892, p 70; 20 September 1900, p 139; 27 March 1916, p 283.

Development summary		
1856	Standing order 34	Previous question, form of
	Standing order 35	Amendments, after such question
1870	Standing order 44	Previous question: Form of
1895	Standing order 107	Previous question
	Standing order 108	Form of previous question
	Standing order 109	Previous question with regard to series of resolutions
	Standing order 220	Previous question shall not be moved in committee
2003	Sessional order 107	Form of the previous question
	Sessional order 108	Determination of previous question
2004	Standing order 107	Form of the previous question
	Standing order 108	Determination of previous question

The motion for the previous question is considered a somewhat ruthless mechanism due to the severity of its effect – no matter the outcome, debate on the motion under consideration is halted or 'guillotined'. In addition to SOs 107 and 108, provision for the previous question to be moved is also specifically provided under SO 140(2) (second reading) and SO 148(3) (third reading). SO 173(4) specifically prevents the previous question being moved during committee of the whole.

Operation

The previous question is a mechanism for guillotining debate. While the form in which the previous question may be moved has varied throughout the various editions of the standing orders, under the 2004 standing orders, the previous question is put in the form: 'That the question be not now put'.

Once the previous question has been moved, debate on the original item under consideration may not continue. However, the motion for the previous question may be debated, with arguments put for and against the motion.[56] In debating the previous question, the original question and any amendment moved to the original question may be debated (SO 107(4)). There have been instances where debate on the previous question has been adjourned until a future day.[57]

The motion for the previous question may not be amended (SO 107(3)).

If the previous question is negatived, the House must immediately proceed to put and resolve the original question, together with any amendments that had been moved to the original question (SO 108(2)). The effect of the vote is that in disagreeing that the question be *not* now put, the House has agreed that the question *be* now put.

56 See, for example, *Minutes,* NSW Legislative Council, 13 March 1879, p 142; 1 September 1881, p 55; 8 October 1886, p 311; 19 November 1905, p 133; 5 December 1994, p 488.

57 *Minutes,* NSW Legislative Council, 18 March 1869, p 84; 19 November 1874, p 26; 16 July 1884, p 209; 23 July 1884, p 218.

If the previous question is agreed to, the original question lapses and there is no subsequent opportunity to put the original question to a vote (SO 108(1)). If a member wishes to continue the debate, the motion must be restored on a future day, on notice.

If the original question consists of a series of motions which are under discussion as one, and the questions are to be put separately, the decision on the previous question on the first motion is conclusive for all of the motions (SO 108(3)). The predecessor to SO 108(3), 1895 SO 109, makes clear that this is intended to specify the procedure that applies where a member has requested that the question on a motion comprised of multiple paragraphs be put separately under SO 102(3) and (4), or 'seriatim'.

A motion for the previous question has not been moved during the operation of the 2004 standing orders, but the procedure was commonplace until the mid 1900s.

Background and development

Under SO 107(1), the form in which the previous question is put to the House is: 'That the question be not now put', however, the form in which the previous question has been put has changed over time.

When the provision was first adopted under 1856 SO 34, the previous question was put in the form 'Shall the question be now entertained?' Under 1856 SO 35, if the previous question was carried, a member could then move an amendment to the original question before the original question was subsequently put.[58] If the previous question was negatived, the item under consideration lapsed.[59] It was not uncommon during the early years of the new parliament for the previous question to be moved and then subsequently withdrawn, by leave.[60]

Provision for the previous question was substantially amended in the 1870 revision of the standing orders (SO 44):

- to change the form of the previous question from 'Shall the question be now entertained?' to 'That the question be now put?',
- to omit the 1856 provision that 'the previous question, until decided, shall preclude any amendment of the main question', though the practice remained the same – once the previous question was moved, no further proceedings could

58 See, for example, *Minutes,* NSW Legislative Council, 4 December 1857, p 59, where, following the previous question being agreed to, an amendment was moved to the original question to refer the motion to a select committee; and *Minutes,* NSW Legislative Council, 3 February 1859, p 13, where, following the previous question being agreed to, an amendment was moved to the original question to omit all words after 'That' and insert instead new words.

59 See, for example, *Minutes,* NSW Legislative Council, 17 February 1859, p 17; 9 May 1861, p 199.

60 *Minutes,* NSW Legislative Council, 27 November 1857, p 29; 2 November 1858, p 97; 2 March 1859, p 19; 20 December 1859, pp 45-46.

take place on the original question until the motion for the previous question was decided, and

- to omit 1856 SO 35 in its entirety, removing the provision for the original question to be amended following the previous question being agreed to. The original question must instead be determined immediately.[61]

In keeping with the 1856 practice, under the 1870 standing order if the previous question was negatived, the original question lapsed.[62]

In 1895, provision for the previous question was again amended, utilising the terms of the newly adopted Legislative Assembly standing orders. The revision had several effects.

- SO 107[63] specifically made clear that a question could be superseded by the previous question.
- Under SO 108,[64] the member moved 'I move the previous question', however, the form of the previous question remained the same – the question being 'that the question be now put' – and if agreed to, the original question must then be put immediately without amendment or debate.[65] However, if the previous question was negatived, the House would proceed immediately to the next item on the Notice Paper and the motion under consideration would lapse. During the operation of the 1895 standing orders, no examples of the previous question being negatived were noted in the records of the House.
- SO 109[66] adopted a new provision which regulated the procedure for putting the previous question with regard to a series of resolutions. Where a member had requested that a question be put seriatim (that is, separately), the decision

61 See, for example, *Minutes,* NSW Legislative Council, 13 June 1877, p 106; 13 March 1879, pp 142-143; 1 September 1881, pp 55-56; 20 October 1881, p 108; 10 November 1881, p 123; 3 April 1883, p 73; 30 October 1884, p 335; 8 October 1886, pp 311-312; 5 July 1886, p 258.

62 See, for example, *Minutes,* NSW Legislative Council, 6 August 1875, p 160; 6 April 1876, p 121; 6 March 1879, p 135; 11 June 1879, p 254; 13 November 1879, p 21; 26 February 1880, p 79; 1 April 1880, pp 115-116; 28 November 1888, p 33; 4 December 1889, p 15; 10 May 1893, p 283.

63 1895 SO 107 was adopted in the same terms as 1894 Assembly SO 180.

64 1895 SO 108 was adopted in the same terms as 1894 Assembly SO 181.

65 See, for example, *Minutes,* NSW Legislative Council, 28 August 1895, pp 18-19; 10 December 1895, p 154; 5 December 1994, pp 483-490 (previous question moved, p 488).

65 1895 SO 109 was adopted in similar terms as 1894 Assembly SO 182. The Council standing order required that where the previous question had been put on a series of resolutions and the question on the resolutions was to be put seriatim, the previous question would be put on the first of the resolutions and be taken to be conclusive for all therein. In contrast, Assembly SO 182 provided that in the same circumstances, the previous question would be put *before* putting the question on the first of the resolutions and the outcome of the previous question would be taken to be conclusive for all the whole of the resolutions.

of the previous question on the first of the resolutions would be conclusive for all of the questions.

- 1895 SO 221[67] introduced a new provision stating that the previous question could not be moved in committee of the whole.

However, the 1895 standing orders had an unintended consequence. Within the new revision, the House had adopted a new procedure under SO 102 for the closure of debate, otherwise referred to as the gag. This procedure provided that any member could at any time during debate move 'That the question be now put'. If the question was agreed to, the question on the original question would be put immediately. If the question was negatived, the debate on the original question would resume. In adopting the new procedure, the House had provided for two very different procedures to be put in the same form, 'That the question be now put'.

The 2004 rewrite provided an opportunity to rectify this anomaly, and the terms of SO 107(1) amended the form of the previous question to: 'That the question be *not* now put'. This ensured that the previous question and closure motion are now put in a different form. The amendment also reversed the effect of the previous question as it had operated under the 1895 provisions. As noted earlier, under 1895 SO 108, the original question would lapse if the previous question was negatived, rather than agreed to. In contrast, if the previous question is agreed to under current SO 107, the original question lapses immediately.

Aside from this amendment, the majority of the 1895 provisions were carried over in the 2004 rewrite of the standing orders (SOs 107, 108, 173 and 107(2)). The 2004 revision also imposed several addition requirements:

- the previous question may not be moved to an amendment (SO 107(2))[68]
- the motion 'that the question be not now put' may not be amended (SO 701(3)), and
- in debating the previous question, the original question and any amendment may be debated (SO 107(4)).

67 SO 221 was adopted in 1895. However, following the rescission of SO 210 later that year, the SO was renumbered to be SO 220 for most of the life of its operation. All annotations in the Legislative Council volumes are listed under SO 220.

68 The prohibition on the previous question being put in committee of the whole had previously applied under the 1895 standing orders, but only featured in the standing orders regulating committee of the whole (1895 SO 221). The 2004 revision also carried this provision over in the standing orders regulating committee of the whole (SO 173(4)) but additionally included the provision in the standing order regulating the previous question. The operation of this provision is discussed under SO 173, Proceedings in Committee.

CHAPTER 18

AMENDMENTS

109. MOVING OF AMENDMENTS

(1) A member may amend a question:

(a) by omitting certain words,

(b) by omitting certain words in order to insert or add other words, or

(c) by inserting or adding words.

(2) An amendment may be moved to a proposed amendment as if the proposed amendment were the original question.

(3) An amendment may not be moved to an earlier part of a question if a later part has been amended or has been proposed to be amended, unless the proposed amendment has been withdrawn by leave of the House.

(4) An amendment must be relevant to the question it is proposed to amend and must not be a direct negative of the question.

(5) A proposed amendment may be withdrawn by the mover, or in the absence of the mover with the mover's authority, by leave of the House.

(6) The mover of a motion or a member who has already spoken in the debate may not move an amendment.

(7) An amendment to a question must be in writing and signed by the mover, if required by the Chair.

(8) Amendments do not require a seconder.

Development summary		
1895	Standing order 64	No seconder needed
	Standing order 115	Different forms of amendments
	Standing order 116	Amendments to be in writing if required
	Standing order 117	When later part of a question amended
	Standing order 119	Not withdrawn without authority of mover

Development summary		
	Standing order 120	Proposed amendment withdrawn
	Standing order 121	Amendment to proposed amendments
2003	Sessional order 109	Moving of amendments
2004	Standing order 109	Moving of amendments

As a general rule, substantive motions seeking a decision of the House can be debated and amended. Under the standing orders, a number of subsidiary and procedural motions are also open to amendment, such as a motion that debate be adjourned, that the report from committee of the whole be adopted and that a motion for the disallowance of a regulation be considered forthwith. The second and third readings of a bill, while subsidiary in that they are consequent on the House agreeing to other motions, can also be amended, although the scope of amendments is limited by the standing orders.

Standing order 109 provides the rules for amendments. These rules apply to amendments moved to motions and to bills in committee of the whole.

Operation

A member may seek to amend a motion by omitting words, omitting words with a view to inserting instead other words, or by inserting or adding words.

An amendment is itself a new question on which members have a right to speak and to move amendments. A member who has spoken in debate may speak again to an amendment and to an amendment to the amendment. However, the mover, and a member who has already spoken in debate, may not move an amendment as this would be contrary to the rule that members may only speak once.

An amendment may not be moved to an earlier part of a question if a later part has been amended or has been proposed to be amended, unless the proposed amendment has been withdrawn by leave of the House. This ensures an orderly procedure and that decisions made are not reversed without due process. However, the practice of considering and disposing of amendments has changed over time. (See 'Background and development' below).

Under current Legislative Council practice the questions on amendments, including amendments to amendments, are put at the end of the debate, after the mover has spoken in reply in the order in which the amendments occur in the original question.

It is accepted practice that a member can move a number of separate amendments to a motion in one motion. If requested, the questions on the separate amendments are put sequentially (see SO 102).

It is out of order for the mover of a motion to move an amendment (SO 109(6)). In 2005, the mover of a motion on interstate freight on the Pacific Highway sought leave to move an amendment in reply. The Deputy President reserved her ruling and debate was

adjourned until a later hour of the sitting. Later during the sitting, when debate on the motion had resumed, the Deputy President stated that it was highly irregular for the mover of a motion to seek leave to amend the motion when speaking in reply and ruled the amendment inadmissible.[1]

Although it is almost always the case that amendments to bills are received in writing and circulated well before being considered, it is quite common that amendments to motions are moved on the floor of the House. This is generally acceptable if the amendment is simple and clear, such as omitting words, but, as a courtesy to other members, complex amendments are usually circulated in writing.

There are two fundamental rules for the content of an amendment: it must be relevant to the question proposed, and it must not be a direct negative.

The rule of relevance which applies to debate also applies to the content of amendments. Relevance is usually interpreted liberally, so as not to overly restrict members seeking to amend motions in order that the majority may reach agreement on a final form of words.

The proper method for expressing opposition to a question is to vote against it. It is out of order to seek to amend a motion if agreeing to the amendment would have the exact same effect as negativing the motion. An amendment that proposes an alternative proposition, even if the outcome of the amendment would be contrary to the objective of the original motion, is not out of order under this provision. Consequently, an amendment that omits all words after 'That' and inserts a relevant but contradictory proposal is not out of order.

Background and development

Prior to 1895, there were no standing orders relating to amendments. The few Presidents' rulings given tended to relate to the scope of amendments to bills and when instructions to committee of the whole were required.[2] However, President's rulings confirmed the practice for amendments to be moved, debated and determined before moving to the next amendment.[3] The Senate,[4] the House of Representatives[5] and the New South Wales Legislative Assembly[6] all have current standing orders which require each amendment to be moved, debated and determined, before moving to the next amendment.

However, under this practice, it was possible for the House to determine an amendment to part of a question, thereby preventing other members from proposing amendments to a previous part. In 1890, the President stated:

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1 *Hansard,* NSW Legislative Council, 17 November 2005, pp 1760 and 1762-1763.

2 See, for example, *Hansard,* NSW Legislative Council, 31 May 1893, p 7710 (President Lackey).

3 See, for example, *Minutes,* NSW Legislative Council, 13 August 1889, p 170; *Hansard,* NSW Legislative Council, 13 August 1889, p 3946 (President Hay); 5 May 1886 p 1692 (President Hay); see also Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed. 2011), p 410. B C Wright (ed), *House of Representatives Practice* (Department of the House of Representatives, 6th ed, 2012), p 310.

4 Adopted in 1903 as SO 139, later incorporated into renumbered SO 91.

5 House of Representatives SO 123.

6 First adopted as SO 172 in 1994 and as SO 162 in 2006.

> …it is desirable that any hon. member who wishes to amend any of the resolutions should not propose his amendment unless it is clear that no previous part of the resolutions is wished to be amended by any other hon. member. This is a difficulty which has occurred on a previous occasion. An amendment was proposed by an hon. member in possession of the House. It was put by the Chair, and it ultimately prevented amendments on previous portions of the motion being put.[7]

This difficulty is avoided under the current Legislative Council practice whereby the questions on amendments, including amendments to amendments, are put at the end of the debate, after the mover has spoken in reply, in the order in which they occur in the original question.

In 1895, the House adopted standing orders 115 to 122 in similar terms to those adopted in the Legislative Assembly the year before, but with the following differences: no seconder to an amendment was required, an amendment could only be withdrawn with the authority of the mover, and the form in which the questions on amendments were to be put were not included in the Council standing orders.

Standing order 109 adopted in 2004 retains the same rules as the 1895 standing orders with the addition of the provision that amendments must be relevant and must not be a direct negative. Former SO 118, that no amendments be proposed to words already agreed to, was adopted in 2004 as SO 110, and former SO 122, that the question as amended be put, was incorporated in 2004 as SO 111.

110. NO AMENDMENT TO WORDS AGREED TO

A member may not move an amendment to words which the House or Committee has agreed should remain or be inserted or added, except to add other words.

Development summary		
1895	Standing order 118	No amendment to words already agreed to
2003	Sessional order 110	No amendment to words agreed to
2004	Standing order 110	No amendment to words agreed to

Standing order 110 is an expression of one of the fundamental principles of parliamentary procedure, that a decision of the House, or committee, including a decision on an amendment, cannot be reversed without due process such as that provided in SO 104 for rescission of a motion, or under SO 146 for the reconsideration of a bill in committee of the whole.

Operation

Under SO 110, if a decision is made that words should remain or be inserted or added, no amendment can be made to those words except to add other words.

7 *Hansard*, NSW Legislative Council, 11 June 1890, p 1222 (President Hay).

In practice, standing order 110 prevents words that the House has agreed should remain, or be inserted, from subsequently being omitted or changed by way of a further amendment thereby creating a circuitous course of action. SO 110 is also intended to prevent members from moving amendments concerning matters already dealt with as a way of frustrating proceedings.

Evidence of the observance of this provision can be found in the lack of recorded precedent to the contrary.

Background and development

There were no rules for amendments in the standing orders prior to 1895. In 1895 the House adopted standing orders 115 to 122 in similar terms as those adopted in the Legislative Assembly the year before, with the following differences: under the Council standing orders, no seconder to an amendment was required, an amendment could only be withdrawn with the authority of the mover, and the form in which the questions on amendments were to be put was not prescribed.

Standing order 109 adopted in 2004 retains the same rules as the 1895 standing orders, with the addition of the provision that amendments must be relevant and must not be a direct negative.

1895 SO 118, that no amendments be proposed to words already agreed to, was adopted in 2004 as SO 110, and 1895 SO 122, that the question as amended be put, was incorporated in 2004 SO 111.

111. PROCEDURE FOR PUTTING OF AMENDMENTS

(1) The Chair will put the question on every amendment "That the amendment be agreed to".

(2) When an amendment has been agreed to, the main question must be put as amended.

(3) When an amendment has been proposed but not agreed to, the original question will be proposed.

Development summary		
1895	Standing order 122	Question as amended put
1990	Sessional order	Proposing of questions on amendments
2003	Sessional order 111	Procedure for putting of amendments
2004	Standing order 111	Procedure for putting of amendments

Standing order 111 prescribes the form for putting the question on every amendment, including those to bills moved in committee of the whole, and provides that after the question on an amendment has been put, the original motion, as amended, or as moved, is then proposed.

Operation

A member may seek to amend a question by omitting words, omitting and inserting instead other words, or by inserting or adding words (See SO 109). A member moves an amendment at any time during their speech. At the end of debate, the Chair will first put the question on any amendments proposed, including any amendments to amendments, in the order they appear in the question, and then on the original question, as amended, or as moved.

The question on an amendment to an amendment is put before the question on the amendment it seeks to amend. If the amendment to the amendment is negatived, the question is then put on the original amendment as moved. If the amendment to the amendment is agreed to, the question is put on the amendment as amended before proceeding to the question on the next amendment or the original motion as moved, or as amended.

Under SO 111, all questions on amendments are put in the form 'That the amendment be agreed to'. This form of putting a question is significantly simpler than that required prior to 1990.

Background and development

There were no rules for amendments in the standing orders prior to 1895. The rules adopted in 1895 were similar to those adopted in the Legislative Assembly the year before with minor amendments.

The form of putting the question provided by SO 111 was first adopted in 1990. Prior to 1990, the practice had been for the question on amendments to be put in two parts. In deciding an amendment that proposed to omit words and insert new words, the question was first put 'that the words proposed to be omitted stand'. If that motion was negatived, the House had voted to omit the words, so the second question was then put 'that the words proposed to be inserted be so inserted'.[8] If the first question – that the words proposed to be omitted stand – was agreed to, the second question relating to the insertion of new words was not put. The result of the first question being negatived, and the second question being negatived would be an absence of words. For example, if the words to be omitted were 'all words after That', and no additional words were inserted, the question before the House would be 'That'. In committee of the whole if such a scenario occurred when considering an amendment to a bill it would leave a blank in the bill.

To simplify the form for putting these questions, on 21 May 1990 the House adopted a sessional order to provide that on any amendment proposed in the House or committee of the whole, the Chair, unless otherwise determining, would put the question 'That

8 This form of putting the question was contained in Legislative Assembly SOs 192, 193 and 194 adopted in 1894

the amendment be agreed to',[9] thereby obviating the need to put the question on the amendment in two parts. The Senate had adopted the same approach in 1987 and incorporated the provision in the standing orders in 1998. The new practice also avoids the possibility of reducing a question to just 'That'. In the case of a complex amendment, or amendments, the House may choose to revert to the earlier form of putting the question. In 2012, the old form of putting the question on amendments was used to enable the House to consider four sets of conflicting amendments to a motion relating to same-sex marriage, some of which were to be put sequentially at the request of a member.[10]

The sessional order was readopted in the same terms each subsequent session,[11] before being incorporated into the 2003 rewrite of the standing orders as new SO 111(1).

The rule that the original question as amended is put was contained in its predecessor 1895 SO 122. SO 111(3) now also provides that when an amendment is negatived the question as originally proposed is put, a rule that had previously been applied in practice but not provided for in the standing orders.

9 *Minutes,* NSW Legislative Council, 21 May 1990, p 181.

10 *Minutes,* NSW Legislative Council, 31 May 2012, pp 1029-1032; *Hansard,* NSW Legislative Council, 31 May 2012, pp 12391-12394.

11 *Minutes,* NSW Legislative Council, 21 February 1991, p 27; 2 July 1991, p 20; 4 March 1992, p 25; 2 March 1993, p 27; 2 March 1994, p 31; 24 May 1995, p 27; 17 April 1996, p 31; 17 September 1997, p 40; 12 May 1999, p 47; 8 September 1999, p 28; 12 March 2002, p 38; 30 April 2003, p 46.

CHAPTER 19

DIVISIONS

112. CALLING FOR DIVISIONS

(1) A question put by the Chair in the House or committee must be resolved by a majority of voices for the "ayes" or "noes".

(2) When the Chair states that the "ayes" or the "noes" have it, members may challenge that opinion.

(3) A division may not be called for unless voices have been given both for the "ayes" and "noes".

(4) A division may only be called for by two or more members who have given their voices against the majority as declared by the Chair.

(5) If only one member calls for a division, the member may ask for their vote to be recorded in the Minutes of Proceedings.

(6) At any time before the tellers are appointed a call for a division may be withdrawn by leave of the House. The division will not be proceeded with, and the decision of the Chair will stand.

Development summary		
1856	Standing order 11 Standing order 12	Putting question – form of Division – appointing tellers
1870	Standing order 13 Standing order 14	Putting question: Form of Division – appointing tellers
1895	Standing order 112 Standing order 123 Standing order 124	Question determined by the voices or by a division of the House When no division Division called for
2003	Sessional order 112	Calling for divisions
2004	Standing order 112	Lapsed question

SO 112 outlines the procedure for members to call for a division on a question – that is, for the vote of each member to be recorded to determine whether a majority of members has voted for or against a question. Outcomes of divisions in the House are recorded in

the Minutes of Proceedings. Divisions in committee of the whole were formerly only recorded in Hansard,[1] but have also been recorded in the Minutes of Proceedings since 2016.

Operation

Every question in the House or in committee of the whole must be decided by the Chair putting the question, and a majority of members voting for the 'ayes' or for the 'noes' (SO 112(1)). Many questions in the House and in committee of the whole are decided on the voices, either unanimously or by the minority choosing not to dispute the opinion of the Chair. However, where members wish to dispute the call made by the Chair, they may call for a division to require that the vote of each member is formally recorded. Under SO 112(2), when the Chair states that the 'ayes' or the 'noes' have it, members may challenge that opinion. In practice, the members call 'the [ayes/noes] have it!' and the President announces that a division is required and calls on the Usher of the Black Rod to ring the division bells.

A division may not be called for unless voices have been given for both the 'ayes' and the 'noes', and a division may only be called for by two or more members who have given their voices against the majority declared by the Chair (SO 112(3) and (4)). If only one member calls for a division, the member may ask for their vote to be recorded in the Minutes of Proceedings, but a division will not ensue (SO 112(5)).[2] This is a new provision, first adopted in 2004. The reasons for adopting the provision are not a matter of record, however, it was likely prompted by the increasing number of crossbench members elected to the House following the 1999 election. Prior to 2004, where only one member called for a division, the matter was resolved in accordance with the vote of the majority of members.[3]

When a division is called for, the Chair appoints tellers from among those voting 'aye' and from among those voting 'no' to record the names of the members voting for and against the question respectively (this practice is discussed further under SO 114). Under SO 112(6), at any time before the tellers are appointed, a call for a division may be withdrawn by leave of the House – that is, with the agreement of all members present.[4] When a division is withdrawn, the opinion originally announced by the Chair stands. Under SO 114(4), when successive divisions are taken and there is limited or no intervening debate, the Chair may direct that the bells be rung for one minute, if no

1 Records of divisions in committee of the whole were additionally published in the 'Record of Divisions in Committee of the Whole House', a sessional return published at the rear of the sessional bound journals, but were not published in the Minutes of Proceedings. The sessional return was published as a requirement under the standing orders (1895 SO 226), but dispensed with from 2004 when that provision was omitted from the 2004 standing orders.

2 *Minutes*, NSW Legislative Council, 4 December 2003, p 483.

3 For example, *Minutes*, NSW Legislative Council, 13 December 1988, p 382; 15-16 December 1995, p 474.

4 For example, *Minutes*, NSW Legislative Council, 9 May 2006, p 2011; 22 October 2009, p 1437; 2 September 2010, p 2016; 22 November 2012, p 1440; 27 March 2014, p 2439.

member objects. Once leave has been given to ring the bells for one minute, there is no provision to withdraw leave.

Free votes and conscience votes

Generally, members of a political party will vote in conformity with a pre-determined position taken by their party on the bill or motion before the House. In practice, each party determines this position according to the policies, practices and procedures favoured by that party. However, on occasion, parties may decide to allow their members a free vote or a 'conscience vote', enabling them to vote in accordance with their own personal views on the matter. Free votes are not provided for under the standing orders, and the decision whether to allow a free vote is determined by the parties informally outside of the House. There are several recent examples of free votes on motions[5] and bills[6] in the House, and on proposed amendments to bills in committee of the whole.[7] The procedure by which a conscience vote is taken in the House or committee of the whole is identical to that followed for all other votes.

Background

The provisions of SO 112 have evolved over many years. The 1856 standing orders provided for questions to be resolved by members voting 'aye' or 'no', for the result to be announced by the Chair, and for a division to be demanded (see also discussion under SO 114).

The terms of SO 112(3) and (4) were adopted in 1895 (SOs 123 and 124), with the exception of the requirement for two or more members to call for a division, which was not adopted until 2004. In 1987, the House had agreed to a sessional order which included a provision that if not more than five members voted on a side the President would declare the question in the favour of the majority and the names of the members in the majority and minority would be entered in the Minutes of Proceedings.[8] The sessional order was not readopted, and the provisions of the 1895 standing order stood until the 2004 rewrite.

As noted above, SO 112(5) is a new provision adopted in 2004.

Provision for a division to be withdrawn by leave (SO 112(6)) was first formalised in the standing orders in 2004, taken from the terms of Senate SO 98(3), however, the procedure operated as a matter of practice from 1856.

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5 For example, a motion regarding marriage equality, *Minutes*, NSW Legislative Council, 31 May 2012, pp 1029-1032.

6 For example, the Rights of the Terminally Ill Bill 2013, *Minutes*, NSW Legislative Council, pp 1745-1747; the Same-Sex Marriage Bill 2013, *Minutes*, NSW Legislative Council, 14 November 2013, pp 2208-2209.

7 *Hansard*, NSW Legislative Council, 14 November 2002, pp 6746, 6752-6753 and 6767; 26 June 2003, pp 2217 and 2221; 1 July 2003, p 2431.

8 *Minutes*, NSW Legislative Council, 13 October 1987, pp 1109-1110.

113. VOTING IN DIVISION

(1) A member must vote in a division in accordance with that member's vote by voice.

(2) A member may not vote in any division on a question in which the member has a direct pecuniary interest, unless it is in common with the general public or it is on a matter of state policy. If a member does vote, the vote of that member is to be disallowed.

(3) A member is not entitled to vote in a division unless the member is present in the chamber when the question is put with the doors locked.

Development summary		
1895	Standing order 125	Member must vote with his voice
	Standing order 126	No member to vote if pecuniarily interested
	Standing order 128	Division bell rung, glass turned, and doors locked
2003	Sessional order 113	Voting in division
2004	Standing order 113	Voting in division
2016	Sessional order	Voting in division – variation to SO 113

This standing order applies certain restrictions on members voting in division: members must vote in accordance with their vote by voice; must not vote on a question in which they have a direct pecuniary interest; and may only vote in a division if they were present in the chamber when the question was put and the doors locked.

Operation

A member must vote in division in accordance with that member's vote by voice (SO 113(1)).[9] Of course, not all members will be in the chamber when a question is put by the Chair. When a division is called and the bells rung, members not present will attend the chamber to vote. SO 113(1) does not prevent such members from voting. Rather, it prevents a member who was present in the chamber and voted one way with their voice from changing that vote in the subsequent division. Former Presidents have provided further clarification:

- A member may speak against a motion during debate and then vote for the motion. The standing orders only prevent a member voting with the ayes or noes when the question is put and then voting the reverse in division.[10]
- While members must vote in division in accordance with their vote by voice, members do not have to remain in the chamber to vote in division.[11]

9 Ruling: President Lackey, *Hansard,* NSW Legislative Council, 21 December 1898, p 3909; Ruling: Deputy President O'Conor, *Hansard,* NSW Legislative Council, 2 September 1915, p 1538.

10 Ruling: President Johnson, *Hansard*, NSW Legislative Council, 2 March 1989, p 5568.

11 Ruling: President Burgmann, *Hansard*, NSW Legislative Council, 2 March 2006, p 20944; Ruling: President Lackey, *Hansard*, NSW Legislative Council, 21 December 1898, p 3910.

A member may not vote in any division on a question in which the member has a direct pecuniary interest, unless it is in common with the general public or it is on a matter of state policy.[12] If a member does vote, the vote of that member is to be disallowed (SO 113(2)). *Erskine May* states that a direct financial interest must be immediate and personal. *May* also states that 'state policy' may be equated with 'public policy'. The term is not confined to public bills introduced by the government, but rather is also the subject of private members' bills.[13]

In the interests of full disclosure, on occasion a member has made a brief statement when speaking to a bill or other matter to declare a general interest in the matter under consideration, even though the matter would likely fall within the definition of being 'in common with the general public'.[14]

A member prohibited from voting on a question in which they have a direct pecuniary interest may simply abstain from voting, or may do so after having made a brief statement in the House. Section 1(a) of the Code of Conduct for Members states that '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'. Members may do so either by declaring their interests on the Register of Disclosures maintained by the Clerk, or by declaring their interest when speaking on the matter in the House or a committee, or in any other public and appropriate manner (Section 1(b) of the Code of Conduct for Members).

The rule regarding voting with a direct pecuniary interest is taken from UK practice (see 'Background' below). *Erskine May* states that an objection to a vote on the ground of personal interest can be raised only on a substantive motion and cannot be brought forward as a point of order.[15] A pecuniary interest matter was dealt with by such a motion in the Legislative Assembly in 1975,[16] and another that arose in the Legislative Council in 2002 was referred for inquiry by the Standing Committee on Parliamentary Privilege and

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12 This provision of SO 113(2) echoes the guidelines provided under the Code of Conduct for Members, which states that 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 (section 1(c)).

13 Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011), p 83.

14 For example, before speaking to the Superannuation Legislation Amendment Bill in 2010, Dr John Kaye (The Greens) declared that he had an interest in the bill as he was a holder of a deferred benefit in a state public sector defined benefits superannuation scheme (*Hansard*, NSW Legislative Council, 24 June 2010, p 24705).

15 *Erskine May*, 24th ed, p 84.

16 During debate on a bill that sought to make provision for the appointment of Parliamentary Secretaries, a member sought to move that another member's vote be disallowed because that member had a direct pecuniary interest in the bill, having been a 'de facto but illegal Parliamentary Secretary and that, as such, he was receiving special privileges including secretarial assistance and the use of a car'. The Speaker ruled the motion out of order. The member pressed the matter, and the following sitting day the Speaker gave an extended ruling to lay out his reasons for ruling the motion out of order: the bill had made no reference to any existing Parliamentary Secretary, legal, de facto or otherwise; the present standing of the member as a Parliamentary Secretary remained entirely unaffected by the bill; and if there was any doubt in such a case as this, it would be for the

Ethics (now the Privileges Committee), on substantive motion.[17] Rulings of the President have also stated that matters relating to pecuniary interest may not be addressed by a point of order, but must instead be addressed by way of substantive motion.[18]

Under SO 113(3), a member is not entitled to vote in a division unless the member is present in the chamber when the question is put with the doors locked. However, former Presidents have clarified that this rule is subject to several qualifications:

- While members may move about the chamber during the ringing of the bells, members may not move to the opposite side of the chamber once the doors have been locked, the question put and tellers appointed.[19]
- Members present within the Bar of the House are taken to be present for the purposes of a division.[20] A member sitting in the gallery is not taken to be present for the purposes of a division.
- A member must be present within the Bar of the House when the Chair orders that the doors be locked. A member who enters the chamber after the order from the Chair, but prior to the ropes being drawn across the Bar of the House, will be ordered to leave the floor and may not participate in the division.[21]

In 2016, the House adopted a sessional order to vary SO 113 to further provide that paragraph (3) does not apply, at the discretion of the President, to a member caring for a child and seated in the President's Gallery when the question is put with the doors locked.[22] The sessional order was adopted on the recommendation of the Procedure Committee, which had inquired into alternative mechanisms for allowing members with the care of a child to vote in division.[23] On the House agreeing to the new sessional order, the President made a statement to elaborate on the operation of the new rule:

House to resolve that doubt by motion on notice, not for the Speaker (*Hansard*, NSW Legislative Assembly, 8 October 1975, pp 1585-1586.)

17 *Minutes*, NSW Legislative Council, 25 September 2002, pp 383-386 and 387-391. The committee ultimately found that the member had made errors in his pecuniary interest returns, but that the errors were not wilful contraventions of the pecuniary interest regulation and that no sanction could be recommended (see Standing Committee on Parliamentary Privilege and Ethics, NSW Legislative Council, *Report on inquiry into the Pecuniary Interests Register*, Report No. 20, October 2002).

18 Ruling: President Peden, *Hansard*, NSW Legislative Council, 16 June 1931, p 3313; Ruling: President Budd, *Hansard*, NSW Legislative Council, p 3799.

19 Ruling: President Hay, *Hansard*, NSW Legislative Council, 2 June 1880, pp 2571-2573; Ruling: President O'Conor, *Hansard*, NSW Legislative Council, 4 April 1916, p 6048.

20 Ruling: President O'Conor, *Hansard*, NSW Legislative Council, 4 April 1916, pp 6048 and 6049.

21 Ruling: Chair Gay, *Hansard*, NSW Legislative Council, 26 November 1992, p 10041; Ruling: Chair Khan, *Hansard*, NSW Legislative Council, 15 November 2016, p 84.

22 *Minutes*, NSW Legislative Council, 9 November 2016, p 1260.

23 Procedure Committee, NSW Legislative Council, *Young children accompanying members into the House*, Report No. 9 (October 2016).

- A member voting under the new sessional order would need to be seated in the President's Gallery by the time the President or other member presiding says 'Lock the doors'.
- A member may sit on either side of the President's Gallery regardless of whether he or she is voting for the ayes or noes.
- The member needs to ensure the President, or the occupant of the chair, is informed of his or her request to make use of the sessional order prior to the call for the doors to be locked by advising their party Whip, a fellow crossbench member or having one of the Chamber and Support staff convey the request to the Chair.
- Members need to ensure that the Chair is advised each time they request to make use of the sessional order. That is, a member cannot advise the Chair once and have that advice stand for the entire day.[24]

Since 2004, matters concerning a pecuniary interest have arisen on several occasions. In 2007, during Question Time, a minister whose spouse was a federal member of Parliament made comments in his answer regarding the Federal Government's action on an issue. A point of order was taken that the minister had a conflict of interest. The President ruled that the standing orders refer only to conflicts of pecuniary interests, and not to general conflicts of interest. The fact that a member's family member is standing for election to another parliament does not amount to a conflict of interest requiring disclosure in the pecuniary interests register.[25] Also in 2007, during debate on the Murray-Darling Basin Amendment Bill, the Deputy Leader of the Opposition sought clarification as to whether the Minister for Rural Affairs was entitled to speak to the bill given that earlier in the session the Minister had indicated he was not eligible to answer a particular question relating to water charges because he owned water licenses and therefore had a pecuniary interest. The President drew members' attention to the terms of SO 113(2), and the Minister proceeded to address matters concerning water charges.[26]

Background

SO 113 continues to apply the equivalent provisions of the 1895 standing orders (1895 SOs 125, 126 and 128), with one minor variation. While 1895 SO 125 similarly stated that a member who voted with the 'Ayes' or 'Noes' was not at liberty to vote with the opposite party, where a member *did* vote contrary to their vote by voice, the standing order applied an additional requirement on the President to order that the division lists be corrected.

24 *Hansard,* NSW Legislative Council, 9 November 2016, p 15.
25 *Hansard*, NSW Legislative Council, 17 October 2007 p 2679.
26 *Hansard*, NSW Legislative Council, 14 November 2007, p 4062.

While the rules that formed the basis of those standing orders were the subject of rulings in the years prior to 1895,[27] the only formal precursor to the 1895 standing orders related to voting with a direct pecuniary interest.

Between 1856 and 1862, concerns regarding members voting on matters in which they were alleged to have a pecuniary interest were raised on several occasions, however, the subject was not at that time captured by the standing orders.[28] In 1863, a standing order was adopted which provided that where a member's vote is challenged on the ground of personal interest, the practice of the House of Commons was to be applied. That practice was articulated in a ruling given by the Speaker of that House in 1811, in which the rule regarding pecuniary interests was explained in the following terms:

> This interest must be a direct pecuniary interest, and separately belonging to the persons whose votes were questioned, and not in common with the rest of His Majesty's subjects, or on a matter of state policy.[29]

The standing order was adopted by the Council on the recommendation of an inquiry by the Standing Orders Committee, which was sparked by a series of rulings made by the President. During debate on a motion to resume consideration of the Life Assurance Encouragement Bill in committee of the whole, a member confirmed that he was a proprietor and director of a company which enjoyed certain privileges that the bill proposed to extend to other companies. The President ruled that in keeping with the authority in the British Parliament, the member was 'exempted' from voting as the member had a very clear pecuniary interest in the company which was the subject of the bill. However, the ruling did not extend to the right to debate on the bill, and accordingly the member was allowed to speak to the question.[30] Another member then indicated that he too was a proprietor of the company but that he proposed to support the extension of the company's privileges to other companies. The President ruled that the member could vote on the question, consistent with practice in the Lords.[31] The following day, the member who had been prevented from voting moved a motion without notice as

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27 For example, in 1880 President Hay ruled that a member is entitled to take a seat on whichever side he wishes until the door is locked and the question is put (*Hansard*, NSW Legislative Council, 2 June 1880, pp 2571-2573).

28 In 1857, on a motion for committal of the Bonded Warehouses Duty Bill, three members retired beyond the Bar of the House when the President put the question. The President ruled that the members must vote. However, when the members returned and each declared a direct pecuniary interest, the House agreed on division to a motion that the members abstain from voting (*Minutes*, NSW Legislative Council, 4 February 1857, p 58). In 1860, during a division in committee of the whole on an amendment to the Newcastle Wallsend Coal Company's Railway Bill, a member stated that he had a direct personal interest as shareholder in the company. The Chair of Committees ordered that the doors be unlocked and the member withdrew (*Journal of the Legislative Council*, NSW Legislative Council, vol 5, Part 1, Report of divisions in Committee of the Whole, p 127).

29 *Erskine May*, 24th ed, p 83.

30 *Minutes*, NSW Legislative Council, 17 December 1862, p 178. *Sydney Morning Herald*, 18 December 1862, p 3.

31 *Minutes*, NSW Legislative Council, 17 December 1862, p 178.

a question of privilege that the President's ruling be referred to the Standing Orders Committee for consideration and report.[32]

The committee's report on the matter noted that in the House of Lords the matter of voting with an interest was left to the personal honour of the peers, while in the Commons members could not vote on questions in which they had a direct personal interest, although no instance had been found of a vote being disallowed on a question of public policy. The report concluded that the member had been entitled to vote, and recommended that a rule be adopted to govern giving and challenging votes on questions involving a direct pecuniary interest.[33] The House adopted the committee's report and agreed to a further reference to the committee to prepare an appropriate standing order.[34] The standing order subsequently agreed to by the House the following month adopted the rule provided for in the House of Commons and not the House of Lords as 'followed' in the original instance.[35] The standing order was later readopted in the 1870 rewrite of the standing orders (1870 SO 2). In the years following the adoption of the standing order, two further points of order were taken on matters pertaining to a pecuniary interest.[36]

In 1895, standing order 126 was adopted, which clarified the principle which was to apply to matters concerning a direct pecuniary interest:

> No member shall be entitled to vote in any division upon a question in which he has a direct pecuniary interest, not in common with the rest of Her Majesty's subjects and on a matter of state policy, and the vote of any member so interested shall be disallowed.

As noted above, this provision has carried over to the 2004 standing order.

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32 *Minutes*, NSW Legislative Council, 18 December 1862, p 181.

33 *Journal of the Minutes of the Legislative Council*, 1862, vol 9, pp 227-30 (report of committee).

34 *Minutes*, NSW Legislative Council, 29 July 1863, p 26.

35 *Minutes*, NSW Legislative Council, 12 August 1863, p 35; *Journal of the Minutes of the Legislative Council,* 1863-64, vol 10, Part 1, pp 231-233 (report of committee); *Minutes*, NSW Legislative Council, 19 August 1863, pp 37-38; *Minutes*, NSW Legislative Council, 2 September 1863, p 41 (adoption by House and approval by Governor).

36 In 1888, during consideration of the Permanent Trustee Company Bill in committee of the whole, a point of order was raised that a member was a shareholder and director of the Company and should not advocate passage of the Bill. The Chairman ruled that he was unaware of any rule that would prevent the member speaking in the manner he had done but that it would be a different matter if he were to vote. A motion of dissent from the ruling was moved, but the motion to report the dissent to the House was negatived (*Hansard*, NSW Legislative Council, 10 May 1888, pp 4634-4635). In 1894, during debate on a motion for a message to the Assembly concerning the Australasian Rights Purchase Bill, a member expressed surprise that the motion had been moved by a member who was a shareholder in a company that would be affected by measures in the Bill. The motion was subsequently agreed to, following which the member who had taken the point of order made a personal explanation noting his right to challenge the vote of a member having a direct pecuniary interest (*Hansard,* NSW Legislative Council, 24 January 1894, pp 168-171).

114. PROCEDURE FOR DIVISION

(1) Before a division is taken, strangers may be ordered on motion without notice, to withdraw from the House.

(2) When a division is called for, the Clerk, by direction of the Chair, must ring the bells for five minutes as indicated by a minute glass timer.

(3) When the bells stop ringing, the Chair will direct the doors to be locked. A member must not then enter or leave the chamber until after the division is concluded.

(4) When successive divisions are taken and there is limited or no intervening debate, the Chair may direct that the bells be rung for one minute, if no member objects.

(5) When the doors have been locked and members are in their places, the Chair must:

(a) state the question to the House,
(b) direct the "ayes" to go to the right of the Chair and the "noes" to the left, and
(c) appoint two tellers for each side.

(6) Every member present when a question is being decided by division must remain and vote.

(7) After members have taken their seats on the side of the chamber on which they intend to vote they may not move from those seats once tellers have been appointed and until the result of the division has been declared.

Development summary		
1856	Standing order 12 Standing order 13	Division – appointing tellers Strangers withdrawing
1862-1870	Sessional order	Strangers
1870	Standing order 14	Strangers withdrawing
1895	Standing order 127 Standing order 128 Standing order 129(a) Standing order 129(b)	Previous to division, strangers withdrawn from body of House Division bell rung, glass turned, and doors locked Question put and division taken – tellers Members present must vote
1985	Standing order 128	Ringing of bells for five minutes
1987	Sessional order	Divisions (SO 129)
2003	Sessional order 113	Procedure for division
2004	Standing order 113	Procedure for division

SO 114 outlines the procedures to be followed when a division is called. The bells are rung for five minutes and the doors locked; the question is then stated by the Chair, who directs the 'ayes' to the right of the House and the 'noes' to the left. Two tellers

are appointed to record the names of the members voting for each side. All members present at the time the doors are locked must vote, and must remain in their seats until the outcome of the division is declared by the Chair.

Operation

When a division is called for, the Clerk (in practice, the officer sitting at the Usher of the Black Rod's position at the Table) must ring the bell for five minutes. The officer sitting at the Deputy Clerk's position simultaneously turns over a minute glass timer to time the duration of the bells (SO 114(2)). At the conclusion of five minutes, the Chair orders that the doors be locked. As soon as the Chair so orders, the Usher ceases ringing the bells. The Usher bars the northern door to the chamber and stands in front of it for the duration of the division, while Chamber and Support staff place cords across the entrances to the chamber floor at the eastern end of the chamber. Once the doors have been locked, members are not permitted to enter or leave the chamber until the division has concluded (SO 114(3)). As noted in the previous chapter, rulings of former Presidents have clarified that this rule is subject to several qualifications (see SO 113).

When successive divisions are taken and there is limited intervening debate, or no debate, the Chair may ask whether any member would object to the bells being rung for only one minute (SO 114(4)). In most cases there is no objection.

When the doors have been locked and members are in their places, the Chair must restate the question to the House or committee. The Chair then directs the 'ayes' to the right of the Chair and the 'noes' to the left, though members would usually be in their places by that time. Rulings of former Presidents have maintained that a member will be permitted to move to the opposite side of the chamber until the doors have been locked, the question put and tellers appointed.[37] The Chair appoints two tellers each for the 'ayes' and 'noes' from among the members voting on each side (SO 114(5)). The tellers are most often the Whip and Deputy Whip for the major parties, but other members are also on occasion appointed as tellers, particularly in the case of members of the crossbench.

SO 114(6) provides that every member present when a question is being decided by division must remain and vote. While it is not uncommon for members to abstain by being absent from the chamber when a vote is taken, SO 113(1) states that a member must vote in accordance with that member's vote by voice, placing an obligation on those who are present when a division is called to see the division through to its conclusion (although, in practice, members who say 'aye' or 'no' may find they are paired and therefore leave the chamber for the division). Once the tellers have been appointed, members must remain in their seats until the result of the division has been declared (SO 114(6) and (7)).

If a vote is being taken when an order of the House has specified that business must be interrupted at that time for the consideration of certain business, such as the

37 Ruling: President Hay, *Hansard*, NSW Legislative Council, 2 June 1880, pp 2571-2573; Ruling: President O'Conor, *Hansard*, NSW Legislative Council, 4 April 1916, p 6048.

interruption of business for Question Time, the vote will be completed. If a question is before the House and not finally disposed of by the time of the division, the President then interrupts proceedings and resumption of debate on the question is set down for a later hour without any question being put. If the House was committee of the whole at the time, the Chair interrupts proceedings and reports progress to the House. Further consideration of the matter is set down as an order of the day for a later hour without any question being put (SO 46(2)(c)).

On occasion, alternative arrangements for divisions have been adopted either by the House or by statute. For example, in 1996, the House resolved on the motion of the Attorney General and Minister for Industrial Relations that on any division in committee of the whole on the Industrial Relations Bill and cognate:

(a) the doors would be locked whenever the Chairman was satisfied that all members who were not paired were present, notwithstanding that the time for ringing the bells had not yet expired, and

(b) the Chairman could appoint one or two tellers for each side.[38]

In 1997, under section 33F of the *Special Commissions of Inquiry Act 1983* (now repealed), the agreement of two-thirds of the members of the House present and voting was required to authorise the Governor to establish a special commission of inquiry concerning parliamentary proceedings.[39]

In 2011, the House agreed to a motion that it be an instruction to the committee of the whole for the consideration of the Industrial Relations (Public Sector Conditions of Employment) Bill 2011 that, where a division was called for in relation to amendments requested to be put sequentially, the bells would be rung for five minutes for the first question. The doors would then be locked and remain locked until the remaining questions had been disposed of.[40]

Background

Most of the provisions of SO 114 were first adopted in 1895. Only the provision of SO 114(5), which states the core procedure for a division, has applied since 1856.[41]

The 1856 standing orders additionally required that strangers withdraw from the body of the House within the Bar, but could remain below the Bar or in the galleries unless otherwise ordered (SO 13). From 1862, a sessional order was adopted which amended the terms of the standing order to provide that during a division, strangers on the right and left of the Chair may remain, as well as those below the Bar or in the

38 *Minutes*, NSW Legislative Council, 15 May 1996, p 136.
39 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 292.
40 *Minutes*, NSW Legislative Council, 2-4 June 2011, p 183.
41 1856 SO 12, 1870 SO 14.

galleries, unless otherwise ordered.[42] According to a *Sydney Morning Herald* report, the object of the proposal was to prevent the recurrence of an inconvenience which had occurred because of an arrangement between the two Houses for seats to be provided for members of the other House on the right and left of the Speaker and President respectively. As there was no bar in the Council,[43] the members of the other House had been obliged to withdraw during divisions.[44] From 1870, the provisions of the sessional order were incorporated into the standing orders (SO 15). The 1895 SO 127 and the 2004 standing orders amended the provision to require that strangers would only be obliged to withdraw from the House during a division if ordered.

Most of the remaining provisions of SO 114 have operated consistently since 1895 (1895 SOs 128, 129(a) and (b)), with slight variation.

Time for ringing the bells

On the recommendation of the Standing Orders Committee[45], provision for the bells to be rung for five minutes was first made by an amendment to 1895 SO 128 in 1985, the standing order having previously required the bells to be rung for only two minutes. The standing order was also amended to provide that the bells may be rung for one minutes only on any subsequent division provided that no member objected. A similar amendment was made to the standing order governing the time for ringing the quorum bell in the House and in committee of the whole (1895 SOs 11 and 225).[46] It is understood that the time for ringing the bells was extended to five minutes to facilitate members' travel to the chamber following the construction of new offices in the 'tower block' at the rear of the original Parliament building, considerable energy having been devoted to precisely measuring the time it would take a member to travel the several floors from their new office to the chamber.

Tellers

1895 SO 129(a) made provision for new tellers to be appointed in the event that the tellers did not agree; this provision was omitted from the 2004 standing order. SO 129(a) also originally required the President to appoint two tellers from 'each party', a provision that became outdated as the Council began to count an increasing number of crossbench members among its numbers. In 1987, a sessional order agreed to on the motion of the Leader of the Government omitted reference to the two parties in favour of appointing

42 *Minutes,* NSW Legislative Council, 10 July 1862, p 27; 24 June 1863, p 8; 19 October 1864, p 8; 31 January 1865, p 16; 25 October 1865, p 8; 25 July 1866, p 8; 3 July 1867, p 8; 17 December 1868, p 22; 29 September 1869, p 8; 2 February 1870, p 12; 12 August 1870, p 8.

43 The brass poles to which rope 'bars' are attached at the Bar of the House (i.e. at each of the two entries into the chamber) were first installed as part of the chamber restoration project undertaken during the 1980s.

44 *Sydney Morning Herald*, 11 July 1862, p 3.

45 *Minutes*, NSW Legislative Council, 20 November 1985, pp 910-914.

46 *Minutes*, NSW Legislative Council, 21 November 1985, p 933; *Hansard*, NSW Legislative Council, 21 November 1985, p 10229.

'two of each side', however, the sessional order was not readopted in subsequent sessions and the original provision continued to apply until the 2004 rewrite.

More than five members required to call for a division

The 1987 sessional order also inserted a rather controversial new provision which restricted divisions to questions for which there were more than five members on a side:

> If it is apparent to the President that there would be not more than five members on a side, the President shall forthwith declare in favour of the 'Ayes' or 'Noes', as the case may be, and the names of members in the majority and minority shall be entered in the Minutes of Proceedings.[47]

The mover, the Leader of the Government, argued that the amendment would save time and streamline the division process, however, other members argued that the amendment may minimise the prominence of the crossbench who, at times, 'exhibited great courage in their willingness to call for a division against the united opinion of the Government and the Opposition'.[48] The motion as originally moved had provided that only the names of the members in the minority would be entered into the minutes, however, members of the crossbench were successful in amending the motion to require that those voting in both the minority *and* the majority be recorded, to prevent individual members from 'hiding under the umbrella of a party vote'.[49] Although the sessional order was agreed to, the provision was never tested – the crossbench did not call for a division against the two major parties during the remainder of the session and the sessional order was not readopted in subsequent sessions.

Members to remain seated until the result of the division declared

SO 114(7), which specifically prevents members from moving from their seats once the tellers have been appointed until the result of the division has been declared, appears to have always applied as a matter of practice but was first formalised in the standing orders in 2004. The terms are taken from Senate standing order 101(6).

115. COUNTING OF DIVISION

(1) The names and total number of members voting on each side is recorded by the tellers on each side, who must sign their respective lists, and present them to the Chair, who will announce the result to the House.

(2) If the tellers cannot agree on the numbers, the Chair may appoint new tellers.

(3) If there is only one member on a side in a division, the Chair, without completing the division, must immediately declare the decision of the House.

47 *Minutes*, NSW Legislative Council, 13 October 1987, pp 1109-1110.

48 *Hansard*, NSW Legislative Council, 13 October 1987, pp 14200-14201.

49 *Minutes*, NSW Legislative Council, 13 October 1987, p 1110.

(4) The Clerk will record divisions in the House in the Minutes of Proceedings.

(5) Members paired during any division will be recorded by the tellers and printed in the Minutes of Proceedings and Hansard.

Development summary		
1856	Standing order 12	Division – appointing tellers
	Standing order 14	Division lists
1870	Standing order 14	Division – appointing tellers
	Standing order 16	Division lists
1895	Standing order 129(a)	Question put and division taken – Tellers
	Standing order 129(c)	Members counted and names taken down
	Standing order 131	Division lists recorded
1988–2003	Sessional order	Provision for pairs to be recorded
2003	Sessional order 115	Counting of division
2004	Standing order 115	Counting of division

SO 115 lays out the straightforward practice for counting a division on a vote. The standing order comprises of some rules and practices that have operated since 1856, and others that have developed since the reconstitution of the Council in 1978.

Operation

As soon as the Chair orders that the doors be locked, the ringing of the bells ceases. The Chair then restates the question and appoints two tellers each for the 'ayes' and 'noes' from among the members voting on each side. The tellers are most often the Whip and Deputy Whip for the major parties, but other members are also on occasion appointed as tellers, particularly in the case of members of the crossbench.

Pre-printed 'Ayes' and 'Noes' division lists containing the names of each member, with the details of the question and name of the member sitting in the chair written in by the Clerks, are provided to the tellers. The tellers record the name of each member voting on their side of the chamber, and the total number of members voting on both sides of the chamber. The tellers sign the respective lists and present them to the Chair, who then announces the result to the House (or committee, as it may be) (SO 115(1)).

If the tellers cannot agree on the numbers, the Chair may appoint new tellers (SO 115(2)). Such an event would be highly irregular in the modern day as members remain seated for the duration of the division and the tellers typically check their lists with each other before handing them to the Chair, however, there are examples of disagreement between the tellers in the past (see below).

Standing order 115(3) provides that if there is only one member on a side in a division, the Chair will immediately declare the decision of the House (or committee) without completing the division (although SO 112(5) provides that where only one member calls for a division, that member may request that their vote be recorded in the Minutes of

Proceedings). This is because SO 112(4) provides that a division will only proceed where two or more members have given their voices against the majority as declared by the Chair.

Divisions in the House are recorded in the Minutes of Proceedings, a requirement under the standing orders since 1856. Divisions in committee of the whole were formerly recorded in a 'committee bill' completed by the Clerks and bound in the *Journal of Proceedings in Committee of the Whole* for that session. However, since 2016 proceedings in committee of the whole, including divisions, have been included in the Minutes of Proceedings. Division lists in both the House and committee are also published in the Hansard transcript of proceedings.

SO 115(5) requires that members paired during a division be recorded by the tellers and printed in the Minutes of Proceedings and Hansard. This is a new provision first adopted in the standing orders in 2004, having originally commenced as a sessional order in 1988. Pairs are an informal arrangement between the Whips of the major parties only[50] – members of the crossbench have generally not been a party to the pair system, subject to the special circumstances discussed below. (It is noted this stands in contrast to practice in the Australian Senate, where members of the crossbench have been paired. Such arrangements are recorded in Hansard but are not recorded in the *Journal of the Senate*). If a member of the major parties cannot be present for a vote they may arrange to be paired with a member of the opposite side, through their Whip, in order to cancel out the effect of their absence. Neither votes in the division, but their names are recorded by the tellers and printed in the records of proceedings. The system is intended to ensure that the result of votes is not determined by the happenstance absence of a member, however, given the lack of crossbench participation in the arrangement the system is far from foolproof. In the event that the result of a division is likely to be determined by the absence of a member of the crossbench, on some occasions the parties have informally agreed to abstain from putting the question on that item until the member is present.

In special circumstances, alternative pairing arrangements may be adopted. For example, in 2016 the Government Whip advised the House that, during the absence of Greens member Dr John Kaye owing to illness, the Premier had agreed to an informal pairing arrangement between the Coalition and The Greens.[51]

While the standing order acknowledges the practice of pairing members, it does not apply rules to the pairing arrangement, so points of order cannot be entertained by the Chair on these matters. This was tested in 1998, when the Clerk, rather than the

50 In 1870, the President remarked that the duty of tellers was to record the names of members who voted during debate on a disagreement of a division in committee of the whole (*Sydney Morning Herald*, 24 November 1870, p 2).

51 *Hansard*, NSW Legislative Council, 24 February 2016, p 86. The Government Whip advised that owing to the informal nature of the arrangement between the two parties, the pairs would not be reflected in the official records of the House. For this reason, those members absent from the chamber should not be assumed to have been negligent in their duty towards voting on contentious matters.

President, took the chair owing to the resignation of the President. Prior to the Clerk calling for nominations for the Office of President, a member took objection to the Clerk entertaining nominations due to the absence of another member and the likelihood that that member's vote would be crucial to determining the outcome of a vote on the nominees. The Clerk advised that he could not entertain a point of order as the standing orders did not provide guidance as to the rules for the pairing of members, however, in view of the member's concerns, he would entertain the suggestion that he leave the chair until a later hour. At the suggestion of the member who had raised the objection, the Clerk left the chair until the ringing of a long bell later that day.[52]

Background and development

The provisions of SO 115 draw in some cases from rules that have applied for many years in the Council and others from rules and procedures that have developed since the reconstitution of the Council in 1978.

The provisions of SO 115(1), which vest the tellers with responsibility for recording the names and number of members voting for each side, have applied consistently since 1856 in various forms (1856 SO 12; 1895 SO 129(a) and (c)). The first division occurred in the House on the 12th sitting day of the First Parliament (1856), on a question of privilege.[53] Provision for the Chair to appoint new tellers in the event of a disagreement was first made in 1895.[54] Prior to 1895, in cases of error or where there was a disagreement between tellers, the Chair would declare the division 'informal' and the division would be taken again.[55]

The recording of names in divisions was not always consistent, and members have been recorded by their official designations or even by initials, which was duly noted by the Chairman of Committees in 1860.[56]

Provision for the Chair to declare the decision of the House or committee was first adopted in 1895 SO 129(c), though the practice applied since the early years of the Council.[57] As noted earlier, the Clerk has been required to publish the results of each division in the Journals since 1856 under 1856 SO 14 and 1895 SO 131.

In cases where there is only one member voting for the 'ayes' or 'noes' on a question, the practice of the Chair declaring the outcome of the vote immediately, without division,

52 *Minutes*, NSW Legislative Council, 29 June 1998, pp 610-611.
53 *Minutes*, NSW Legislative Council, 24 September 1856, p 12.
54 1895 SO 129(a).
55 *Minutes*, NSW Legislative Council, 31 October 1866, p 86; *Sydney Morning Herald*, 1 November 1866, p 5.
56 *Sydney Morning Herald*, 18 May 1860, p 3.
57 *Minutes*, NSW Legislative Council, 7 March 1893, p 176 (first occurrence); 17 May 1893, p 298; 13 June 1893, p 360. The practice fell away after the adoption of the standing order, though the practice did occur on several occasions in the following years: *Minutes*, NSW Legislative Council, 23 June 1915, p 16; 21 November 1923, p 90; 30 May 1928, p 48.

has applied consistently.[58] In 1873, this practice was the subject of contention, when the vote of the Postmaster-General against an amendment moved to the question was not recorded in the minutes, his being the only vote against the question.[59] Several days later, a motion to require that the vote of the Postmaster-General be recorded in the minutes was agreed to.[60] The resolution soon led to a reference to the Standing Orders Committee to inquire into the expediency of amending the standing orders to provide for a record to be made of the 'names of the members forming the majority, in cases where a division has been called for and cannot be taken in consequence of there being only one Member voting in the minority'.[61] The committee, however, did not report prior to the prorogation of that parliament.

The pairing system has operated since the early years of the Council, but was not formally recorded in the Minutes of Proceedings.[62] Provision for pairs to be recorded was first made in 1988 in the same terms as SO 115 (5), on the motion of the newly elected Coalition Government.[63] The sessional order was likely introduced to replicate provisions adopted by the Legislative Assembly in 1985, with the support of both of the major parties. During debate on the motion in the Assembly, it was observed that leaders were often criticised if they did not attend divisions, in spite of the need for their time to be spent on other matters, and it was hoped that this procedure would address the problem.[64] The sessional order was readopted in the same terms in the Council each subsequent session[65] until being incorporated in the 2004 rewrite of the standing orders.

116. CASTING VOTE

If the numbers voting for each side are equal, the Chair must give a casting vote. The Chair may give reasons for the casting vote and those reasons may be entered in the Minutes of Proceedings.

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58 *Minutes*, NSW Legislative Council, 7 November 1856, p 21; 2 April 1874, p 149; *Hansard*, NSW Legislative Council, 25 August 1937, p 400 (in committee of the whole); *Minutes*, NSW Legislative Council, 13 December 1988, p 382; 15-16 December 1995, p 474. More recent occurrences are not reflected in the official records of the House as the practice has developed that the Chair simply declares the result verbally to the House or committee.

59 *Minutes*, NSW Legislative Council, 2 April 1873, pp 110-111.

60 *Minutes*, NSW Legislative Council, 9 April 1873, p 121; *Sydney Morning Herald*, 10 April 1873, p 2. The form of the question was amended following a point of order being taken, to ensure that the minutes recorded the exact motion to which the Postmaster-General had disagreed, which was 'That the words proposed to be omitted stand'.

61 *Minutes*, NSW Legislative Council, 10 April 1873, p 124 (committee did not report).

62 For example, in 1893 a member made a personal explanation following criticism of his conduct in making particular pairing arrangements. *Hansard*, NSW Legislative Council, 7 February 1893, pp 3849-3859.

63 *Minutes*, NSW Legislative Council, 24 May 1988, p 49.

64 *Hansard*, NSW Legislative Assembly, 20 February 1985, pp 3533-3534.

65 *Minutes*, NSW Legislative Council, 18 August 1988, p 26; 22 February 1990, p 24; 21 February 1991, p 25; 2 July 1991, p 17; 4 March 1992, p 23; 2 March 1993, p 25; 2 March 1994, p 29; 24 May 1995, p 26; 17 April 1996, p 28; 17 September 1997, p 38; 12 May 1999, p 45; 8 September 1999, p 25; 12 March 2002, p 36; 30 April 2003, p 46.

Development summary		
1856	Standing order 44	Authority of Chairman
1870	Standing order 54	Authority of Chairman
1895	Standing order 130 Standing order 219	President gives casting vote Decision of questions – Chairman's casting vote
2003	Sessional order 116	Casting vote
2004	Standing order 116	Casting vote

Where there is an equality of votes in a division the Chair may give a casting vote. The Chair may choose to give reasons in explanation of his or her vote, but is not required to do so.

Operation

Unlike practice in some other Australian jurisdictions, the Chair does not exercise a deliberative vote. Under section 22I of the *Constitution Act 1902*, all questions arising in the Council are to be decided by a majority of the votes of members present, with the President or other member presiding having only a casting vote. This principle is also reflected in SOs 116 and 102(7) (Putting of Question).

Under SO 116, the Chair may give reasons for casting their vote in a particular way. While the standing order states that such reasons may be entered in the Minutes of Proceedings, in practice this only occurs where a casting vote is given in the House. Where reasons have been given by the Chair, or other member presiding, in committee of the whole, they were traditionally only entered in the Hansard record of proceedings, as the Minutes of Proceedings did not record proceedings in committee of the whole.[66] However, since 2016 proceedings in committee have been recorded in the minutes, and any future reasons given for casting votes will be reflected in the official record of the House.

The established principles that guide a Chair in exercising a casting vote are:

- the Chair should always vote for further discussion where this is possible
- where no further discussion is possible, decisions should not be taken except by majority
- a casting vote on an amendment to a bill should always leave the bill in its existing form.[67]

66 Records of divisions in committee of the whole were additionally published in the 'Record of Divisions in Committee of the Whole House', a sessional return published at the rear of the sessional bound journals, but were not published in the Minutes of Proceedings. The sessional return was published as a requirement under the standing orders (1895 SO 226), but dispensed with from 2004 when that provision was omitted from the 2004 standing orders.

67 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, p 294.

Nevertheless, the Chair's casting vote very often accords with the same vote of the party to which he or she belongs. This trend has accelerated since the mid-2000s. However, it cannot be assumed that the Chair will always so rule, particularly where the privileges of the House are concerned or the vote in question is a matter on which one or more parties have been granted a conscience vote.

It is fairly commonplace for the Chair to give reasons when making a casting vote, though the practice has dropped away somewhat in recent years. Reasons given have included:

- to afford further opportunity to further consider the measure[68]
- to follow the rule so as not to make the decision of the House final[69]
- to follow practice and precedent to preserve the status quo[70]
- to permit further opportunity for discussion[71]
- to preserve status quo in accordance to principles of casting votes[72]
- that the matter was essentially a procedural motion.[73]

It is rare for the Chair of Committees to give reasons for casting a vote in a particular way; where reasons have been given they have generally been to the effect that the Chair voted to leave the bill in its existing form.[74]

The casting vote has generally determined questions relating to amendments moved, however, it may also determine questions relating to procedural motions moved in committee of the whole.[75]

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68 *Minutes,* NSW Legislative Council, 4 May 1870, p 97; 2 December 1998, p 1004.

69 *Minutes,* NSW Legislative Council, 23 November 1870, p 74; 5 September 1900, p 113.

70 *Minutes,* NSW Legislative Council, 30 September 1913, p 73; 11 December 1946, p 32; 28 October 1999, p 177; 28 November 2001, p 1296; 10 April 2002, p 117.

71 *Minutes,* NSW Legislative Council, 29 November 1966, p 162; 16 May 1990, p 170.

72 *Minutes,* NSW Legislative Council, 14 November 2002, p 484.

73 *Minutes,* 18 November 1997, p 194. In this last example, the question at issue was the suspension of standing orders to afford an item precedence. The Chair voted with the 'noes', stating that as the matter was essentially procedural in nature, it was within the province of the House to alter its decision at a subsequent time.

74 *Hansard,* NSW Legislative Council, 29 April 1880, p 2100 (in accordance with own opinion and recommendation of a select committee); 6 December 1893, pp 1669-1670 (to leave bill in its present condition); Sessional Return: Report of Divisions in Committee of the Whole, *Journal of the Legislative Council*, 1894, vol 52, Part I, p 189 (further opportunity of expressing an opinion on a subject); *Journal of the Legislative Council*, Sessional Return: Report of Divisions in Committee of the Whole, vol 56, 1897, Part I, 18 August 1897, p 243 (keep form of bill in which it had been submitted); 17 April 1991, p 2274 (leave bill in existing form); 21 May 1998, p 5030 (not a deliberative vote but a casting vote).

75 Sessional Return: Report of Divisions in Committee of the Whole, *Journal of the Legislative Council*, 1866, vol 14, Part I, p 168 (motion that the Chairman do leave the Chair, report progress and ask leave to sit again tomorrow); *Journal of the Legislative Council*, Sessional Return:

Background

Since 1856, the Chair has been permitted only a casting vote, and not a deliberative vote, by virtue of the provisions of either the standing orders[76] or statutory provisions.[77] Provision for the Chair to give reasons was first made in the standing orders in 1895 (SOs 130, 219). This provision appears to have been inspired by practice in the United Kingdom Houses of Parliament.[78]

117. POINTS OF ORDER IN DIVISION

A member taking or speaking to a point of order during a division must remain seated and be covered.

Development summary		
1895	Standing order 104	Speaking 'to order' during division
2003	Sessional order 117	Points of order in division
2004	Standing order 117	Points of order in division

Where a member takes a point of order during a division they must remain seated. To assist in drawing the attention of the Chair, the member is required to be 'covered' – that is, to hold a sheet of paper above their head while seeking the call.

Operation

While a member is ordinarily required to stand when taking a point of order, once the doors are locked, members must remain where they are seated in order that their vote is clearly made. The rationale under SO 117 for being 'covered' is that a member will more readily attract the attention of the Chair by placing a piece of paper above their head while seeking the call. The practice is informed by the practice of the House of Commons (see further below).

A point of order raised during a division should relate to the division, and not a matter which has occurred earlier. The same general rules apply to points of order taken during a division as those that apply in the House – the attention of the Chair must be directed to a breach of order the moment it occurs, and the member raising the point of order should state which standing order or practice has been breached. Proceedings on the division interrupted by the point of order may not be resolved or concluded until the point of order is decided by the Chair. There is no limit on the number of members who

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Report of Divisions in Committee of the Whole, vol 72, 1908, 9 April 1908, p 47 (motion that consideration of the clause be postponed).

76 1856 SO 44; 1870 SO 54; 1895 SOs 130 and 219.

77 Section 8, *Constitution Act 1855*; s 22I, *Constitution Act 1902*.

78 *Erskine May*, 24th ed, p 420.

may speak or how many times they may speak to a point of order. Further commentary on the practice for raising a point of order can be found under standing order 95.

Background

SO 117 is a continuation of the provisions of 1895 SO 104, however, the requirement for members to 'be covered' is a new addition which formalised a longstanding practice. The rationale for this rule stems from past practice of the House of Commons, where members were required to remain seated and 'covered' to draw the attention of the Chair during a division. In practice, an opera hat was kept at each end of the chamber and had to be passed to the member who took a point of order during a division, which was a time-consuming process in a House comprised of several hundred members. When the Committee on Modernisation of the House of Commons undertook a review of the procedure in 1998, they observed:

> This inevitably takes some time, during which the Member frequently seeks to use some other form of covering such as an Order Paper. This particular practice has almost certainly brought the House into greater ridicule than almost any other, particularly since the advent of television. We do not believe that it can be allowed to continue.[79]

In response to a recommendation made by the committee, the House abolished the practice. The practice now favoured is that members who have a point of order affecting a division then in progress go to the Chair and explain the issue. The Chair will then either intervene in the division, such as ordering an extension of time, for the purposes of resolving the matter, or will determine that the matter is one that would more appropriately be raised after the division is over.[80]

The Australian Senate similarly requires that members remain seated but does not require that members be covered (Senate SO 103). The *Annotated Standing Orders of the Australian Senate* notes that a former Clerk had observed that in the Commonwealth Parliament instances had been noted where a member who desired to speak during a division covered their head with a sheet of paper due to a mistaken impression that the practice of the Westminster Parliament applies in Australia, though this is not in fact correct.[81]

The significance of a member 'covering' themself is in some respect most appreciated in reference to the contrasting rule under 1895 SO 68, the precursor to current SO 85 which provides that a member must address the President standing. SO 68 stated that in all cases, 'a member desiring to speak shall rise in his place uncovered, and address himself to the Chair'. The reference to being 'uncovered' was a reference to the requirement that members remove their hats when entering the chamber. This practice was likewise

79 Committee on Modernisation of the House of Commons, paragraph 64. At http://www.publications.parliament.uk/pa/cm199798/ cmselect/cmmodern/600iv/md0405.htm#a10.

80 *Erskine May*, 24th ed, p 431.

81 Rosemary Laing, *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009), p 346.

taken from the House of Lords, where the rule applied to men – women peers were permitted to wear a hat when speaking without seeking the permission of the House.[82] (In contrast, in the House of Commons, every member who speaks rises in their place and 'stands uncovered').[83]

118. CORRECTION OF DIVISIONS

If the numbers or names of members voting in a division are incorrectly reported, the House on being informed of the error may order the record to be corrected.

Development summary		
1895	Standing order 132	Mistakes corrected in Minutes of Proceedings
2003	Sessional order 118	Correction of divisions
2004	Standing order 118	Correction of divisions

On occasion, an error is recorded on a division sheet certified by the tellers. Such errors are usually noted immediately by the Clerks and quickly rectified by requesting that the tellers make a certified notification on the sheet. If, however, an error is published in the minutes and later comes to the attention of members or the Clerk, the House may, on motion, order the record to be corrected.

Operation

While errors occasionally appear in division lists, they are usually noted and rectified prior to the publication of the Minutes of Proceedings and Hansard. Where this is not the case and an error is noted after publication, a member may move a motion, without notice, that the division list be corrected. There have been few such instances in the Council,[84] the last occurring in 1983.[85]

Where an error in a division list is the result of an administrative error on the part of department staff during the preparation of the minutes, the error is corrected and the document republished on the authority of the Clerk. Such instances are also rare.

Background

SO 118 is a continuation of the rule that previously applied under 1895 SO 132. Prior to 1895, errors in division lists were denoted by an asterist in the Minutes of Proceedings

82 Sir David Lidderdale KCB (ed), *Erskine May's Treatise on the Law, Privilege and Usage of Parliament* (Butterworths, 19th ed, 1976), p 414.
83 *Erskine May*, 19th ed, p 414.
84 *Minutes,* NSW Legislative Council, 1 April 1925, p 28; 25 March 1931, p 114; 25 October 1932, p 87; 26 October 1955, p 50.
85 *Minutes,* NSW Legislative Council, 30 November 1983, p 589.

and any further discrepancies were also printed in the minutes. Errors included double entries made for the same member,[86] errors in the count of votes,[87] and unreported votes.[88]

119. DIVISIONS IN COMMITTEE

Divisions in committee of the whole House are to be taken in the same manner as in the House.

Development summary		
1895	Standing order 216	Divisions in committee
2003	Sessional order 119	Divisions in committee
2004	Standing order 119	Divisions in committee

SO 119 clarifies that divisions in committee are to be conducted according to the rules for divisions in the House.

Operation

Procedurally, there is no difference in the method for taking a division in committee of the whole to that for taking a division in the House. Physically, the Chair conducts the division from his or her place at the table in between the Clerks, whereas the President conducts divisions from the chair on the dais, however, the tellers stand and members sit in the same places taken during divisions in the House.

Background

Since 1856, the standing orders have provided that the rules in committee of the whole are the same as those in the House, except that members may speak more than once on the same question.[89] A separate standing order applying this rule specifically to divisions was first adopted in 1895 (SO 216), drawing from the new rules adopted by the Assembly (Assembly 1894 SO 308), and then readopted by the Council in 2004 in slightly amended terms, but with the same effect.

86 *Minutes,* NSW Legislative Council, 17 February 1859, p 17; 21 September 1859, p 15.
87 *Minutes,* NSW Legislative Council, 19 June 1889, p 106.
88 *Minutes,* NSW Legislative Council, 17 February 1859, p 17; 21 September 1859, p 15.
89 1856 SO 43, 1870 SO 53.

CHAPTER 20

ADDRESSES TO THE GOVERNOR

120. MAKING OF ADDRESS

An address to the Governor or the Queen, except an address-in-reply, must be proposed by motion on notice given in the usual manner.

Development summary		
1856	Standing order 57	Motion proposing Address
1870	Standing order 68	Motion proposing Address
1895	Nil	
2003	Sessional order 120	Making of address
2004	Standing order 120	Divisions in committee

An Address is the formal means by which the Council communicates with the Queen or the Governor, except in the case of a protest against a bill which is dealt with under SO 161. SO 120 governs the making of Addresses other than the Address-in-Reply, which is the subject of SO 8 'Address-in-reply'.

Operation

An Address is adopted by motion on notice in the usual way, by leave in the absence of notice (SO 73), or if the Address expresses appreciation, thanks or condolence, on the motion of a minister without notice (SO 74(4)). A motion for the adoption of an Address may be debated and amended.[1]

An Address to the Queen is forwarded to the Governor with a request that it be forwarded to Her Majesty. In 2007 and 2012, Addresses were forwarded to the Queen congratulating Her Majesty on her 60th wedding anniversary and on her Diamond Jubilee.[2] On occasion, the Houses have sent a joint Address to the Queen, the motion for which provides that the President is authorised to sign the Address on behalf of the

1 See, for example, *Minutes*, NSW Legislative Council, 9 September 2015, pp 374-376.

2 *Minutes*, NSW Legislative Council, 28 November 2007, pp 374-375 (60th wedding anniversary); 14 February 2012, p 670 (Diamond Jubilee).

Council in conjunction with the Speaker on behalf of the Assembly and an equivalent motion is moved in the Assembly.[3]

Addresses to the Governor have sought the production of papers under SO 53,[4] communicated agreement to the revocation of the dedication of state forests under the *Forestry Act 2012*[5] and congratulated the new Governor on his or her appointment.[6]

There have also been cases in which a motion has been moved to adopt an Address from both Houses to the Governor seeking the removal of a judicial officer under section 53 of the *Constitution Act 1902*. Under the Act, the responsible minister is to table a report of the Conduct Division of the Judicial Commission in both Houses. The judicial officer may be invited to appear at the Bar of the House to address the House.[7] The Council may then resolve that an Address requesting the removal of the judicial officer be adopted and presented to the Governor. If agreed to, the Assembly would also be required to pass a similar motion before the Address is presented to the Governor. There have been three motions moved for such an Address, but in each case the motion has been negatived.[8] Other legislation also provides for the removal of public officers by the Governor on an Address from both Houses,[9] but there have been no attempts to activate these provisions to date.

Background and development

The 1856 standing orders provided for an Address to Her Majesty, either House of the Imperial Parliament, or the Governor, to be proposed by motion on notice in the usual manner (SO 57) and for Addresses of congratulation or condolence to members of the royal family to be proposed in a similar manner (SO 58). Addresses to Her Majesty, other members of the royal family or the Imperial Parliament were to be forwarded to the Governor with a request that the Address be forwarded for presentation (SOs 59-60). Alternatively, an Address to the Imperial Parliament could be forwarded by the President to some peer or member of that Parliament (SO 60).

The 1856 standing orders also included provisions for the making and presentation of joint Addresses to the monarch, other members of royal family, the Imperial Parliament or the Governor (SOs 63-66). The procedures concerning joint Addresses included requirements for the holding of a conference with the Assembly to communicate the

3 See, for example, *Minutes*, NSW Legislative Council, 9 September 2015, pp 374-376; *Votes and Proceedings*, NSW Legislative Assembly, 9 September 2015, pp 303 and 306; 10 September 2015, p 314.

4 *Minutes,* NSW Legislative Council, 15 September 2005, p 1568; 2 September 2009, p 1313; 18 March 2010, p 1724; 20 November 2014, pp 352-353.

5 See, for example, *Minutes*, NSW Legislative Council, 21 November 2013, p 2247; 12 November 2014, p 272.

6 See, for example, *Minutes*, NSW Legislative Council, 14 October 2014, p 114

7 See, for example, *Minutes*, NSW Legislative Council, 2 June 2011 am, p 186.

8 For details, see *Legislative Council Practice*, pp 581-592.

9 See, for example, *Public Finance and Audit Act 1983*, Sch 1, cl 5 (Auditor-General); *Ombudsman Act 1974*, section 6(5) (Ombudsman).

Address and obtain the Assembly's concurrence. Joint Addresses, when finally agreed by both Houses, were to be signed by the President on behalf of the Council (SO 64).

New standing orders adopted in 1895 prescribed procedures for the presentation of Addresses (SOs 133-134 of 1895) but not the making of Addresses. This anomaly was rectified in 2004 when SO 120 was adopted in similar terms to Senate SO 171 'Making of address'.

In the first decades of responsible government it was not uncommon for the Council to adopt Addresses to the monarch, or to the Governor for submission to Her Majesty's government, concerning matters of state.[10] However, Addresses to the monarch were later confined to messages of congratulation, condolence and welcome.

Addresses were adopted by motion on notice, by consent without previous notice[11] or by motion without notice under SO 59 of 1895 (now SO 74(4) 'Precedence of motions').[12] In some cases, the terms of the Address were drafted or settled by a select committee whose report was adopted by the House[13] or amended in committee of the whole.[14]

There were also Addresses to members of the royal family other than the King or the Queen,[15] and to the Queen requesting that a measure be submitted to the Imperial Parliament.[16]

The first joint Address was proposed in 1856, when a message was sent by the Council transmitting a copy of proposed Addresses containing petitions to the Queen and both Houses of the Imperial Parliament. As required by the then standing orders, the message

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10 See, for example, *Minutes,* NSW Legislative Council, 21 November 1856, pp 25-26 (Address to Governor-General concerning the separation of the northern districts to be forwarded to Secretary of State for the Colonies for the information of Her Majesty's Government); 9 May 1861, pp 198-199 (Address concerning the title of Governor-General); 16 July 1879, p 293; 22 July 1870, pp 299-300 (Address to Lieutenant-Governor concerning the independence and role of the Council to be forwarded to Her Majesty's Principal Secretary of State for the Colonies); 3 August 1899, pp 32-33; 16 August 1899, p 44; 17 August 1899, p 48 (Address concerning the establishment of an Australian Commonwealth).

11 See, for example, *Minutes*, NSW Legislative Council, 17 November 1948, p 20 (congratulations to Princess Elizabeth and Duke of Edinburgh on the birth of a son), 3 December 1953, p 117 (welcome to the Queen); 12 Aug 1953, p 9 (congratulations on coronation); 12 August 1953, p 10 (sympathy for death of Queen Mary).

12 See, for example, *Minutes*, NSW Legislative Council, 27 February 1952 pp 232-233 (condolence for death of George VI and congratulations on accession of Elizabeth II); 23 September 1942, p 7 (condolence for death of King); 18 February 1936, p 71 (condolence for death of George V and congratulations for accession of Edward VIII); 4 December 1935, p 48 (condolence for death of Princess Victoria).

13 See, for example, *Minutes*, NSW Legislative Council, 12 November 1856, pp 21-22; 19 November 1856, p 23; 21 November 1856, pp 25 and 26; 16 April 1868, p 199; 20 April 1868, pp 205-206; 18 December 1878, p 77.

14 See, for example, *Minutes,* NSW Legislative Council, 4 June 1858, p 35.

15 See, for example, *Minutes,* NSW Legislative Council, 13 June 1900, p 14 (to the Prince of Wales following an attempt on his life).

16 See, for example, *Minutes*, NSW Legislative Council, 30 October 1884, p 335.

requested a free conference with the Assembly to obtain the Assembly's concurrence to the Address and arrange the method of presentation.[17] However, a motion in the Assembly to consider the Council's message was dropped after the Speaker ruled it contravened the Assembly's standing orders.[18] Subsequently, the Council adopted an Address to the Governor-General requesting that the relevant petition be transmitted to the Secretary of State for presentation to the Queen and that the President forward the petitions for presentation to each of the Houses of the Imperial Parliament.[19]

In 1857, a message was transmitted to the Assembly forwarding a copy of the Report of the Select Committee on Australian Federation, and certain resolutions by the Council, and requesting a free conference to obtain the Assembly's concurrence in the form of a joint Address praying that the Governor-General adopt the necessary measures for giving effect to the recommendations contained in the resolutions.[20] The Assembly agreed to the free conference which was held. The Council managers reported that the Assembly managers had agreed to present to the Speaker the draft of the joint Address together with the Council's request for the Assembly's concurrence.[21]

In 1882, the Council received a message from the Assembly proposing the terms of a joint congratulatory Address. On a point of order being taken, the President stated that the mode of originating the Address was not in accordance with the correct procedure but that the action was inadvertent and he thought that consent might be given. The House then agreed by consent to a motion that the Council concur in the Address.[22]

In June 1888, the Council agreed to two motions for joint Addresses of condolence which did not include any request for a conference with the Assembly as provided in the standing orders but simply provided that the President be requested to sign such Address on behalf of the Council in conjunction with the Speaker on behalf the Assembly.[23] A similar approach was adopted in later joint Addresses.[24]

In the 19th and early 20th centuries, Addresses to the Governor concerned a wide range of subjects, including matters relating to public administration and the role of the Council.[25] Later Addresses were largely confined to requests for papers under the then SO 19 (current SO 53), notification of the election of members of the Council to University

17 *Minutes*, NSW Legislative Council, 11 December 1856, p 33.
18 *Votes and Proceedings*, NSW Legislative Assembly, 30 December 1856, p 369.
19 *Minutes*, NSW Legislative Council, 7 January 1857, p 43.
20 *Minutes*, NSW Legislative Council, 13 November 1857, p 22.
21 *Minutes*, NSW Legislative Council, 9 December 1857, pp 34-35.
22 *Minutes*, NSW Legislative Council, 20 September 1882, pp 24 and 25.
23 *Minutes*, NSW Legislative Council, 21 June 1888, pp 239 and 240.
24 See, for example, *Minutes*, NSW Legislative Council, 6 May 1897, p 15 (60th year of reign); 28 May 1902, pp 10-11 (coronation); 4 August 1937, p 6 (coronation); 18 September 1945, p 9 (termination of hostilities in Second World War); 17 November 1948, p 20 (birth of son to Princess Elizabeth); 25 September 1951, p 125 (illness of His Majesty)
25 See, for example, *Minutes*, NSW Legislative Council, 5 April 1866, p 117 (Report of Standing Orders Committee on Officers of the Legislative Council); 30 November 1905, p 169 (protesting the

Senates under legislation then in force, notification of agreement to the revocation of the dedication of state forests under the then *Forestry Act 1916* and congratulations on the Governor's appointment.

121. PRESENTATION OF ADDRESS

(1) The whole House, the President or members named for the purpose, may present an address to the Governor.

(2) An address to the Queen, (or any member of the Royal Family,) must be transmitted to the Governor by the President requesting that it be forwarded for presentation.

(3) When an address is ordered to be presented by the House, the President, accompanied by members, is to proceed to Government House. On being admitted to the Governor's presence, the President will read the address to the Governor.

(4) The President must report the Governor's answer to an address as soon as practicable after receipt

Development summary		
1856	Standing order 59	Mode of Transmitting
	Standing order 61	Presenting or transmitting to Governor
	Standing order 62	Reporting answer
1870	Standing order 71	Mode of Transmitting
	Standing order 73	Presenting or transmitting to Governor
	Standing order 74	Reporting answer
1895	Standing order 133	Addresses to Her Majesty or any Member of the Royal Family presented to the Governor by President
	Standing order 134	Presenting of Addresses to the Governor
	Standing order 135	When presented by the Whole House
	Standing order 136	Governor's reply to an Address from the Whole House
2003	Sessional order 121	Presentation of address
2004	Standing order 121	Presentation of address

SO 121 prescribes procedures for the presentation of Addresses adopted by the House under SO 120.

reduction of the President's estimates in relation to the salaries of office holders); 8 September 1909, p 53 (calling for Government action to give effect to the recommendations of a select committee).

Operation

Under SO 8 the Address-in-Reply to the Governor's opening speech is presented to the Governor by the President and members.

Under SO 121(1), the House may also resolve that the whole House, the President or members named for the purpose may present an Address in other circumstances, for example, to congratulate the new Governor on his or her appointment.[26] There has been no case of an Address being presented by the President or a group of members under the current standing orders (for earlier precedents see 'Background and development').

Addresses for papers under SO 53 and Addresses agreeing to the revocation of the dedication of state forests under the *Forestry Act 2012* are transmitted to the Governor by correspondence signed by President.

Under SO 121(2), Addresses to the Queen or any member of the royal family are transmitted by the President to the Governor by letter requesting that the Address be forwarded for presentation.[27]

Under SO 121(3), when an Address is to be presented by the whole House the President announces the day and time at which the Governor has agreed to receive the House and usually makes a statement regarding arrangements.[28] Under SO 8, when an address-in-reply to the Governor's speech has been agreed to, a motion is moved agreeing that the House proceed to Government House and present the Address at the stated day and time.[29] The Address may be presented during an adjournment of the House[30] or the House is suspended and resumes when members return.[31]

Under SO 121(4), when the House returns from presenting an Address to the Governor, the President reports that the House has presented the Address and the answer given by the Governor.[32] Any response to an Address to the Queen is also reported to the House by the President,[33] although responses are not always received.[34] Responses to Addresses under SO 53 are communicated to the House by the Clerk.

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26 *Minutes,* NSW Legislative Council, 11 November 2014, pp 255-256; 8 March 2001, p 882.

27 See, for example, *Minutes,* NSW Legislative Council, 28 November 2007, pp 374-375; 14 February 2012, pp 670 and 672.

28 See, for example, *Minutes,* NSW Legislative Council, 21 November 2006, p 383; 11 October 2011, p 470.

29 See, for example, *Minutes,* NSW Legislative Council, 22 November 2006, p 402; 11 September 2014, p 64; 13 October 2015, p 431.

30 In 2011 the Address-in-Reply was presented on 12 October at 10.30 am, the House having adjourned on 11 October until 12 October at 12.00 pm.

31 See, for example, *Minutes,* NSW Legislative Council, 16 September 2014, p 77; 11 November 2014, p 255.

32 See, for example, *Minutes,* NSW Legislative Council, 11 November 2014, pp 255-256.

33 See, for example, *Minutes,* NSW Legislative Council, 26 February 2008, p 435; 13 October 2015, pp 430-431.

34 No response was received to an Address of congratulation to the Queen adopted 14 February 2012.

Background and development

Addresses to the Governor

SO 61 adopted in 1856 provided for Addresses to the Governor to be presented by the whole House, the President or a delegation of members named for that purpose.[35] In 1870, SO 61, by then renumbered SO 73, was amended to enable an Address to the Governor to be presented by the President or to be 'by him transmitted by letter'.[36]

In 1895, SO 73 was superseded by SO 134 which provided for Addresses to the Governor to be presented by the President unless ordered to be presented by the Council in a body, or by a deputation of members named for the purpose. SO 135 specified the procedure for the presentation of an Address by the whole House:

> When an Address is ordered to be presented by the Whole House, the President, with the House, shall proceed to Government House, and, being admitted to the Governor's presence, the President shall read the Address to the Governor, the members who moved and seconded such Address being on his left hand.

The 1856 standing orders also included a procedure for the presentation of a joint Address to the Governor.[37] This was discontinued in 1895.

Addresses to the Queen or royal family

SO 59 of 1856 provided that Addresses to Her Majesty or any member of the royal family shall be transmitted to the Governor in a letter from the President requesting His Excellency to cause the same to be forwarded for presentation. Despite the requirement for presentation by letter, there were occasions on which Addresses were presented to the Governor by the whole House,[38] or to the Governor by a deputation,[39] with a request that the Address be forwarded for presentation.

In 1895, SO 59, by then renumbered SO 71, was superseded by SO 133 which provided for Addresses to the Queen or other members of the royal family to be presented to the Governor by the President or transmitted by him by letter requesting that the Address be forwarded for presentation.

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35 For Addresses presented by the President accompanied by a delegation, see *Minutes,* NSW Legislative Council, 23 May 1856, p 6; 2 October 1856, p 15; 26 November 1856, p 27; 9 May 1861, p 197.

36 *Minutes,* NSW Legislative Council, 2 November 1870, pp 62-63; 10 November 1870, p 66.

37 'Joint addresses to the Governor, if presented in a body by both Houses, shall be read by the President; but, if by deputation of members from both Houses, then by such member of the deputation as shall be named by the President, if the proposal for the address originated in the Council, or by the Speaker, if it originated in the Assembly' (SO 66). However, no records of a joint Address being presented to the Governor have been found.

38 *Minutes,* NSW Legislative Council, 18 March 1868, p 175.

39 *Minutes,* NSW Legislative Council, 20 April 1868, p 206. The resolution specified that the Address be presented by delegation to the Earl of Belmore, who was the Governor of New South Wales at the time.

1856 SO 60, which provided for Addresses to either House of the Imperial Parliament to be forwarded in a similar manner for presentation or transmitted for that purpose by the President to some peer or Member of Parliament, and SO 65, which provided for joint Addresses to Her Majesty, any member of the royal family or either House of Parliament to be forwarded for presentation in such manner as shall be settled in conference with the Assembly, remained in force, although renumbered, until omitted from the 1895 standing orders. In 1882, following the receipt of a message from the Assembly proposing a joint congratulatory Address, the President advised that the mode of originating the joint Address was irregular, presumably because no conference had been held. However, the Council adopted the joint Address by consent and appointed a deputation of members to accompany the President to present the Address to the Governor for forwarding to the Secretary of State and presentation to the Queen.[40] In 1888, the Council adopted a joint Address to the Queen by resolving that the President sign the Address on behalf of the Council in conjunction with the Speaker on behalf of the Assembly, without any conference being held.[41] This set the pattern for later joint Addresses.

Answer by the Governor

SO 62 of 1856 provided that the Governor's answer to an Address was to be reported by the President if the Address had been presented by the whole House or by the first member named if the Address had been presented by deputation. In 1895, this provision, by then renumbered SO 74, was superseded by SO 134 which specified that the Governor's answer to any Address shall be reported by the President.

40 *Minutes,* NSW Legislative Council, 20 September 1882, pp 24 and 25

41 *Minutes,* NSW Legislative Council, 21 June 1888, pp 239 and 240.

CHAPTER 21

MESSAGES FROM THE GOVERNOR

122. PRESENTATION OF MESSAGE

(1) The President must report a message from the Governor to the House as soon as practicable after receipt.

(2) The message may be taken into consideration at once, or a future day fixed for its consideration.

(3) If a message is received from the Governor when the House is in committee, the President may resume the Chair without any question being put. After the message has been dealt with, the President may leave the Chair and the committee resume its proceedings.

Development summary		
1856	Standing order 55 Standing order 56	Message how delivered Consideration of message
1864	Standing order 67 Standing order 68	Message how delivered Consideration of message
1870	Standing order 67 Standing order 68	Message how delivered Consideration of message
1895	Standing order 21 Standing order 137 Standing order 138 Standing order 139 Standing order 140	Presentation of Messages, Papers and Returns Reception of How dealt with Consideration of When Message comes while in Committee of the Whole
2003	Sessional order 122	Presentation of message
2004	Sessional order 122	Presentation of message

SO 122 prescribes procedures for the reporting and consideration of messages from the Governor. Earlier standing orders included additional procedures which are now no longer followed.

Operation

Messages from the Governor include messages from the Lieutenant-Governor in the absence of the Governor and from the Administrator in the absence of the Governor and Lieutenant-Governor. The most common messages communicate assents to bills or the administration of the government on the Governor being absent from, or returning to, the state. Others advise of a casual vacancy in the Senate, the resignation of a member of the Council, the convening of a joint sitting to fill a casual vacancy in the Council, or the appointment of a new Governor.

Where a message from the Governor is received before the commencement of a sitting, the message is reported by the President as the first item of business following prayers. If received during the sitting, the message is reported as soon as practicable. This is usually immediately after the business under consideration is concluded, but there have been cases in which business has been interrupted to allow the message to be reported.[1]

The procedure for consideration of messages in SO 122(2) is not often used as most messages, such as assents to bills, do not require any response. However, following receipt of a message notifying the House of a vacancy in the Senate, the House resolves that the message be taken into consideration on receipt of a message from the Assembly requesting that the Council fix a time and place for the holding of a joint sitting to choose a person to fill the vacancy.[2] Following receipt of a message advising of the appointment of a new Governor, the House adopts an Address on the motion of a minister[3] or resolves that consideration of the message stand an order of the day for the next sitting day and adopts an Address on that day.[4]

Where a message from the Governor is received during committee of the whole, the message is usually reported after the proceedings in committee have concluded under SO 122(1). In urgent or importance cases, the Chair may leave the chair to enable the message to be reported to the House. As the House has not referred the matter to the committee, the committee cannot consider it and there is no means by which the committee can report the receipt of the message to the House.

In 2010, two messages reporting the assumption of the administration of the state by the Lieutenant-Governor were received without an intervening message reporting the re-assumption by the Governor.[5] In a further case, the assumption of the administration

1 See, for example, *Minutes,* NSW Legislative Council, 3 December 2009, p 1626 (to convene a joint sitting to fill a vacancy in the Council, caused by the resignation of the Hon Henry Tsang); 6 May 2015, p 70 (to convene a joint sitting to fill a vacancy in the Council, caused by the resignations of the Hon Penny Sharpe and the Hon Steve Whan).

2 See, for example, *Minutes,* NSW Legislative Council, 6 May 2015, p 32.

3 *Minutes,* NSW Legislative Council, 14 October 2014, p 114.

4 *Minutes,* NSW Legislative Council, 1 March 2001, p 864; 6 March 2001, pp 870-871.

5 *Minutes,* NSW Legislative Council, 20 April 2010, pp 1737-1738. The Lieutenant-Governor first assumed administration when the Governor assumed administration of the Commonwealth Government. He then assumed administration two days later when the Governor left the country. The Governor did not re-assume in the intervening period.

by the Lieutenant-Governor was reported, followed by a message from the Governor reporting receipt of a member's resignation which had been accepted by the Governor while she was still Administrator of the Commonwealth.[6]

The Official Secretary, rather than Governor, has acknowledged receipt of protests lodged with the Clerk.[7]

Proclamation proroguing Parliament delivered to the Assembly in session

On 21 January 1904, the session having been opened two days earlier, the Speaker of the Legislative Assembly interrupted the adjournment debate in that House to announce 'I have had a document put in my hand proroguing Parliament'. The Speaker immediately left the chair at 7.50 pm.[8] The Legislative Council was not sitting at the time as it had adjourned at 5.26 pm until the following Wednesday. The Houses did not meet again until 23 August 1904. A similar practice occurred in 1908.[9]

Background and development

SO 55 adopted in 1856 provided that: 'Whenever a message from the Governor is announced, the business before the Council shall be suspended; and the bearer of the message be introduced, to deliver the same to the President.' SO 56 stated: 'The President shall immediately read the message to the House and, if necessary, a day shall then be appointed for taking the same consideration'.

On the motion for the adoption of SO 55, an amendment was proposed to insert at the end 'who shall receive the same within the bar'. According to the report of the proceedings in the *Sydney Morning Herald*, the intention of the amendment was to make the formality of receiving a message from the Governor equal to and not less than that observed for receiving a message from the Assembly. It is presumed, though there is no record, that the practice observed at the time was that a messenger from the Governor would be announced and then proceed to deliver the message directly to the President in the chair. Alternatively, it is possible that the messenger conveyed the message to the Bar where he was received by a member, the Clerk or a chamber attendant who then handed the message to the President.

In 1863, a message from the Governor conveying assent to a bill was 'sent under cover' to the President. The message was delivered to him by a member of the House and not by Governor's messenger. On reporting the message, the President informed the House that the message had been sent under cover to him and of his inability to receive it in that manner as it would be contrary to SO 67 (originally SO 55) and the practice of the Imperial Parliament. The matter was referred to the Standing Orders Committee,[10] which

6 *Minutes,* NSW Legislative Council, 8 June 2010, p 1889.
7 See, for example, *Minutes,* NSW Legislative Council, 28 May 2013, p 1751; 18 June 2013, p 1804.
8 *Hansard,* NSW Legislative Assembly, 21 January 1904, p 161.
9 *Hansard,* NSW Legislative Assembly, 11 April 1908, pp 1046-1047.
10 *Minutes,* NSW Legislative Council, 23 December 1863, p 81.

recommended that SO 67 be extended to provide that if the bearer was not a member he could be introduced for the purpose of delivering the message. It is presumed that this would have allowed a member of the House to take a message from the Governor or the Governor's messenger and convey it to the President. The report was considered in committee of the whole and adopted without debate.[11] The new SO 67, which was approved by the Governor,[12] provided:

> Whenever a message from the Governor shall be announced, the business before the Council shall be suspended, and the message shall be delivered to the President. If the bearer be not a member of the House, he shall be introduced for the purpose of delivering it.

New standing orders adopted in 1895 included SOs 137-140, which were based on standing SOs 218-221 of the Assembly. SO 137 was similar to former SO 67 (originally 55) in that it provided for business to be suspended to allow a message from the Governor to be reported. In practice, however, it appears that messages from the Governor were usually reported as the first item of business after prayers or at other times when there was no other business before the House, rather than by suspending business. This practice was reflected in SO 21, also adopted in 1895, which provided that messages from the Governor, as well as messages from the Assembly, papers and returns, may be presented or laid upon the Table at any time when other business is not before the House.

SOs 138-140 of 1895 were generally consistent with former SOs 67 (1856 SO 55) and 68 (1856 SO 56), except that:

- when the message was read members were to be 'uncovered' (take off their hats) (SO 138)
- if the message was to be considered on a future day it was first to be ordered without debate to be printed (SO 139)
- a message could be taken into consideration at once (SO 139)
- if the House was in committee of the whole when the message was received, the President could resume the chair without any question being put, and after the message had been dealt with, leave the chair, whereupon the committee was to resume (SO 140).

Subjects addressed in messages from the Governor included matters relating to procedures now superseded, such as forwarding of the writ for the election of Council members under the electoral system in place before 1978[13] and recommendations for the revocation of the dedication of state forests under the then *Forestry Act 1916*.[14]

11 *Minutes,* NSW Legislative Council, 13 January 1864, p 102.
12 *Minutes,* NSW Legislative Council, 21 January 1864, p 109.
13 See, for example, *Minutes,* NSW Legislative Council, 13 November 1951, pp 161-163.
14 See, for example, *Minutes,* NSW Legislative Council, 1 May 1951, p 68.

Others included matters with no recent equivalent such as the abdication or death of the King and the accession of a successor.[15]

Up to 1975 there are records of proceedings showing that following receipt of a message from the Lieutenant-Governor notifying the assumption of the administration of the government the House would pass a resolution expressing thanks.[16] The last such resolution was in February 1975.

Under SO 122 adopted in 2004, there is no longer provision for business to be suspended for the reporting of a message from the Governor and for the message to be reported immediately. Rather, messages from the Governor are to be reported as soon as practicable after receipt. There is also no longer reference to messages from the Governor being delivered by a member, or to members of the House being 'uncovered' while the message is read. However, the procedures concerning the time at which messages from the Governor are considered (SO 122(2)) and the receipt of messages during committee of the whole (SO 122(3)) remain consistent with those provided for in the standing orders adopted in 1895 (SOs 139 and 140 of 1895).

15 *Minutes,* NSW Legislative Council, 15 December 1936, p 77; 27 February 1952, pp 225-226.

16 *Minutes,* NSW Legislative Council, 25 February 1975, p 274. The next message received in August 1975 was not responded to by the House *(Minutes,* NSW Legislative Council, 6 August 1975, p 12).

CHAPTER 22

COMMUNICATIONS BETWEEN THE TWO HOUSES

123. METHODS OF COMMUNICATION

All communications with the Legislative Assembly must be by message, conference or by committees conferring with each other.

Development summary		
1856	Standing order 67	Modes of communication
1870	Standing order 67	Message how delivered
1895	Part XX	Communications with the Legislative Assembly
2003	Sessional order 123	Methods of communication
2004	Standing order 123	Methods of communication

The Houses formally communicate with each other by message, conference or committee. These methods of communication have been in place since 1856, although the procedures relating to each method prescribed in other standing orders have changed over time.

Operation

The standing orders provide for messages to be exchanged between the Council and the Assembly. This is the most common way for the Houses to communicate and there are numerous examples of messages being transmitted in relation to bills and other matters in various circumstances. See SO 125 for further details.

Conferences between the Houses are conducted in accordance with SOs 128-134. Conferences allow the Houses to appoint managers to represent their position on a matter. The last conference was held in 1978. See SOs 128-134 for further details.

The Houses may also confer by way of a joint committee comprising members appointed by the Council under SO 220 and members appointed by the Assembly[1] or by separate

1 Joint committees include statutory joint committees such as the Committee on the Health Care Complaints Commission, joint standing committees such as the Joint Standing Committee on

committees appointed by each House. In the latter case, SO 219 authorises any committee of the Council to join with any committee of the Assembly to take evidence, deliberate and make joint reports on matters of mutual concern.[2]

Background and development

On 6 June 1856, the Council instructed its Standing Orders Committee to confer with the Standing Orders Committee of the Assembly in relation to 'Communication between the two Houses, by Conference, Message, Joint Committees of both Houses, and Select Committees of the same' as well as 'all other matters in which the two Houses or their committees may have occasion to act jointly'.[3] The first set of standing orders adopted later that year, including SO 67, are as follows: 'Communications with the Assembly may be by message, by conference, by a joint committee, by a select committee or by select committees, conferring with each other'.

New standing orders adopted in 1895 did not include any equivalent provision. However, the sense of the 1856 provision was reflected in the headings to Part XX, 'Communications with the Legislative Assembly', and its four sub-parts, 'By message', 'By conference', 'By joint committees', 'By select committees communicating with each other'.

The 1856 standing orders also included provisions which precluded a select committee from conferring with an Assembly committee without an order of the Council on motion (SO 84) and prescribed certain procedures to be followed where committees from each House conferred (SOs 85-87). Similar provisions were included in the 1895 standing orders (SOs 158-161). Accordingly, where it was intended that a committee of the Council should confer with a committee of the Assembly, the Council granted leave or power to its committee to do so by specific resolution.[4]

SO 123 adopted in 2004 preserves the three methods of communication between the Houses, which have been in place since 1856 – message, conference and committee. However, where conferral is to occur by separate committees from each House it is no longer necessary for the Council to authorise conferral by a specific resolution as SO 219 now provides the necessary authority.

Road Safety and joint select committees such as the Committee on Companion Animal Breeding Practices established in 2015.

2 In 2006, following receipt of a message from the Assembly requesting the Council to authorise its Privileges Committee to confer with the Assembly Committee on Parliamentary Privilege and Ethics Committee in relation to a particular inquiry, the Council advised that under SO 219 the Privileges Committee had the power to join together with any committee of the Assembly to take evidence, deliberate and make joint reports on matters of mutual concern: *Minutes*, NSW Legislative Council, 8 June 2006, pp 117-118.

3 *Minutes,* NSW Legislative Council, 6 June 1856, p 8.

4 For example, *Minutes,* NSW Legislative Council, 2 November 1982, p 221 (Committee on Disclosures by Members); 24 May 1995, pp 42-43 (Standing Committee on Parliamentary Privilege and Ethics); 8 May 2003, p 73 (Standing Orders Committee).

124. MESSAGES FROM THE COUNCIL

A message from the Council to the Assembly must be in writing, signed by the President or Deputy President and delivered by one of the Clerks-at-the-Table.

Development summary		
1856	Standing order 68	Form &c., of Messages
1856-1894	Resolution and sessional order	Form &c., of Messages
1870	Standing order	Form &c., of Messages
1895	Standing order 141	Messages to be signed by President
1922	Standing order 141	Messages to be signed by President
2003	Sessional order 124	Messages from the Council
2004	Standing order 124	Messages from the Council

Messages to the Assembly may concern bills (SOs 151 to 158), the appointment and membership of joint committees (SO 220), resolutions which the Council has resolved are to be communicated to the Assembly (SO 125) or requests for a conference with the Assembly (SO 128).

Operation

The procedures for the preparation and delivery of messages have remained largely unchanged except for an earlier procedure which provided for messages to be delivered by members of the House.

Under current practice, once the Chair has signed a message provided by the Clerk, one of the Clerks-at-the-Table, usually the Black Rod, proceeds directly to the Bar of the Legislative Assembly where the message is conveyed to a Clerk-at-the-Table. If that House is not sitting, the message is delivered to the Clerk of the Legislative Assembly. Before proceeding to the Assembly, a record of the message is entered in a register which remains on the Table while the House is sitting. On returning from the Legislative Assembly, the Clerk to whom the message was delivered is also noted in the message book.

Background and origin

SO 68 adopted in 1856 provided that: 'Every message, whether initiative or otherwise, from this Council to the Assembly, shall be in writing, signed by the President, delivered to the Speaker by two or more members named by the President'. Following the adoption of this provision the practice was for the President to appoint two members who proceeded to the Assembly with the message and on their return reported that they had presented or returned the bill and the message.[5]

5 See, for example, *Minutes,* NSW Legislative Council, 2 October 1856, pp 15-16 (Railways and Immigration Loan Bill); 13 November 1856, p 23 (Drafts on Bankers Bill); 3 December 1856, p 29 (Constitution Act Amendment Bill).

The delivery of messages by members broadly reflected the procedure in the House of Commons up to 1855, when messages would be sent by a member (generally the Chairman of the Committee of Ways and Means or a member who had charge of the bill), who was usually accompanied by 30 of 40 other members. From 1855, one of the Clerks of the Commons or the Lords could be the bearer of messages from one House to the other.[6]

In December 1856, the Council adopted a resolution that in addition to the standing order regarding messages between the Council and the Assembly, one of the Clerks of either House may be the bearer of messages, and that messages be received at the Bar of the House without interrupting business.[7] In January 1857, the Assembly agreed with the Council's proposal and proposed an additional paragraph:

> (3) That it be the duty of the Clerk to communicate every message so received, at the earliest opportunity without interrupting the Public Business, to the President, by whom it shall be made known to the House.[8]

The Council agreed to the Assembly's amendment[9] and readopted the procedures in each session until 1894.

New standing orders adopted in 1895 included SO 141, which was based on SO 223 of the Assembly. As originally adopted, SO 141 provided: 'Every Message from the Council to the Assembly shall be in writing, signed by the President, and shall be sent by a member or by one of the Clerks at the Table.' The words 'or by a member' did not appear in Assembly SO 223. However, SO 224 of the Assembly referred to the receipt of messages from the Council 'by two or more of its members, or by one of its Clerks at the Table'.

SO 124 omits the provision for a member to send the message to the Assembly but otherwise is the same as the 1895 standing order.

From February 1857, the minutes usually recorded that the Clerk had been directed to carry each bill and message to the Assembly.[10] The minutes later ceased to record who delivered each message.

In 1915, President Flowers referred to handwritten messages being difficult to read and the desirability of them being typed.[11] In 1922, the Standing Orders Committee recommended that SO 141 be amended to omit the requirement for messages to be 'in writing' and provide instead for messages to be written or typewritten.[12] In speaking to the proposed amendment during consideration of the report in committee of the

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6 The Lord Campion (ed), *Sir Thomas Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Butterworth & Co. Ltd, 15th ed, 1950), p 808.

7 *Minutes,* NSW Legislative Council, 10 December 1856, p 32.

8 *Minutes,* NSW Legislative Council, 29 January 1857, p 52.

9 *Minutes,* NSW Legislative Council, 30 January 1857, pp 54-55.

10 See, for example, *Minutes,* NSW Legislative Council, 4 February 1857, p 58; 11 February 1857, p 61; 5 November 1857, p 19.

11 *Hansard,* NSW Legislative Council, 29 September 1915, p 2202; 9 December 1915, p 4392.

12 *Minutes,* NSW Legislative Council, 2 August 1922, p 33.

whole, the Chair of the Standing Orders Committee, Sir Joseph Carruthers, stated that the amendment was proposed as a formality, as by then messages were being typewritten as a matter of course.[13] The amendment was agreed to without amendment or further debate.[14]

125. COMMUNICATING A RESOLUTION

A motion may be moved, without notice, at any time when there is no business under discussion, that any resolution of the House be communicated by message to the Assembly.

Development summary		
1895	Standing order 144	Notice of message not required
2003	Sessional order 125	Communicating a resolution
2004	Standing order 125	Communicating a resolution

The Council may wish to communicate a resolution to the Assembly if it is thought appropriate to advise the Assembly of the resolution or the Assembly's agreement to the resolution is sought. Neither House will recognise the proceedings of the other unless communicated under the standing orders. A motion to communicate a resolution by message does not require notice.

Operation

The motion under SO 125 may be moved immediately after the relevant resolution has been passed by the House or at some later stage when there is no business under discussion. There is no requirement that the member moving the motion be the member who moved the substantive motion. For example, in 2012 the House resolved on the motion of a Crossbench member to refer a matter to the Joint Committee on the Office of the Ombudsman and Police Integrity Commission. Later in the day, the Parliamentary Secretary moved without notice that a message be forwarded to the Assembly advising of the terms of the resolution and requesting the Assembly to pass a similar resolution. [15]

Messages have communicated resolutions by the Council which do not require a response from the Assembly, such as advising of changes to the membership of joint committees.[16] Other messages have required a response and are conveyed for the purpose of seeking the concurrence of the Assembly in a matter of joint interest, such as adopting a revised code, of conduct for members,[17] proposing arrangements for a memorandum of understanding between the Presiding Officers and ICAC Commissioner concerning the

13 *Hansard,* NSW Legislative Council, 3 August 1922, p 794.
14 *Minutes,* NSW Legislative Council, 3 August 1922, pp 36-37.
15 *Minutes,* NSW Legislative Council, 29 May 2012, pp 1010 and 1011.
16 See, for example, *Minutes,* NSW Legislative Council, 22 October 2014, p 186.
17 *Minutes,* NSW Legislative Council, 21 June 2007, pp 148-152.

execution of search warrants on members' offices[18] and proposing similar arrangements with respect to the Commissioner of Police,[19] seeking leave for a member of the Assembly to appear as a witness before a Council committee[20] and to request that leave be given to expunge certain paragraphs from an earlier message on a bill.[21] Messages have also responded to invitations from the Assembly to amend standing orders in line with amendments made by the Assembly.[22]

The Council has also used messages to convey its view on matters of principle, such as the Council's right to amend money bills,[23] that in making such amendments the Council 'in no way exceeded its rights or infringed the privileges of the Legislative Assembly'[24] and that it declined to consider a bill to abolish the Council on the ground that it should have originated in the Council.[25]

Outgoing messages are registered in a book kept in the chamber.

Background and development

Early standing orders did not specify any procedure for communicating resolutions to the Assembly aside from the provision under 1856 SO 68 and 1870 SO 80, and a sessional order adopted between 1856 and 1895, which related to the delivery of messages to the Assembly. However, there were cases in which motions were agreed to without notice to forward messages to the Assembly concerning matters such as the adoption of standing orders[26] or requests for copies of select committee reports.[27]

In 1879, following receipt of a message from the Assembly desiring to be informed of steps taken by the Council on the report of its managers, following a free conference on the Parliamentary Powers and Privileges Bill, the Council appointed a select committee to ascertain the practice in reference to sending messages from one House to the other requesting information as to their votes and proceedings.[28] The committee essentially concluded that if one House desired to know what the other had done with respect to any bill or other measure it should appoint a committee to search the journals of the other House rather than seeking the information by message.[29]

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18 *Minutes,* NSW Legislative Council, 25 November 2009, pp 1553-1554.
19 *Minutes,* NSW Legislative Council, 19 October 2010, pp 2090-2091.
20 *Minutes,* NSW Legislative Council, 1 September 1915, p 67.
21 *Minutes,* NSW Legislative Council, 11 June 1884, p 176.
22 See, for example, *Minutes,* NSW Legislative Council, 30 August 1938, p 54; 6 September 1938, p 59 (concerning the duration of parliamentary committees).
23 *Minutes,* NSW Legislative Council, 17 January 1862, p 126.
24 See, for example, *Minutes,* NSW Legislative Council, 26 September 1889, p 254 (Wollongong Harbour Trust Bill).
25 *Minutes*, NSW Legislative Council, 2 December 1959, pp 137-138.
26 *Minutes,* NSW Legislative Council, 23 February 1892, p 238; 8 November 1893, p 33.
27 For example, *Minutes,* NSW Legislative Council, 25 February 1857, p 69; 25 August 1858, p 68.
28 *Minutes,* NSW Legislative Council, 6 May 1879, pp 199-200.
29 *Report from the Select Committee on the Parliamentary Powers and Privileges Bill (In reference to the Assembly's message, dated 24 April, 1879)*, May 1879, in, *Journal of the Legislative Council*, 1878-79, vol 29, Part 1, pp 381-384.

In 1895, the Council adopted SO 144 based on SO 226 of the Assembly to provide that:

> It shall be in order at any time to move, without previous notice, that any Message relating to any stage of a Bill agreed to, or communicating a resolution passed by the Council, be sent to the Assembly.

SO 125 readopts the provision of 1895 SO 144 that a motion for a message to the Assembly communicating a resolution passed by the Council does not require notice, omits the provision for a message to be sent relating 'to any stage of a Bill agreed to', and includes a new provision that a motion for a message to be forwarded to the Assembly can only be moved when there is no other business under discussion. This provision is consistent with other standing orders in clarifying that business under discussion should not be interrupted except under specific circumstances such as those provided for under SO 74 and SO 122.

126. MESSAGES FROM THE ASSEMBLY

(1) A message from the Assembly will be received, if the House is sitting, by one of the Clerks-at-the-Table, or if the House is not sitting, by the Clerk. The Clerk is to inform the President of every message received.

(2) The President is to report to the House every message received as soon as practicable, without interrupting any business before the House.

(3) If any proceeding is necessary on receipt of a message, a future day must be fixed for its consideration.

Development summary		
1856	Standing order 69	Messages from Assembly
1857–1895	Resolution and sessional order	Transmission of receipt of messages
1870	Standing order 81	Messages from Assembly
1895	Standing order 142	Messages from Assembly
2003	Sessional order 126	Messages from the Assembly
2004	Standing order 126	Messages from the Assembly

SO 126 prescribes procedures for the receipt and consideration of messages from the Assembly.

Operation

Under the routine of business followed each sitting day there is an opportunity for messages from the Assembly to be reported to the House, following the reporting of messages from the Governor after prayers (see SO 38). However, messages from the Assembly may also be reported at other times when there is no other business before the House. Usually the message is reported when there is a break between items of business, but there have been occasions on which messages have been reported during

the adjournment debate in order that they be reported prior to the conclusion of the sitting day.[30]

If the Council is sitting when the message is to be delivered, the Serjeant-at-Arms, or other Clerk from the Assembly, enters the chamber and waits behind the Bar for a Council officer to collect the message. The Clerk then notifies the Chair that there is a message to be reported to the House as required by SO 126(1). If the Council is not sitting, the message is delivered to the Clerk of the Parliaments and is reported to the House during formalities on the next sitting day.

Under SO 126(3), if any proceeding is necessary on receipt of a message, a future day must be fixed for its consideration and the message is set down on the Notice Paper as an order of the day accordingly.

The motion to set down a message from the Assembly for consideration on a future day has been amended. In 1994, a Government motion proposing that an Assembly message for the appointment of a Parliamentary Management Board stand an order of the day for the next sitting day was amended on the motion of a Crossbench member to insert 'in committee of the whole'.[31]

The requirement in SO 126(3) to fix a future day for consideration of a message is modified in respect of messages returning bills with amendments or with amendments disagreed to. Unlike other messages, messages received under SOs 152(1) and 156(1) relating to bills may be taken into consideration immediately. Similarly, under SO 122(2) messages from the Governor can be considered immediately on their receipt.

There have been cases in which leave has been granted to suspend standing orders to allow a message from the Assembly to be considered on the day received, most commonly forthwith[32] but also at a later hour.[33] Leave has also been granted to suspend standing orders to allow the orders of the day for consideration of a number of messages concerning joint committees, received from the Assembly earlier in the day, to be considered in globo forthwith.[34]

Background

Standing order 69 adopted in 1856 provided that: 'Every message from the Assembly to this Council, if conveyed by members of that House, shall be received by the President within the Bar.' In line with this provision, there were cases in which messages borne

30 See, for example, *Minutes,* NSW Legislative Council, 11 November 2011, p 587; 25 June 2015, p 253; 13 August 2015, pp 306-307.

31 *Minutes,* NSW Legislative Council, 2 December 1994, pp 467-470. Consideration in committee of the whole allowed full and free discussion where members could speak on issues more than once, as opposed to debate in the House.

32 *Minutes,* NSW Legislative Council, 23 June 2011, pp 277-278; 21 June 2012, pp 1107-1108; 13 May 2015, pp 99-102.

33 *Minutes,* NSW Legislative Council, 22 June 2011, pp 253-254.

34 *Minutes,* NSW Legislative Council, 22 June 2011, p 259.

by two members of the Assembly were received by the President within the Bar of the House and read by him to the Council.[35] By November 1856, however, the minutes began to record that each message had been 'received and read' without specifying who had delivered the message or by whom the message had been received.[36]

In January 1857, both Houses adopted the following modified procedures for the transmission and receipt of messages:

(1) That, in addition to the mode provided by the present Standing Orders with regard to Messages between the two Houses, one of the Clerks of either House may be the bearer of Messages from the one to the other.

(2) That Messages so sent be received at the Bar by one of the Clerks of the House to which they are sent, at any time whilst such House is sitting or in Committee, without interrupting the business then proceeding.

(3) That it be the duty of the Clerk to communicate every Message so received, at the earliest opportunity without interrupting the Public Business, to the President, by whom it shall be made known to the House.[37]

The Council continued to readopt these procedures in each session up to 1894.

New standing orders adopted in 1895 included SO 142, which was based on Assembly SO 224. SO 142 provided for messages to be received from a member or Clerk of the Assembly while the House was sitting or in committee, and for messages to be reported at the earliest opportunity without interrupting business, and for the President to inform the House of receipt of the message.

In addition to the provisions of SO 142, SO 126 now provides for messages to be received when the House is not sitting, and that a future day must be fixed for its consideration.

127. MESSAGES TO BE RECORDED

Every message must be recorded in the Minutes, together with any answer given.

Development summary		
1895	Standing order 143	Messages to be recorded
2003	Sessional order 127	Messages to be recorded
2004	Standing order 127	Messages to be recorded

The text of every message sent or received by the Council and every response is to be recorded in the Minutes.

35 *Minutes,* NSW Legislative Council, 2 October 1856, p 15; 29 October 1856, p 17.
36 See, for example, *Minutes,* NSW Legislative Council, 7 November 1856, p 20.
37 *Minutes,* NSW Legislative Council, 10 December 1856, p 32; 30 January 1857, pp 54-55.

Operation

Every message from the Council conveying the terms of a resolution of the House is recorded in full in the Minutes of Proceedings. Similarly, when a message is received from the Assembly, the message is reported to the House by the President and is recorded in the Minutes of Proceedings.

Before 2016, the Minutes of Proceedings did not record proceedings in committee of the whole and any amendments by the Council to an Assembly bill were only recorded in the minutes in the message to the Assembly seeking its agreement, and in Hansard. In February 2016, the President announced that proceedings in committee of the whole would be recorded in the minutes during the autumn sittings as a trial.[38]

A record of each message communicated to the Assembly is kept in a book maintained by the Usher of the Black Rod.

Background and development

The 1856 standing orders did not include any requirement for messages from the Council to be recorded in the minutes. In practice, the early minutes recorded the terms of any resolution requiring a message to be sent, but not necessarily the message itself. For example, the minutes for 6 March 1857 recorded that the Council had resolved that the Common Law Proceedings Bill be carried to the Assembly with a message informing that House that the Council had agreed to the bill with amendments in which the Council requested the concurrence of the Assembly but did not record the amendments themselves.[39] At some later stage, it became the practice to record the terms of each message including any amendments in which concurrence was sought.[40]

In 1879, following receipt of a message from the Assembly insisting on disagreeing to Council amendments on a bill and expressing concern at an earlier message of the Council on the bill, a motion was moved that consideration of the Assembly's message stand an order of the day for Tuesday next. On a question as to whether a member could move that the message not be received and that the message not be recorded in the minutes, the President ruled that, according to practice, messages from the Assembly are received as a matter of course and that there is no motion that the message be received, but that it would no doubt be competent for the House to amend its minutes as it may deem proper, but there was no room then for an amendment. The motion was agreed to following further debate.[41]

SO 143 adopted in 1895, based on Assembly SO 225, provided that: 'Every Message shall be entered upon the Journals, with the answer thereto, if any be given'. Messages

38 *Minutes*, NSW Legislative Council, 23 February 2016, p 643; *Hansard*, NSW Legislative Council, 23 February 2016, p 9.

39 *Minutes*, NSW Legislative Council, 6 March 1857, p 73.

40 See, for example, *Minutes,* NSW Legislative Council, 21 December 1859, p 47.

41 *Minutes,* NSW Legislative Council, 1 May 1879, p 197; *Sydney Morning Herald*, 2 May 1879, p 2.

continued to be recorded in the minutes, which formed part of the bound volumes known as the Journals. The provision has carried over to current SO 127.

In December 1895, after the President had reported messages concerning amendments made by the Council on three bills, a motion was moved that the messages be not entered in the minutes as they questioned the Council's right to make such amendments. The motion was agreed to following debate and a resolution that the question be now put. The minutes included a series of asterisks in place of the text of each message.[42]

42 *Minutes,* NSW Legislative Council, 10 December 1895, p 154.

CHAPTER 23

CONFERENCES

128. REQUESTS FOR CONFERENCE

(1) A conference requested by the Council with the Assembly must be by message.

(2) In requesting a conference, the message from the Council must state the general object of the conference and the names of managers proposed to serve.

(3) The number of members must be not fewer than five at an Ordinary Conference and 10 at a Free Conference.

(4) A conference may not be requested by the Council on the subject of a bill or motion of which the Assembly is in possession at the time of the request.

Development summary		
1856	Standing order 70 Standing order 71 Standing order 75 Standing order 76	Conference Message requesting Modes of conferring Subjects of conference
1870	Standing order 82 Standing order 83 Standing order 84 Standing order 88	Conference Message requesting Modes of conferring Subjects of conference
1895	Standing order 145(a) Standing order 146	Motion for Conference to name Managers Request for, to be by Message stating general objects
2003	Sessional order 128	Requests for conference
2004	Sessional order 128	Requests for conference

SO 123 provides that all communication with the Legislative Assembly must be by message, conference or by committees conferring with each other.

Standing orders 128 to 134 set out the procedures for conferences.

The standing orders have provided for the conduct of conferences since 1856. In practice, differences between the Houses tend to be resolved by the exchange of messages. A conference procedure was used to great effect in 1978 to settle complex constitutional matters on the reform of the Council but has not been used since.

Conferences take one of two forms: a free conference or an ordinary conference. At a free conference, managers for each House may communicate both orally and in writing. No formal written record of a conference is kept, allowing members to voice their opinions freely.[1] At an ordinary conference managers may only communicate in writing (SO 132).

Operation

SO 128 provides for the procedures when the Council wishes to request a conference with the Assembly.

SO 128 does not specify or restrict the matters upon which a conference can be requested. Free conferences may be held on matters other than bills, such as matters of constitutional importance,[2] on an Assembly bill subject to section 5B of the *Constitution Act 1902* (see SO 133), on a Council bill under SO 153, or on any other bill or matter. For example, in 2011, the Council sought a free conference on an Assembly bill after the Assembly had disagreed to the Council's amendments,[3] even though the circumstances did not meet the requirements for resolving disagreements on an Assembly bill under SO 156, or the provisions for resolving deadlocks under section 5B of the *Constitution Act 1902*. The request was rejected, and the disagreement was ultimately resolved following communication between the Houses by way of message.[4]

Standing order 128(2) provides that a request from the Council for a conference with the Assembly must be by message and such message must state the general object of the conference. The message to the Assembly requesting a conference on the separation of the northern districts of New South Wales in 1856 stated:

> That a message be sent to the Legislative Assembly, transmitting a copy of the Addresses to Her Majesty and the two Houses of Parliament, on the subject of the separation of the Northern Districts, adopted by this House, and requesting a Free conference in order to obtain the concurrence of the Assembly therein, and to arrange the manner in which the same shall be forwarded for presentation.[5]

In the most recent case, the general object was merely described as 'with respect to the disagreement between the Legislative Council and the Legislative Assembly on the bill…'[6]

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1 See SO 133, 1856 SO 82 and 1895 SO 152 as adopted, which provided that at all free conferences the Council managers shall be at liberty to confer freely by word of mouth with the Assembly managers.

2 Separation of the Northern Districts (New England and Clarence) into a separate colony (1856/7) and an Australian Federation (1857).

3 *Minutes,* NSW Legislative Council, 26 August 2011, pp 387-388; 13 September 2011, pp 426-427.

4 *Minutes,* NSW Legislative Council, 21 August 2012, pp 1144 and 1148-1149; 22 August 2012, p 1156.

5 *Minutes,* NSW Legislative Council, 11 December 1856, p 33.

6 *Minutes,* NSW Legislative Council, 13 September 2011, p 427.

Under SO 128(3), there must be no fewer than 10 members from the Council at a free conference and no fewer than 5 members are to be appointed for an ordinary conference. At each free conference requested by the Assembly there have been 10 managers, except in the case of the conference for the St Andrew's College Bill to which initially 5 members were appointed as managers in an error originally made by the Assembly when requesting the conference, which was later corrected and 10 members appointed.[7] 5 members from each House were appointed to be managers for the ordinary conference on the Australian Federation.[8] The managers for the Council at the conference on the Australian Federation reported that one of the managers had been unavoidably absent 'on account of indisposition' resulting in only 4 members of the Council participating in the conference.[9]

Under SO 128(4), the Council must be in possession of the bill or motion when the request is made.

Background and development

Under the standing orders adopted in 1856, conferences were to be requested by message stating the object in general terms and the number of Council managers (SOs 70 and 71), every conference was to be taken to be an ordinary conference unless a free conference was mentioned (SO 75) and no conference was to be requested on a bill or motion of which the Assembly was in possession (SO 76). The 1895 standing orders included similar provisions, except that they omitted the default provision concerning ordinary conferences, introduced minimum requirements for the number of managers at ordinary and free conferences and required the number of managers from each House to be the same (SO 145 and 146).

A conference has been held at the request of the Assembly on 23 occasions, all in relation to bills introduced in the Assembly. On a further two occasions, in relation to the Crown Lands Bill in 1898[10] and the Constitution Amendment (Legislative Council Abolition) Bill 1959-60,[11] the Assembly requested a conference but the Council declined the request.

Details of conferences held in New South Wales are recorded in *New South Wales Legislative Council Practice*. Only two requests for a conference had been made by the Council prior to a request in 2011. Both involved proposals for a joint Address, which under the standing orders at the time required a conference with the Assembly to obtain the Assembly's concurrence and agreement on a method for presentation.[12]

7 *Votes and Proceedings,* NSW Legislative Assembly, 30 October 1867, pp 367-368; *Minutes,* NSW Legislative Council, 16 October 1867, p 83; 23 October 1867, p 87; 31 October 1867, pp 93-94.
8 *Minutes,* NSW Legislative Council, 13 November 1857, p 22.
9 *Minutes,* NSW Legislative Council, 9 December 1857, pp 34-35.
10 *Minutes,* NSW Legislative Council, 7 July 1898, p 48.
11 *Minutes,* NSW Legislative Council, 7 April 1960, pp 213-214.
12 1856 SOs 63 and 65.

In the first case, the motion specified a free conference and named 10 Council managers.[13] However, when the matter was considered by the Assembly the Speaker ruled that it contravened Assembly standing orders and the item was dropped from the business of that House.[14] In the second case, the motion named 5 managers[15] and the request was agreed to by the Assembly.[16]

The use of a free conference to discuss matters directly with the Legislative Assembly was also raised, but not pursued in the following circumstances:

- In 1996, the Council's Privileges Committee recommended a free conference to consider a code of conduct for the members of both Houses[17] but the matter was not further considered by the House.
- In 2000, on a message being received from the Assembly insisting on its amendments disagreed to by the Council, leave was sought to suspend standing orders to allow a motion to request a free conference, but objection was taken and the matter was resolved by message.[18]

129. APPOINTMENT OF MANAGERS

(1) A motion requesting a conference must contain the names of the members proposed to be the managers for the Council.

(2) If the House requires, the managers for the Council will be selected by ballot.

(3) The number of managers to represent the Council in a conference requested by the Assembly will be the same as the Assembly.

Development summary		
1856	Standing order 72 Standing order 73 Standing order 77	Moving for conference Selection of managers Number of managers
1870	Standing order 84 Standing order 85 Standing order 89	Moving for conference Selection of managers Number of managers
1895	Standing order 145(a) Standing order 145(b)	Motion for conference to name managers Managers may be appointed by ballot

13 *Minutes,* NSW Legislative Council, 11 December 1856, p 33 (Separation of the Northern Districts).

14 *Votes and Proceedings*, NSW Legislative Assembly, 12 December 1856, p 338; 30 December 1856, p 369.

15 *Minutes,* NSW Legislative Council, 13 November 1857, p 22 (Australian Federation). The motion did not specify whether the requested conference was to be free or ordinary, which by default under the standing orders at the time resulted in a request for an ordinary conference.

16 *Minutes,* NSW Legislative Council, 1 December 1857, p 31.

17 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the establishment of a draft code of conduct for members*, Report No. 3, October 1996, Recommendation 5.

18 *Minutes,* NSW Legislative Council, 29 June 2000, pp 575-576 and 580 (Dairy Industry Bill).

Development summary		
	Standing order 145(c) Standing order 146	Number of Request for, to be by Message stating general objects
2003	Sessional order 129	Appointment of managers
2004	Standing order 129	Appointment of managers

A motion requesting a conference must name the managers for the Council. SO 129 provides for a ballot to be used to select the managers, if required, and that when the Assembly requests a conference, the number of managers for the Council is to be the same as the number appointed by the Assembly. The managers are usually members supporting the principal object of the conference.

Operation

A motion requesting a conference must name the managers for the Council (SO 129(1)). The managers are selected by ballot if the House so requires (SO 129(2)). Where the Council agrees to a request for a conference by the Assembly the number of Council managers must be the same as the managers of the Assembly (SO 129(3)).

In the few relevant precedents, the motion to request a free conference named 10 managers for a free conference on the separation of the northern district of New South Wales into a separate colony[19], 5 managers for an ordinary conference on Australian Federation[20] and 10 managers for a free conference on the Graffiti Legislation Amendment Bill 2011.[21] The resolutions were conveyed by message to the Assembly. In 1875, the Council requested a second free conference on the Lands Acts Amendment Bill, the first conference having been requested by the Assembly. The resolution requesting the second conference provided that the managers of the first conference be the managers on behalf of the Council in the second conference.[22]

Under 129(2), if the House requires, the managers for the Council will be selected by ballot, which would be conducted under SO 135. Under 1895 SO 145, provision was made for a ballot to be conducted for the Council managers for a conference requested by the Council, but no provision was made for a ballot to be conducted for the appointment of managers for a conference requested by the Assembly. Nevertheless, in 1895 a ballot was held for a conference on an Assembly bill at the request of a member when objection was taken to 5 of the 10 members proposed.[23] SO 129 now provides for a ballot to be conducted when required by the House for managers for the Council for conferences requested by either House.

19 *Minutes*, NSW Legislative Council, 11 December 1856, p 33.
20 *Minutes*, NSW Legislative Council, 13 November 1857, p 22.
21 *Minutes*, NSW Legislative Council, 13 September 2011, p 426.
22 *Minutes*, NSW Legislative Council, 6 August 1875, p 160.
23 *Minutes*, NSW Legislative Council, 20 November 1895, pp 123-124; *Hansard*, NSW Legislative Council, 20 November 1895, p 2760.

Members cannot be compelled to act as managers for the Council if their views do not coincide with the object of the conference. If a member proposed in the motion as a manager for the Council objects to being proposed, the motion can be amended. In 1867, on three members not answering the call over, a motion was proposed for three new members to be managers for the Council. One of the members so proposed, the Hon Edward Deas Thomson, objected to being named as one of the managers on the ground that he was not prepared to argue the questions that might arise at the conference. The President ruled that, nevertheless, the motion was in order. One of the three absent members then arrived and the motion before the House was amended to remove Mr Deas Thomson's name.[24]

The last free conference held by the Houses, on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill in 1978, was requested by the Assembly under section 5B of the *Constitution Act 1902*. The message from the Assembly advised that the Assembly managers would be the Premier and nine named ministers. The motion by the Leader of the Government in the Council agreeing to the request for the conference was amended to change the room in which the managers would meet. The Leader of the Opposition in the Council then moved that the managers for the Council would be himself, the Deputy Leader of the Opposition and eight opposition members.[25]

According to precedent, before the managers proceed to the conference, the Clerk, at the direction of the President, calls over the names of the managers and if a manager does not answer, a replacement is appointed by the House by motion.[26] On two occasions the call over of names did not take place prior to the conference.[27]

In 1927, a message from the Assembly requesting a conference, and the Council's message agreeing included an instruction to the managers to consider a particular matter in relation to the bill the subject of the conference.[28]

Background and development

Under the 1856 standing orders a notice of motion requesting a conference was to contain the names of the managers (SO 72), the Council managers were to be selected in the same manner as the members of a select committee (i.e. by ballot) if any one member so required (SO 73), and the Council managers were to be the same in number as those of the Assembly (SO 77).

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24 *Minutes*, NSW Legislative Council, 14 November 1867, pp 101-102.

25 *Minutes*, NSW Legislative Council, 25 January 1978, p 752.

26 See, for example, *Minutes*, NSW Legislative Council, 30 October 1867, p 91; 21 November 1895, p 33; 20 October 1897, p 161; 25 March 1912, p 135.

27 *Minutes*, NSW Legislative Council, 2 December 1912, p 154 (Gas Bill); 16 December 1915, p 230 (Fair Rents Bill).

28 *Minutes*, NSW Legislative Council, 10 March 1927, pp 142-143 (Industrial Arbitration (Living Wage Declaration) Bill).

The 1895 SO 145 included similar requirements, except that the managers were to be selected by ballot if the House, rather than 'any one member', so required (SO 145(b)). SO 146 repeated the requirement that every message for a conference with the Assembly was to state the names of the members appointed by the Council as its managers. These provisions were readopted in the 2004 rewrite of the standing orders, in slightly amended terms.

130. SITTING SUSPENDED

During any conference the sitting of the Council must be suspended.

Development summary		
1856	Standing order 74	Suspension of business
1870	Standing order 86	Suspension of business
1895	Standing order 149	Business suspended during conference
2003	Sessional order 130	Sitting suspended
2004	Sessional order 130	Sitting suspended

Standing order 130 ensures that when a conference is held, the Council must not be sitting.

Operation

Business of the House must be suspended for the duration of the conference.

The Minutes of Proceedings for the free conferences held have recorded that the managers names having been called over 'The Managers then proceeded to the Conference, attended by the Usher of the Black Rod, the business of the House being suspended during their absence'. The House would later resume and the managers having returned would report to the House.[29]

In these past examples, if the conference had not concluded by the time the House was due to resume, the business of the House was again suspended to allow the conference to proceed and the process of resuming and suspending business continued until the managers had returned and reported.[30] Usually this occurred within one sitting day even if the conference continued over more than one calendar day.[31] However, a new sitting day commenced on each subsequent day of the conference on the Land and Income Tax Assessment Bill in 1895. The only business transacted each day was the managers proceeding to the conference, a

29 See, for example, *Minutes,* NSW Legislative Council, 12 November 1896, p 229 (Mining Laws Amendment Bill); 25 March 1912, p 135 (Industrial Arbitration Bill).

30 *Hansard,* NSW Legislative Council, 11 March 1927, p 2273.

31 See, for example, *Minutes,* NSW Legislative Council, 23 November 1916, p 198 and 199 (Workmen's Compensation Bill 1916); 11 March 1927, pp 147-148 (Industrial Arbitration (Living Wage Declaration) Bill 1927); 31 January 1978, p 768 (Constitution and Parliamentary Electorates and Elections (Amendment) Bill 1978).

manager reporting that the conference had not yet concluded, the House granting leave for the managers to sit the next day and the House adjourning,[32] except for the final day when some business was transacted by the House before the conference met.[33]

Background and development

SO 74 of 1856 provided that during any conference between the Houses the business of the Council shall be suspended. SO 149 of 1895 was in similar terms.

In 1978, the managers for the conference on the Constitution Parliamentary Electorates and Elections (Amendment) Bill reported to the House twice that they had not yet concluded their deliberations. On each occasion the President advised that 'To suit the convenience of honourable members, I shall now leave the Chair [until a named date and time].' After agreement had finally been reached, and the managers' report had been received, the Council granted leave, on motion of the Leader of the Opposition, for its managers to meet again with the managers of the Assembly, after which the House continued to sit. The conference then met a further two times, both on subsequent sitting days but at times at which the House stood adjourned – the first time after the House rose[34] and the second before the House met.[35] Neither meeting was recorded in the minutes of the House.

SO 130 continues the provision first adopted in 1856.

131. TIME AND PLACE OF CONFERENCE

(1) The Council will appoint the time and place for holding a conference requested by the Assembly.

(2) When the Council requests a conference, it will agree to it being held at the time and place appointed by the Assembly. The agreement of the Council must be communicated by message.

(3) At a conference requested by the Assembly, the managers for the Council will assemble at the time and place appointed, and receive the managers of the Assembly.

Development summary		
1856	Standing order 78 Standing order 79	Time and place of holding Conference requested by Assembly
1870	Standing order 90 Standing order 91	Time and place of holding Conference requested by Assembly

32 *Minutes,* NSW Legislative Council, 21 November 1895, p 127; 22 November 1895, p 129; 26 November 1895, p 131 (Land and Income Tax Assessment Bill 1895).

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

34 *Hansard,* NSW Legislative Council, 2 March 1978, p 12327. House adjourned at 4.16 pm and the conference convened for 4.15 pm.

35 *Hansard,* NSW Legislative Council, 8 March 1978, p 12527. House met at 4.28 pm. Conference met at 9.30 am and concluded at 9.50 am.

Development summary		
1895	Standing order 147 Standing order 148	House agreeing to conference to appoint time and place of meeting Council to receive managers of Assembly
2003	Sessional order 131	Time and place of conference
2004	Sessional order 131	Time and place of conference

The House which agrees to the holding of the conference requested by the other House appoints the time and place for the conference, and the other House agrees to the time and place by message.

Operation

SO 131(1) provides that the Council appoints the time and place for holding a conference requested. The motion to set the time and place for the conference can be amended,[36] but under SO 131(2) when the Council requests a conference, it must agree to whatever time and place is set by the Assembly.

In 1916, the Council received a message from the Assembly requesting that the holding of the conference be deferred to a later day which was agreed to.[37]

In cases where the conference has failed to reach a resolution at its first meeting, the House has given leave for the managers to meet again at a set time, by motion.[38] In other cases, the time for the later meetings were arranged informally without a motion or announcement in the House.[39]

Under SO 131(3), at a conference requested by the Assembly, the managers for the Council receive the managers of the Assembly. At a conference requested by the Council, the managers of the Assembly receive the Council managers. In 1867, the Assembly managers failed to meet the Council managers at the appointed time as the Assembly did not receive the Council's message agreeing to the conference and setting the day and time until the day appointed for the conference.[40] The Assembly then sent a new request for a conference to which the Council again agreed, setting a new time and place.[41] The Assembly managers again failed to attend on the new appointed day as the Assembly did not meet on that day due to lack of a quorum. The Assembly again renewed its request for a conference which was agreed to by the Council appointing yet another day. [42]

36 See, for example, *Minutes,* NSW Legislative Council, 25 January 1978, pp 752-753.
37 *Minutes,* NSW Legislative Council, 29 March 1916, p 294.
38 *Minutes,* NSW Legislative Council, 21 November 1895, p 127; 22 November 1895, p 129; 26 November 1895, p 131; 23 November 1916, p 198.
39 *Minutes,* NSW Legislative Council, 11 March 1927, p 147; 31 January 1978, p 768.
40 *Votes and Proceedings*, NSW Legislative Assembly, 30 October 1867, pp 367-368; *Minutes,* NSW Legislative Council, 30 October 1867, p 91.
41 *Minutes,* NSW Legislative Council, 31 October 1867, pp 93-94.
42 *Minutes,* NSW Legislative Council, 13 November 1867, p 99.

In 1857, the Usher of the Black Rod announced to the House that the managers of the Assembly were waiting for the Council managers who had not arrived at the place of meeting by the set time. The Clerk having called over the names of the managers, who answered, the members proceeded to the meeting attended by the Usher of the Black Rod, and the Council was suspended.[43]

Background and development

Under the 1856 standing orders the time and place for a conference requested by the Assembly was to be appointed by the Council (SO 78), the Council was to agree to any time or place appointed by the Assembly for a conference requested by the Council (SO 78), and at conferences requested by the Assembly the Council managers were to assemble at the appointed place and time and receive the Assembly managers (SO 79).

The 1895 standing orders were in similar terms (SOs 147 and 148) except that they specified that the Council's agreement to the time and place appointed by the Assembly shall be communicated by message (SO 147), as does SO 131.

132. PROCEEDINGS AT ORDINARY CONFERENCE

(1) At ordinary conferences the reasons or resolutions of the Council will be communicated by the managers in writing. The managers will only receive communications from the managers for the Assembly in writing.

(2) At ordinary conferences the managers for the Council will deliver the reasons or resolutions of the Council to the managers for the Assembly, or receive from the managers of the Assembly the reasons or resolutions communicated by the Assembly.

Development summary		
1856	Standing order 80 Standing order 81	Ordinary Conferences The Like
1870	Standing order 92 Standing order 93	Ordinary Conferences The Like
1895	Standing order 150 Standing order 151	Communications at Ordinary Conference Proceedings at Ordinary Conference
2003	Sessional order 132	Proceedings at ordinary conference
2004	Standing order 132	Proceedings at ordinary conference

Unlike a free conference, managers for the Legislative Council and Legislative Assembly at an ordinary conference can only communicate in writing.

43 *Minutes,* NSW Legislative Council, 9 December 1857, p 34.

Operation

As prescribed in SO 128(3), there must be no fewer than five members from each House appointed as managers at an ordinary conference.

Whereas managers at a free conference can confer freely with the managers for the Assembly, SO132 provides that the role of a manager at an ordinary conference is to deliver the written reasons or resolutions of the Council to the managers for the Assembly, and to receive the written reasons or resolutions from the Assembly.

The procedures for requesting an ordinary conference, appointing managers and the time and place are the same as for a free conference.

At the only ordinary conference held, on the Australian Federation in 1857, the managers for the Council reported that they had presented the managers for the Assembly with a draft of a joint Address to the Governor–General, which had been agreed to by the Council, and had requested the concurrence of the Legislative Assembly. The Assembly managers replied that they would present the draft Address to their Speaker.[44] The matter was interrupted by prorogation before the Assembly replied.

Background and development

The 1856 standing orders provided that at ordinary conferences communications were to be in writing (SO 80) and that the managers' duty was confined to reading and delivering their reasons or resolutions to the Assembly managers and hearing read and receiving the Assembly managers' reasons or resolutions (SO 81). The 1895 standing orders were in similar terms (SOs 150 and 151), as is SO 132 adopted in 2004.

133. FREE CONFERENCE UNDER THE CONSTITUTION ACT

(1) When the Assembly, under section 5B of the Constitution Act 1902 requests a free conference, the Council must agree to the conference being held without delay. The Council must appoint the time and place for holding the free conference.

(2) At free conferences the managers for the Council may confer both orally and in writing with the managers for the Assembly.

Development summary		
1856	Standing order 82	Free conference
1870	Standing order 94	Free conference
1895	Standing order 152	Conduct of free conference

44 *Minutes,* NSW Legislative Council, 9 December 1857, pp 34-35.

Development summary		
1934	Standing order 152 Standing order 152A	Conduct of free conference Free Conference under the Constitution Act
2003	Sessional order 133	Free Conference under the Constitution Act
2004	Standing order 133	Free Conference under the Constitution Act

Section 5B of the *Constitution Act 1902* provides for the resolution of a deadlock on a bill introduced in the Assembly other than a bill appropriating revenue or moneys for the ordinary annual services of the government. Under section 5B, if the Council rejects, fails to pass, or passes an Assembly bill with amendments to which the Assembly does not agree and after three months in the same or the next session again rejects or fails to pass the bill or passes it with amendments to which the Assembly does not agree, a free conference of managers may be held. Section 5B also provides additional procedures to be conducted after a conference for resolving the deadlock, namely the holding of a joint sitting and ultimately the conduct of a referendum on the bill.

Standing order 133 provides that the Council must agree to a conference under section 5B without delay and must set the time and place for holding the conference.

Operation

Under SO 113(1), on such a message being received, the Council must agree to the holding of the conference without delay and appoint a time and place (SO 133(1)).

SO 133(2) provides that at a free conference managers may confer both orally and in writing. The provision applies not only to free conferences on section 5B bills but to all free conferences.

Aside from these requirements, a free conference under section 5B proceeds as any other free conference under the provisions of these standing orders.

Only two requests for a free conference under section 5B of the *Constitution Act 1902* have been made. The first, in 1960, concerning a bill to abolish the Council, was rejected by the Council as the Council considered that it had neither rejected nor failed to pass the bill within the meaning of section 5B and that therefore no situation had arisen where a free conference of managers was necessary or proper.[45] In subsequent court proceedings it was held that the Council's action in returning the bill to the Assembly had, in fact, amounted to a rejection of the bill under section 5B but that the failure to hold a free conference did not invalidate the subsequent holding of a joint sitting under section 5B or prevent the bill being put to a referendum.[46] Ultimately, the bill was submitted by way of referendum to the electors. A majority of electors not

45 *Minutes,* NSW Legislative Council, 6 April 1960, p 203; 7 April 1960, pp 213-215 (Constitution Amendment (Legislative Council Abolition) Bill).

46 (1960) 105 CLR 214 at 215-216 per the whole Court. See *New South Wales Legislative Council Practice,* pp 36-37.

approving the bill, the Council was confirmed as a constituent part of the Legislature of New South Wales.

The second request, in 1978, concerning a bill to reform the Council's electoral system, was agreed to by the Council.[47] The motion to agree to the Assembly's request was amended to omit the proposed meeting location, being the Legislative Assembly's Public Works Committee Room, and inserting instead the Legislative Council Committee Room.[48] The Notice Paper for the day set for the conference, 31 January 1978, (recorded at the end of the Minutes of Proceedings for 26 January 1978) shows the place and time of the meeting of the free conference.[49] In that case, the conference led to a settlement on the bill so that the other procedures prescribed by section 5B did not need to be applied.[50]

In both cases, the message received from the Assembly requesting a free conference made it clear that the free conference was pursuant to section 5B of the *Constitution Act 1902*. For example, in 1978 the Council received the following message:

> Mr President –
> The Legislative Assembly, pursuant to the provisions of Section 5B of the Constitution Act, 1902, and having regard to the Legislative Council's Message dated 11 January, 1978, in reference to the Constitution and Parliamentary Electorates and Elections Amendment) Bill, requests a Free Conference with the Legislative Council with respect to the disagreement between the Legislative Council and the Legislative Assembly on the said Bill; and the Legislative Assembly has appointed ten of its members to be managers of such conference in its behalf and such managers shall be:
> Mr Wran, Mr Ferguson, Mr Renshaw, Mr Cox, Mr F. J. Walker, Mr Hills, Mr Day, Mr Jensen, Mr Crabtree and Mr Einfeld.[51]

Background and development

SO 82 of 1856 provided that at all free conferences the Council managers shall be at liberty to confer freely by word of mouth with the Assembly managers.

In 1895, the 1856 provision was superseded by SO 152 which was in similar terms.

In 1934, the opening words of SO 152 were amended slightly, and SO 152A was adopted to reflect the recent insertion of section 5B into the *Constitution Act 1902*. SO 152A provided that: 'If a free conference is requested by the Assembly in pursuance of section 5B of the Constitution Act 1902, the Council shall agree to the conference being held without delay, and the time and place for holding the same shall be appointed by the Council'.

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47 *Minutes,* NSW Legislative Council, 25 January 1978, p 752 (Constitution and Parliamentary Electorates and Elections (Amendment) Bill).

48 *Minutes,* NSW Legislative Council, 25 January 1978, pp 752-753.

49 *Minutes,* NSW Legislative Council, 26 January 1978, p 762.

50 See *New South Wales Legislative Council Practice*, Appendix 2.

51 *Minutes,* NSW Legislative Council, 25 January 1978, p 752; See also *Minutes,* NSW Legislative Council, 7 April 1960, p 213.

134. REPORT OF CONFERENCE

When a conference has concluded, the managers for the Council will report the proceedings to the Council in writing as soon as practicable.

Development summary		
1856	Standing order 83	Report from managers
1870	Standing order 95	Report from managers
1895	Standing order 153	Proceedings to be reported
2003	Sessional order 134	Report of conference
2004	Standing order 133	Report of conference

As a delegation of the Council, the managers for the Council are required to report back to the Council on the outcome of the conference held with managers of the Legislative Assembly.

Operation

When a conference has concluded, the Council managers report their proceedings and any agreement reached to the House as soon as practicable. In most cases, after tabling the report, a motion has been agreed to for the President to leave the chair and the House to resolve into committee of the whole to consider the report. The committee of the whole would then report to the House whether it agreed to the report.[52] However, in 1978, on the tabling of the report on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill, a motion was moved, by consent, that the report and attachment be adopted.[53]

The House, or committee of the whole, is not bound by any agreement reached by the managers. For example, in 1900 following the conference on the Sydney Corporation (Amending) Bill the managers reported that the conference had failed to arrive at any agreement.[54] The committee of the whole appointed to consider the report resolved to agree to the report of their managers. However, the motion for the House to adopt the committee's report was amended to add that the House continued to insist on its amendments but would be willing to consider any further proposal that would resolve the dispute,[55] in response to which the Assembly advised by message that it waived its objection to certain amendments. The Council subsequently agreed not to insist on some of its amendments.[56]

Managers have reported a range of outcomes including agreements made, that no resolution had yet been made, that the managers had failed to reach agreement, and that further instructions were required.

52 See, for example, *Minutes*, NSW Legislative Council, 15-16 December 1915, p 231.
53 *Minutes*, NSW Legislative Council, 31 January, 1, 2, 7 February, 1978, p 769.
54 *Minutes*, NSW Legislative Council, 20 September 1900, p 139.
55 *Minutes*, NSW Legislative Council, 26 September 1900, pp 144 and 145.
56 *Minutes*, NSW Legislative Council, 27 September 1900, p 148.

Following the first agreement to hold a conference on a bill, in 1867, a manager reported that having proceeded to the meeting room the Council managers were not met by any managers from the Assembly.[57] The Council subsequently received a message from the Assembly again requesting a conference, to which the Council agreed.[58]

Following the first four conferences on bills, the managers reported that the Assembly managers had put forward arguments in support of the Assembly's position on provisions of the bill and the Council managers sought further instructions from the House.[59] In three of those cases, a compromise was reached on the bill by the exchange of messages between the Houses after the managers' report had been considered in committee of the whole: the first by the Council not insisting on its amendments;[60] the second by the Council not insisting on some amendments but proposing further amendments which were considered at a second conference on the bill and then agreed to by the Assembly;[61] and the third by the Council not insisting on some amendment but insisting on others which the Assembly subsequently agreed to.[62] In the remaining case the motion that the President 'do now' leave the chair and the House to resolve itself into a committee of the whole to consider the manager's report was negatived on division and the order of the day for consideration of the report was later discharged.[63]

From 1891, the managers' reports usually recorded matters which had been agreed to by the managers from each House but there were exceptions. In 1899, following the conference on the Australasian Federation Enabling Bill, the managers reported that the conference had failed to arrive at a settlement of the matters of difference on the Council amendments to the bill. Consideration of the managers' report was set down as an order of the day for the following day when it was read by the Clerk and adopted by the House.[64] The bill lapsed on prorogation before it was further considered. Some two weeks later, in the next session of parliament, a bill of the same name was received from the Assembly and on the following day passed its remaining stages, an amendment to the commencement provisions being agreed to in committee of the whole, and the bill returned to the Assembly.[65]

In some cases, a manager reported that the conference had not concluded its labours and either the House gave leave for the managers to meet again[66] or the conference resumed without any formal action by the House.[67]

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57 *Minutes*, NSW Legislative Council, 30 October 1867, p 91.
58 *Minutes*, NSW Legislative Council, 31 October 1867, pp 93-94.
59 *Minutes*, NSW Legislative Council, 14 November 1867, p 102; 5 August 1875, p 157; 10 April 1879, p 169; 23 November 1881, p 134.
60 *Minutes*, NSW Legislative Council, 20 November 1867, p 104.
61 *Minutes*, NSW Legislative Council, 6 August 1875, pp 159-161.
62 *Minutes*, NSW Legislative Council, 23 November 1881, pp 134-135; 24 November 1881, p 138.
63 *Minutes*, NSW Legislative Council, 17 April 1879, p 174; 20 May 1879, p 227.
64 *Minutes*, NSW Legislative Council, 28 March 1899, p 34; 29 March 1899, p 35.
65 *Minutes*, NSW Legislative Council, 19 April 1899, p 10.
66 *Minutes*, NSW Legislative Council, 21 November 1895, p 127; 22 November 1895, p 129; 26 November 1895, p 131; 23 November 1916, p 198.
67 *Minutes*, NSW Legislative Council, 31 January 1978, p 768.

In 1978, the conference on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill first met on 31 January. On 1 February the House resumed and the managers reported that they had not yet concluded their deliberations. On the following day the House again resumed and the managers again reported that they had not yet concluded their deliberations. On 7 February the managers reported that they had reached an agreement with the Assembly managers based on a document attached. The report and attachment were adopted by the House and leave was granted, on motion, for the managers to meet again with the Assembly managers. A message was also received from the Assembly advising that leave had been granted to its managers to meet again with Council managers.[68] A second report by the managers advised that the conference had agreed that the bill should be amended to give effect to the agreement reached at the first conference and that action in this regard should be initiated in the Council.[69] In this case it was important that the Council initiate any further action to ensure that the section 5B procedures were not jeopardised. If the Assembly had initiated subsequent action, the Council could have further delayed progress of the bill.

The report of the free conference was set down for consideration at a later hour and a motion agreed to that a message be forwarded to the Legislative Assembly requesting the return of the bill and the Council's message of 11 January 1978 returning the bill to the Assembly.[70]

Background and development

Under SO 83 of 1856, after a conference had terminated the Council managers were to return to the House and report their proceedings. SO 153 of 1895 omitted the superfluous reference to returning to the House and added a requirement for managers to report 'forthwith'. SO 134 now provides for the Council to report proceedings 'as soon as practicable'.

68 *Minutes*, NSW Legislative Council, 31 January 1978, pp 768-769 and 770.

69 *Minutes*, NSW Legislative Council, 8 March 1978, p 876.

70 *Minutes*, NSW Legislative Council, 8 March 1978, p 876.

CHAPTER 24

BALLOTS

135. CONDUCT OF BALLOT

(1) When the House decides that a ballot will be conducted, the bells will be rung and the doors locked as in a division.

(2) Ballot papers will be distributed by the Clerks to all members in their places. Members must write on the ballot paper the name or names of the candidate or candidates for whom they wish to vote, and deposit it in the ballot box provided by the Clerk. If any voting paper contains a larger or lesser number of names than are to be elected, the voting paper will be rejected as informal.

(3) When all voting papers are collected, the Clerk will ascertain and report to the President the names of the members having the greatest number of votes, who will be declared elected.

(4) If two or more members have an equality of votes, the result of the ballot will be decided by casting vote of the President or other member presiding.

Development summary		
1856	Standing order 48 Standing order 49	Mode of selecting committees Lists of Members
1870	Standing order 58 Standing order 59	Mode of selecting committees Lists of Members
1895	Standing order 236 Standing order 237	Ballot – How conducted Mode of selecting committees
2003	Sessional order 135	Conduct of ballot
2004	Standing order 135	Conduct of ballot

Standing order 135 provides the process for conducting a ballot in the House, except for those conducted under standing order 13 for the election of the President and Deputy President.

The President is elected by exhaustive ballot, whereby successive ballots are taken until a candidate has the greatest number of votes which must also be a majority of votes of members present. (See SO 13).

In contrast, if there is an equality of votes after a ballot conducted under standing order 135, the result is decided by casting vote of the President or other member presiding.

The most common ballots conducted under standing order 135 are for election of crossbench members on Legislative Council committees. Under standing order 210, in the absence of agreement, the representation on a committee is to be determined by the House. In the majority of cases the House agrees to a motion that membership be determined by ballot.

Operation

Under the provisions of standing order 135, the House having agreed to a motion that a ballot is required, the division bells are rung for five minutes and the doors locked. While the Clerks distribute prepared ballot papers, the President informs the House of the procedure for conducting the ballot. Members must write on the ballot paper the name of the member, or members, they wish to vote for and deposit it in the ballot box provided by the Clerk. If a member writes a larger or lesser number of names than is required, the vote will be rejected. The Clerk tallies the votes and reports the result to the President. Usually members are appointed by the President to oversee the count. The member or members reported by the Clerk to have the greatest number of votes is declared by the President to be elected. If there is an equality of votes, the standing order provides for the President to decide by casting vote.

Ballot papers are pre-prepared with a space for members to write the name of their preferred candidate.

Legislative Council of New South Wales

ELECTION OF CROSSBENCH MEMBER TO PRIVILEGES COMMITTEE

BALLOT PAPER

I give my vote for

.....

As the bells are ringing, the Clerk conducts a final count of the prepared blank ballot papers and initials the top right hand corner of each ballot paper. If all members are present, 41 ballot papers will be distributed by the Clerk. If any members are absent, the Clerk will retain the excess ballot papers. Ballot papers are not available for scrutiny after the declaration of the result.

The most common ballot conducted under standing order 135 is for the crossbench membership on Legislative Council committees.[1] In the majority of cases, the ballot has been required to elect one of the two members who had nominated for one position on the committee. However, there are examples of a ballot to elect two members from three candidates, and, in 2002, ballots were held for the Crossbench membership on two joint select committees in which all 11 Crossbench members were candidates for the one crossbench position on the committee, one of which resulted in an equality of votes and a casting vote from the Chair.[2]

There have been only two other occasions on which a casting vote to determine the outcome of a ballot has been required.[3] The most recent occurred in May 2015, when a ballot was conducted in the absence of agreement among the crossbench members for membership on the Privileges Committee. The President reserved his casting vote until a later hour that day.[4] In 1925, a casting vote was required following a ballot held for the election of a senator (see below for further details). In giving his casting vote, the President gave as his reasons that the candidate was a returned soldier, that he followed practice on a former occasion and that the candidate received the greatest number of first preference votes.[5]

Background and development

Prior to 2003, the provision for a ballot was only in relation to a motion for a select committee. Under the provisions of 1856 SOs 47 and 48, a notice of motion for a select committee was to include the names of members to serve on the committee. On the motion being moved, a member could require that the members instead be chosen by members providing the Clerk with a list of names of members to serve on the committee and the Clerk declaring the members with the most votes. If any list contained more than the proper number of names it would be rejected. In the case of an equality of votes, the President would determine who would serve on the committee (SO 49). Once a request was made, the House would proceed immediately to a ballot.[6]

1 See, for example, *Minutes,* NSW Legislative Council, 13 September 2012, p 1232; 14 May 2015, pp 108-109; 26 May 2015, p 118.
2 *Minutes,* NSW Legislative Council, 19 March 2002, pp 70-74 (Joint Select Committee on Bushfires and Joint Select Committee on the Quality of Buildings).
3 *Minutes,* NSW Legislative Council, 19 March 2002, p 74.
4 *Minutes,* NSW Legislative Council, 26 May 2015, pp 118 and 119.
5 *Hansard,* NSW Legislative Council, 1 January 1925, pp 136-147.
6 See, for example, *Minutes,* NSW Legislative Council, 31 August 1859, p 6.

In 1889, it was ruled that the question on an amendment to a motion for the appointment of a member to a select committee could not be put once a ballot had been required.[7]

In 1932, an amendment was moved to the second reading of the Meat Industry (Amendment) Bill to refer the bill to a select committee and naming the members of the committee. On the President putting the question that the bill be so referred, a point of order was taken as to when a motion could be moved under SO 236 (of 1895) for membership to be chosen by ballot. The President ruled that it was only when the question had been agreed to 'That the bill be referred to a select committee', that a ballot could be requested. The President intimated he would put the question seriatim. On the question that the bill be referred to the committee being agreed to, he then put the question that that the members proposed be the members of the committee. An amendment was moved that the membership be chosen by ballot. The amendment was negatived on division, following which the original motion for named members was also negatived on division, the President casting his vote with the 'noes'. A further motion was then moved naming different members to be members of the committee. Debate on the motion was subsequently adjourned until the next sitting day, on division.[8] (See footnote for outcome of proceedings).

The early examples of the House conducting ballots for membership of select committees were in the main for membership of a select committee to prepare the Address-in-Reply[9] and for membership of a select committee to consider a bill.[10] In 1876, the President ruled that it was within the power of any member to move that a committee be chosen by ballot, which would ensure appointment of whatever committee membership the House desires.[11]

In 1890, the Chair of Committees ruled that although under the standing orders the only case in which a ballot could be taken was in the election of members of select committees there was nothing in the standing orders which prevented a ballot being used for another purpose, namely the appointment of delegates to the National Australian Convention. The Chair further ruled that as the committee had agreed that a ballot should be conducted, it was appropriate that such ballot be conducted in committee of the whole.[12]

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7 *Minutes,* NSW Legislative Council, 12 June 1889, p 97; *Hansard,* NSW Legislative Council, 12 June 1889, p 2088.

8 *Minutes,* NSW Legislative Council, 16 December 1932, pp 202-204. On 20 December 1932, standing orders were suspended by motion on notice to allow motions for the rescission of the order of the day referring the bill to the select committee and the resolution adjourning the debate on the motion for membership of the committee. The rescission motions being agreed to, the second reading was again moved and agreed to, the bill passed its remaining stages and was returned to the Assembly without amendment. *Minutes,* NSW Legislative Council, 20 December 1932, pp 214-217.

9 *Minutes,* NSW Legislative Council, 8 December 1858, p 2; 31 August 1859, p 6; 25 September 1860, p 3.

10 *Minutes,* NSW Legislative Council, 28 July 1848, p 57 (Chinese Immigration Bill); 23 September 1862, p 83 (Coal Fields Regulation Bill).

11 *Sydney Morning Herald*, 3 March 1876, p 3 (Medical Bill).

12 *Hansard,* NSW Legislative Council, 8 October 1890, p 4332 (Ballot conducted in committee of the whole and carried on division).

In 1925, a ballot was held for the election of a senator. Under the rules for the election, as three persons were proposed and seconded a ballot was required and the President declared the time at which the ballot would close. At the time declared by the President, the scrutineers and the Clerks retired to conduct the scrutiny of the votes. Of the 140 votes cast, no candidate had an absolute majority. The person with the fewest first preference votes was excluded and the second preference votes distributed among the remaining two candidates resulting in an equality of votes. In giving his casting vote the President gave as his reasons that the candidate was a returned soldier, that he followed practice on a former occasion and that the candidate received the greatest number of first preference votes.[13]

Standing order 135 omitted the reference to a ballot being conducted on a motion for a committee, thereby extending the provision to other matters, such as the election of delegates to a free conference under SO 129.

The 1856 standing orders provided the ballot would be conducted by members giving the Clerk a list of the members they wished to serve on the committee, not exceeding the number originally proposed, and the members with the greatest number of votes were declared members of such committee. The 1856 and 1870 standing orders were less clear than current standing orders that it was a secret ballot. However, ballots were nonetheless conducted so that members could cast their vote without revealing it to other members. In 1889, the President ruled that ballots were conducted specifically to avoid a personal contest which might otherwise arise between members for a position on the committee.[14]

1895 SO 236 additionally provided for members to place their ballot papers 'in the hands of the Clerk, giving time for him to note one paper… before another is presented' and prescribed that the Clerk was to count the votes by marking off and initialling the names of members presenting a ballot paper on a list which was to be kept with the records of the ballot.

Until 2003, there was no provision in the standing orders for the President to cast a vote in the case of a ballot resulting in an equality of votes.

13 *Hansard,* NSW Legislative Council, 1 January 1925, pp 136-147.
14 *Hansard,* NSW Legislative Council, 12 June 1889, p 2090.

CHAPTER 25

PUBLIC BILLS

136. INITIATION

(1) A bill, other than a bill received from the Assembly, must be initiated by a motion for leave to bring in a bill.

(2) A member having leave to bring in a bill must present a copy to the House.

(3) The title must agree with the order of leave, and no clause may be inserted in a bill which is irrelevant to its title.

(4) A bill not in accordance with the order of leave, or with the rules and orders of the House, will be ordered to be withdrawn.

(5) The precise duration of every temporary bill must be expressed in a distinct clause at the end of the bill.

(6) A second bill may only be introduced under the original order of leave when the order for the second reading or any subsequent stage of the original bill has been discharged.

(7) When the original bill is withdrawn, the order for the introduction of the second bill may be read.

Development summary		
1856	Standing order 106 Standing order 107 Standing order 108 Standing order 109 Standing order 110	Bills, how initiated Draft of bill Contents, and Title Subject of bill Duration of bill
1870	Standing order 119 Standing order 120 Standing order 121 Standing order 122 Standing order 123	Bills, how initiated Draft of bill Contents, and Title Subject of bill Duration of bill
1895	Standing order 163 Standing order 164 Standing order 165 Standing order 170	How initiated Duration of Temporary Laws to be distinctly expressed First Reading Discharge of Order and introduction of Second Bill

Development summary		
1988	Sessional order	Introduction of Public Bills
1995	Sessional order	Introduction of Public Bills
2003	Sessional order 136	Initiation
2004	Standing order 136	Initiation

Standing order 136 provides the process for a member to seek the authorisation of the House to introduce a bill for an Act to create a new law or for an Act to amend an existing law.

Operation

Under the *Constitution Act 1902* bills may originate in either House, except for money bills which must be introduced in the Assembly. SO 136 sets out the procedures for introducing a bill in the Council.

Fluctuations in the number of bills introduced in the Council have largely depended on the number of independent and crossbench members in the House and whether the government had control of both the Assembly and the Council. Between 1949 and 1984, no government bills were introduced in the Legislative Council. After the transition to a fully elected House following reconstitution, the Leader of the Government in the Council advised the House that the practice would resume of bills for which Legislative Council ministers were responsible being introduced in the Legislative Council.[1] On the same day, notice was given for the introduction of the Dairy Industry Amendment Bill.[2]

Motion for leave to bring in a bill

A bill is initiated by a motion moved on notice 'That leave be given to bring in a bill for an Act to …' followed by the 'long title' of the bill. The long title sets out the scope or subject matter of the bill proposed. The bill subsequently introduced must conform to the long title and any amendments considered in committee of the whole must also agree with the purpose of the bill as expressed in the order of leave. A bill not in accordance with the order of leave, or with the rules and orders of the House, will be ordered to be withdrawn.

There is no time frame specified in which a bill must be introduced following leave being granted. The bill can be introduced immediately, or at a subsequent time. There are examples of leave being granted and the bill not being subsequently presented,[3] or presented some time later, with the minutes usually noting the date

1 *Hansard,* NSW Legislative Council, 2 May 1984, p 48.
2 *Minutes,* NSW Legislative Council, 2 May 1984, p 22.
3 See, for example, *Minutes,* NSW Legislative Council, 12 December 1991, p 386 (Legal Profession (Public Accountability) Amendment Bill).

on which leave had been obtained.[4] There are precedents of an order of leave which lapsed on prorogation being restored in the subsequent session.[5]

The introduction of a bill at a subsequent time was common when bills were prepared at a members' own expense. Gaining leave of the House to introduce the bill before having it prepared would save time, effort and money being spent on the preparation of a bill, only for the House to object to the bill being introduced. Since 1991, private members have been able to access the resources of the Parliamentary Counsel's Office for the drafting of bills and amendments, although it is still open to a member to have a bill drafted at their own expense.[6]

There is no reference in SO 136 for debate on a motion for leave to be given to bring in a bill, although there are precedents of debate occurring.[7] *Erskine May* discusses the scope of such debate:

> In moving for leave to introduce a bill a Member may explain the object of the bill and give reasons for its introduction, but, normally, this is not the proper time for any lengthened debate upon its merits. If the motion be opposed, or if there is a likelihood of its being negatived and no further occasion arising for discussion, or if there are grounds of urgency, this opportunity may be taken for a full exposition of the character and objects of the bill; but, except under such circumstances, a prolonged debate on the introduction of a bill can rarely serve any useful purpose, and cannot fail to anticipate discussion of the principle of the bill proper to the second reading.[8]

Presidents' rulings support the principle articulated in *May* that the scope of debate on leave is limited. On 20 March 1935, a point of order taken during debate on the motion

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4 See, for example, *Minutes,* NSW Legislative Council, 25 March 1875, p 21; 17 June 1875, p 79 (Cruelty to Animals Act Amendment Bill, introduced as Animals Protection Bill); 5 May 1875, p 40; 12 May 1875, p 49 (Innkeepers' Liability Bill); 30 March 1876, p 113; 5 April 1876, p 117 (Appeals from Summary Convictions Bill); 22 May 1890, p 38; 26 June 1890, p 76 (Practice of Medicine and Surgery Regulation Bill, introduced as Medical Bill); 8 May 1895, p 194 (as formal business); 29 May 1895, p 202 (No-Liability Mining Companies' Act Repeal Bill); 21 October 1897, p 163; 17 November 1897, p 186 (Inebriates Control and Treatment Facilitation Bill, introduced as Inebriates Bill); 10 August 1899, p 40; 16 August 1899, p 45 (Liquor Adulteration Bill, introduced as Adulteration of Liquors Bill); 5 August 1903, p 56; 12 August 1903, p 60 (Bills of Sale (Amendment) Bill).

5 See, for example, *Minutes,* NSW Legislative Council, 10 November 1988, p 244; 10 May 1990, p 147; *Hansard,* NSW Legislative Council, 10 May 1990, p 2930 (Citizens Initiated Referendums Bill).

6 This arrangement was part of the Memorandum of Understanding between the Liberal/National Government under Premier Greiner and the Independent members of the Assembly (also known as the Charter of Reform), 31 October 1991, p 3.

7 See, for example, *Minutes,* NSW Legislative Council, 30 September 1971, p 139; 21 October 1971, p 164; *Hansard,* NSW Legislative Council, 30 September 1971 pp 1671-1688; 21 October 1971, pp 2232-2352 (Clutha Development Pty Limited Agreement Repeal Bill); *Minutes,* NSW Legislative Council, 10 November 1988, p 223; *Hansard,* NSW Legislative Council, 10 November 1988, p 3092 (Interpretation (Amendment) Bill).

8 Sir Charles Gordon KCB (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (Butterworth & Co. Ltd, 20th ed, 1983), p 516.

for leave to bring in the Bills Annulment Bill questioned whether the member was in order in discussing the merits and demerits of the bills that the Bills Annulment Bill sought to annul. The President ruled that in asking for leave the member was entitled to submit to the House any reason why leave should be given.[9]

In 2000, an amendment to a sessional order set time limits on the motion for leave to bring in a private members' bill.[10] The provision was adopted as sessional order 187 in 2003, under which debate on the question for leave to bring in a private members' bill is limited to a one-hour debate, with the mover of the motion and any other member speaking for not more than 10 minutes. The standing orders do not impose any time limits on debate on the motion for leave to introduce a government bill or any other stage of consideration of a government bill. A sessional order adopted on 3 August 2011 and in the subsequent sessions set time limits for the second and third reading debates, and in committee of the whole, but was silent on the motion for leave.[11]

The standing orders are also silent as to whether a motion for leave to bring in a bill can be amended. While there are examples of a notice of motion being amended by leave before being moved,[12] no precedents could be found of an amendment by motion in the Legislative Council. According to *Erskine May* there is also no provision under the standing orders of the House of Commons for amendments to motions for leave.[13]

There is nothing to prevent the motion for leave to bring in a bill being moved as formal business. On 31 August 1916, the motion for leave to bring in the Female Attire Relief Bill was moved as formal business and agreed to. The bill was then presented, read a first time and printed. The second reading of the bill was set down for 'this day week'.[14] On 4 May 1989, the motion for leave to introduce the Unborn Child Protection Bill was moved as formal business and agreed to but the bill was not immediately presented and read a first time as in the above case.[15]

There are few precedents where leave has not been granted to introduce a bill. The motion for leave to introduce the Members of the Legislative Council Disqualification

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9 *Minutes,* NSW Legislative Council, 20 March 1935, p 316; *Hansard,* NSW Legislative Council, 20 March 1935, p 6398.

10 *Minutes,* NSW Legislative Council, 5 April 2000, pp 356-359.

11 *Minutes,* NSW Legislative Council, 3 August 2011, pp 296-298; 9 September 2014, p 11; 6 May 2015, p 59.

12 See, for example, *Minutes,* NSW Legislative Council, 26 September 1991, p 183; 12 December 1991, pp 387-388; 27 April 1993, p 112; 31 August 2000, p 615; 9 May 2002, p 163; 22 May 2003, p 115; 24 February 2005, p 1254; 28 September 2006, p 247.

13 Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011), p 537. Although an earlier edition of *Erskine May* states that amendments have been made or proposed to a question for leave to bring in a bill, either hostile to the motion or designed to alter it. *Erskine May*, 20th ed, p 516.

14 *Minutes,* NSW Legislative Council, 31 August 1916, p 61; *Hansard,* NSW Legislative Council, 31 August 1916, p 1300. The order of the day was subsequently discharged and the bill withdrawn, *Minutes,* NSW Legislative Council, 7 September 1916, p 76.

15 *Minutes,* NSW Legislative Council, 4 May 1989, p 652.

Bill in 1878 was negatived on division.[16] On 30 September 1971, the motion for leave to bring in the Clutha Development Pty Limited Agreement Repeal Bill, a private member's bill, was negatived on division.[17]

Motions for leave to bring in a bill have been agreed on division. In October 1988, the Government opposed leave for the introduction of a private members' bill to remove the embargo on a former Ombudsman to disclose to a select committee information obtained by him in the course of his office. The Government argued that as it intended to introduce legislation to lessen the restrictions on the Ombudsman it would be more appropriate for the member to seek to amend the Government's legislation when it was before the House rather than introduce an alternative bill. The motion for leave was subsequently agreed to on division.[18]

In November 1988, the Leader of the Government stated why, in his view, leave ought always to be granted:

> By and large the Government takes the view that it is a right and proper role for Parliament to examine private members' bills brought before the House in a responsible way by members of Parliament and that the procedural motion that leave be granted to bring in a bill should be treated by the Government as a procedural motion. The acceptance by the Government of that motion should not be in any way seen by any member of the House as an acceptance of the bill, because in a theoretical sense it could be argued that the Government at that time is not even aware of the contents of the bill.[19]

Leave to a member to present a bill does not indicate agreement with the purpose of the bill as stated in the long title. In 1997, the motion for leave to bring in the Voluntary Euthanasia Referendum Bill was agreed to, the bill presented, and the first reading negatived on division.[20]

A bill not in accordance with the order of leave, or with the rules and orders of the House, will be ordered to be withdrawn. Bills must also conform with the provisions of the Constitution.

The short title of a bill should describe the content of the bill in a straightforward manner. An argumentative title or a slogan is not permitted.[21] In 2014, the President made a statement concerning the short title of a bill in a notice of motion and, according

16 *Minutes,* NSW Legislative Council, 10 April 1878, p 66.

17 *Minutes,* NSW Legislative Council, 21 October 1971, p 164; *Hansard,* NSW Legislative Council, 21 October 1971, pp 2232-2252

18 *Minutes,* NSW Legislative Council, 13 October 1988, pp 152-154; *Hansard,* NSW Legislative Council, 13 October 1988, pp 2206-2218 and 2232-2239 (Ombudsman (Parliamentary Select Committees) Amendment Bill).

19 *Hansard,* NSW Legislative Council, 10 November 1988, p 3092 (Interpretation Amendment Bill).

20 *Minutes,* NSW Legislative Council, 15 May 1997, pp 710-711; *Hansard,* NSW Legislative Council, 15 May 1997, pp 8658-8659.

21 *Erskine May*, 24th ed, p 527.

to SO 71(8), ruled the notice out of order. The notice of motion was amended by the Clerk before it was published in the Notice Paper.[22]

Second bill introduced on previous leave

Under SO 136(6), a second bill can be introduced on the original order of leave if the order of the day has been discharged and the original bill withdrawn. The order of the day can be discharged and the bill withdrawn at any stage of consideration of the bill. For example, on 12 September 1895, the order of the day for further consideration in committee of the whole on the No-Liability Mining Companies Bill was discharged and the bill withdrawn, and a new bill introduced and read a first time on 18 September 1895 according to leave of 15 August 1895.[23]

In 1993, the order of the day for the second reading of the Public Hospitals (Conscientious Objections) Bill lapsed on prorogation. The bill was restored to the Notice Paper under standing order 200.[24] On 14 October 1993, the order of the day for the second reading was discharged and the bill withdrawn. A motion was then agreed to that, according to the original leave of 19 November 1992, a new bill be read a first time.[25] Consideration of the bill was again interrupted by prorogation.

Also in 1993, the order of the day for the resumption of the second reading debate on the Legal Profession Reform Bill and cognate Maintenance and Champerty Abolition Bill was discharged and the bills withdrawn. According to original leave of 16 September 1993, the second bills were presented, read a first time and printed. The bills were declared urgent under sessional order and passed by the Council the next day.[26]

In 2002, the order for the day for resumption of the second reading debate on the Public Health Amendment (Juvenile Smoking) Bill was discharged and the bill withdrawn. According to original leave, a second bill was read a first time, the second reading moved, and debate adjourned following the mover's second reading speech until five calendar days ahead.[27]

On 8 February 1877, a motion was agreed to for leave to withdraw a bill and substitute another bill in lieu thereof because the bill as introduced 'provided for an appropriation

22 *Minutes,* NSW Legislative Council, 5 March 2014, p 2332; *Hansard,* NSW Legislative Council, 5 March 2014, p 27017. The notice of motion as given included the short title of the bill as Central Coast Water Catchments Protection (No ifs, no buts, a guarantee) Bill 2014.

23 *Minutes,* NSW Legislative Council, 12 September 1895, p 30; 18 September 1895, p 33 (No-Liability Mining Companies Bill 1895).

24 *Minutes,* NSW Legislative Council, 22 April 1993, p 106.

25 *Minutes,* NSW Legislative Council, 14 October 1993, p 305; *Hansard*, NSW Legislative Council, 14 October 1993, pp 3755-3756.

26 *Minutes,* NSW Legislative Council, 27 October 1993, p 331; *Hansard,* NSW Legislative Council, 27 October 1993, p 4505.

27 *Minutes,* NSW Legislative Council, 24 October 2002, p 430.

of the consolidated revenue, and might be considered as imposing a tax' and was therefore a money bill.[28]

Temporary bills

The provision under 136(5), that the precise duration of every temporary bill must be expressed in a distinct clause at the end of the bill, has no practical application for the House when considering a bill.[29]

Background and development

Under SO 136(1) a bill, other than a bill received from the Assembly, is initiated by a motion for leave to bring in a bill. The previous standing order 163 was similar in its provision. The earlier standing orders, however, differed. Under standing order 106 of 1856 and 119 of 1870, a bill initiated in the Council was introduced either by a motion for leave specifying its general objects, or by a motion for a committee of not less than two members to prepare and bring it in, or by an order of the House on the report of a select committee.

The predecessors to standing order 136(2) were also different in their provisions. Under SO 107 of 1856, after leave was granted to bring in a bill, or on a committee being appointed to bring in a bill, a fair copy of the bill was to be presented 'on an early day', meaning as soon as possible.[30] At a later time, the bill would be presented and read a first time. The introduction of a bill at a subsequent time was also common when bills were prepared at a member's own expense, but there has been only one example of a private member's bill being prepared other than by the Parliamentary Counsel's Office since 1991, when private members were able to access the resources of the Parliamentary Counsel's Office for the drafting of bills and amendments. This process was formally established by a Memorandum of Understanding between the Liberal/National Government under Premier Greiner and the Independent members of the Assembly (also known as the Charter of Reform) on 31 October 1991.[31]

The 1895 standing order omitted the requirement for a bill to be presented 'on an early day'. Instead, SO 165 provided that when leave had been given to bring in a bill 'and a fair copy of the bill had been presented in pursuance of leave granted ... a motion may be made, that this Bill be now read a first time'.

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28 *Minutes,* NSW Legislative Council, 8 February 1877, p 32; *Sydney Morning Herald*, 9 February 1877, p 2 (Vaccination Bill).

29 See, for example, *Ozone Protection Act 1989* s 39; *Gene Technology (GM Crop Moratorium) Act 2003* s 43.

30 See, for example, *Minutes,* NSW Legislative Council, 29 October 1856, p 18; 12 November 1856, p 22 (Destitute Children's Society Bill shown as Destitute Children's Bill).

31 Memorandum of Understanding between the Liberal/National Government under Premier Greiner and the Independent members of the Assembly, 31 October 1991, p 3.

A strict reading of SO 136(2) could suggest that, having leave to bring in a bill, the member 'must present a copy to the House' at that time. This interpretation would be inconsistent with precedent. Rather, the standing orders can be interpreted to mean that a copy of the bill must be presented to the House before the bill can progress to the printing and first reading stage.

Under previous standing orders there was no reference to private members' bills and it was rare for a private member's bill to pass the House. On 31 August 1916, leave was given to introduce a private member's bill, entitled the Female Attire Relief Bill. The bill was read a first time, and the second reading set down as an order of the day 'for this day week'. The order of the day for the second reading was subsequently discharged and the bill withdrawn.[32]

The provision under SO 136(5) that the precise duration of every temporary bill must be expressed in a distinct clause at the end of the bill was contained in the same terms in 1895 SO 164 and in slightly modified terms under SO 123 of 1870 and SO 110 of 1856. Although the provision was also in the Legislative Assembly standing orders adopted in 1894, it has been omitted from the current standing orders in that House. The same rule applies in the House of Commons with the exception of the requirement for the clause to be 'at the end of the bill'.[33]

The provision under SO 136(6) that a second bill can be introduced on the original leave, but only after the order had been discharged and the bill withdrawn, was introduced in 1895 in SO 170. Although there was no provision in the pre-1895 standing orders for a second bill to be introduced on original leave there is precedent. In 1869, the Commons Regulation Bill was withdrawn and a second bill presented.[34]

Under the pre-2003 standing orders, once leave was granted and a 'fair copy of the Bill had been presented in pursuance of leave granted, or when a Bill shall be brought from the Assembly' the bill could be read a first time, printed, and a motion could be moved without notice for the second reading to be set down for a future day, in practice usually the next sitting day.

On 13 October 1987, the Government proposed a sessional order to allow a motion for leave to be given to bring in a bill to be moved without notice. If agreed to, the first reading could be moved forthwith, following which the motion for the second reading could be moved or set down for a future day. If the motion for the second reading was moved immediately after the first reading, debate on the motion was to be adjourned after the mover's second reading speech until the next sitting day or a later day. In support of the sessional order the minister stated that the procedure would enable members to consider the contents of the bill prior to the second reading debate. The Opposition was opposed to the sessional order on the grounds that it would limit debate and allow the

32 *Minutes,* NSW Legislative Council, 31 August 1916, p 61; *Hansard,* NSW Legislative Council, 31 August 1916, p 1300; *Minutes,* NSW Legislative Council, 7 September 1916, p 76.

33 Standing order 81, *Erskine May,* 24th ed, p 545.

34 *Minutes,* NSW Legislative Council, 6 October 1869, p 13; 13 October 1869, p 17.

government to introduce bills without warning. The speaker for the Opposition referred to the provision in the Assembly which required a bill to be adjourned after the mover's second reading speech for a future day which must be at least five clear days ahead. An amendment to refer the proposed sessional order to the Standing Orders Committee was agreed to.[35] The committee did not report before the House was prorogued.

In the next session, the new Government introduced a sessional order varying the rules for introducing public bills. The sessional order differed from that proposed in the previous session in that it retained the requirement for notice to be given of a motion for leave to bring in a bill, and further required that after the mover's second reading speech, the debate was to be adjourned for five clear days ahead unless the bill was declared urgent.[36] The sessional order was adopted in the same terms in subsequent sessions until 24 May 1995, when the House adopted a varied sessional order under which debate was to be adjourned until a future day which must be at least 'five calendar days ahead'. This provision was incorporated in standing order 137 in 2004. The provision relating to declaring a bill urgent was incorporated in standing order 138. (For more detail concerning five calendar days see SO 137).

137. FIRST READING

(1) The question on the first reading and printing will be taken together as one motion, be put by the President immediately after the bill has been received, and be determined without amendment or debate.

(2) On every order for the reading of a bill the short title only will be read.

(3) After the first reading, on any bill other than a bill received from the Legislative Assembly, the second reading may be moved immediately or made an order of the day for a later hour or for a future day. Immediately following the second reading speech by the mover, debate is to be adjourned until a future day which must be at least five calendar days ahead.

Development summary		
1856	Standing order 111 Standing order 112 Standing order 113	Bills, how read First reading Second reading
1870	Standing order 124 Standing order 125 Standing order 126	Bills, how read First reading Second reading
1895	Standing order 162 Standing order 165 Standing order 166	Title only read First reading Day fixed for second reading
1988	Sessional order	Introduction of Public Bills

35 *Minutes,* NSW Legislative Council, 13 October 1987, p 1111; 15 October 1987, pp 1142-1143.
36 *Minutes,* NSW Legislative Council, 24 May 1988, p 54.

Development summary		
1995	Sessional order	Introduction of Public Bills
2003	Sessional order 137	First reading
2004	Standing order 137	First reading

Standing order 137 is an amalgamation of 1895 standing orders 162, 165 and 166 which provided for the first reading, printing and second reading of a bill.

After leave has been given to bring in a bill and the bill has been presented, or a bill has been received from the Assembly, a motion is moved that the bill be read a first time and printed. Under standing orders since 1856, on the motion being agreed to, the short title only is read.

The motion that a bill be printed is both a legacy of practical arrangements of former days when the printing of bills was a slow process, and a procedural motion which results in a bill being available to members and the public.

After the House has agreed to the first reading, the motion for the second reading can be moved. Standing order 137, with standing order 154[37] which relates to Assembly bills, provides the rules for these procedures.

Operation

After a Council bill has been presented, or an Assembly bill has been received, a motion is moved that the bill be read a first time and printed. The House having agreed to the first reading and printing, the Clerk reads the short title of the bill.

The order for printing after the first reading, results in the 'First Print' copy. Only after the bill has been presented, read a first time and printed is it available to the public.

After the first reading of a Council bill, the second reading may be moved immediately or made an order of the day for a later hour or a future day. Immediately following the second reading speech by the mover, debate is to be adjourned until a future day which must be at least five calendar days ahead unless the bill is declared an urgent bill under SO 138.[38] The adjournment of debate on the motion for the second reading on a bill for five calendar days is rarely debated, but debate is not unprecedented.[39]

The motion for the second reading of an Assembly bill can only proceed immediately after the first reading if standing orders have been suspended,[40] or the bill declared

37 Under SO 154, a bill introduced in the Assembly will proceed in the same manner as bills originated in the Council, except for initiation.

38 *Minutes,* NSW Legislative Council, 21 February 2013, p 1478.

39 See, for example, *Minutes,* NSW Legislative Council, 21 February 2013, p 1478.

40 See, for example, *Minutes,* NSW Legislative Council, 30 October 1984, p 222 (National Crime Authority (State Provisions) Bill).

urgent.[41] This practice is consistent with the principle that the various stages of a bill should be considered over consecutive sittings and with previous rules of the House. In practice, standing orders are usually suspended to allow the bill to proceed through all stages in the present or any one sitting of the House.

Background and development

Motions for first reading and printing

Under SO 112 of 1856 and SO 125 of 1870, the first reading and printing of a bill was taken as one motion and the bill was to be printed 'with as little delay as possible'. This was not always possible. In 1874, consideration of the second reading of a bill was postponed on account of a lack of printed copies of the bill, the President ruling that there would be extreme impropriety in proceeding with a bill, the order for printing of which had not been complied with.[42]

Although the standing orders were silent on the ability to debate or amend the motion, motions were debated[43] and amendments moved to have the first reading of a bill read 'this day three month'[44] or 'this day six months'.[45] 'Reasoned amendments', by which the House explains its reasons for declining to give a bill a second reading, have also been moved to the motion for the first reading. In 1873, following a point of privilege being made by the President, a reasoned amendment to the first reading of the Legislative Council Bill No 2 to omit all words after 'That' and insert instead 'this Council declines to take into consideration any Bill repealing those sections of the Constitution Act which provide for the Constitution of the Legislative Council unless such Bill shall be originated in this Chamber' was agreed to.[46]

The first reading has been superseded by the moving of a motion as a matter of privilege. In 1959, on the message transmitting the Constitution Amendment (Legislative Council Abolition) Bill for concurrence being read, and before the first reading of the bill was moved, a motion moved as a matter of privilege was agreed to for the message to be returned to the Assembly advising that the Council declined to consider the bill, arguing

41 Although SO 138 has only been applied to Council bills there is nothing to suggest that an Assembly bill could not be declared urgent under this standing order.

42 *Sydney Morning Herald,* 12 November 1874, p 2.

43 See, for example, *Minutes,* NSW Legislative Council, 29 October 1856, p 19 (Sillitoe's Trust Estate Bill); 12 October 1859, p 25 (Church of England Synods Bill); 21 December 1876, p 12 (Criminal Law Amendment Bill); 9 September 1885, p 9 (Public Health Bill); 29 April 1981, pp 505-506 (Election Funding Bill); 12 June 1984, p 242 (Public Hospitals (Visiting Practitioners) Amendment Bill); 2 April 1987, p 772 (City of Sydney Bill).

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

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

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

that 'where any alteration is to be made in the constitution of one House of Parliament that alteration must originate in the House immediately affected by it'.[47] When the bill was again received by the Council in accordance with section 5B of the *Constitution Act 1902*, a motion was again moved as a matter of privilege and agreed to returning the message and declining to consider the bill.[48]

In 1895, the terms of SO 165 and 166 varied the procedure to provide that the first reading be considered separately to the motion for printing. The terms of standing order 165 and 166 appear to be based on the Legislative Assembly standing order 251 adopted the previous year.

Although there was again no provision made for debate on the motion for the first reading, there were occasions on which debate occurred. In 1922, on the mover of the first reading of a bill commencing to speak, a point of order was taken that based on practice in the Imperial Parliament, the first reading is a mere formality and is not open to debate. Having considered the matter, President Flowers stated that there was no real guidance in *Erskine May,* which only stated that the first reading was rarely opposed and that in the Commons the motion could only be opposed by vote. The President stated that, in his mind, this meant that the motion could be debated in the Lords but not in the Commons, and, as it was not for him to restrict the right to debate, ruled that it was permissible to debate a bill on its first reading.[49]

The ruling of President Flowers was consistent with an earlier ruling of President Hay who, in 1899, ruled:

> In the case of a Bill coming from the other House it has been the general practice, almost amounting to a rule, that, as the Motion for the first reading may be taken without notice, it will be passed also without debate; and although a debate may take place under such circumstances, it is very unusual. The rule with regard to Bills coming from the other House, which is different from Bills originating in this House, is:
>
> Every public Bill sent to this House by the Assembly shall be dealt with in all respects, in its progress through the House, as if it had been initiated in the Council, except that it may be immediately read a first time, on a Motion, without notice.
>
> I, therefore, told the Hon and learned Member, Sir William Manning, that in such cases, in my experience, an opportunity was never sought to obtain an explanation of a Bill coming from the other House upon the first reading. It is not usual in the case of Bills which originate in this House to make an explanation

47 *Minutes,* NSW Legislative Council, 2 December 1959, p 137; *Hansard,* NSW Legislative Council, 2 December 1959, pp 2549-2561.

48 *Minutes,* NSW Legislative Council, 6 April 1960, p 203; *Hansard,* NSW Legislative Council, 6 April 1960, pp 3631-3643.

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

> on the first reading; but that is a matter for the Hon Member who introduces the Bill to consider.[50]

In 1997, the mover of the first reading of the Crimes Amendment (Sexual Offences) Bill gave a lengthy speech on the presumption that the first reading would be negatived, and no further debate would be possible.[51] There were also occasions on which reply to the motion for the first reading was allowed notwithstanding the provision of SO 74 at the time, which only provided for a reply on the second and third readings of a bill.[52]

Once the first reading was agreed to, a motion could be made that the bill be printed and the second reading stand an order of the day for a future day, which date was to be stated. Debate on whether the bill should be printed raised questions as to the consequence of defeating the motion. According to *Erskine May*, the consequence of negativing a motion to print a bill is that 'the question for its second reading cannot be proposed'.[53] In 1986, a point of order that a member was not entitled to speak on the motion for printing was upheld.[54]

Standing order 137 adopted in 2004 combines the first reading and printing in one motion, and provides that the question is to be put by the President immediately after the bill has been received, and be determined without amendment or debate. Read in conjunction with SO 90, and Presidents' rulings above, this provides that the first reading of an Assembly bill cannot be debated, but the first reading of a Council bill can be, and the mover can speak in reply.

Motion for second reading

Standing order 137 provides that after the first reading on a Council bill the second reading may be moved immediately or made an order of the day for a later hour or for a future day. However, following the second reading speech by the mover, debate is adjourned until a future day which must be at least five calendar days ahead. This provision was first introduced as a sessional order in 1988[55] and was incorporated in the 2004 standing orders.

On 13 October 1987, the Government proposed a sessional order concerning the initiation of Council bills, which, among other things, provided that after the first reading the second reading could be moved forthwith, or set down for a future day.[56] If the motion for

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

51 *Minutes,* NSW Legislative Council, 23 October 1997, pp 148-149; *Hansard,* NSW Legislative Council, 23 October 1997, pp 1298-1327.

52 *Minutes,* NSW Legislative Council, 23 November 1995, pp 357-358 (Industrial Relations Bill and Employment Agents Bill); *Minutes,* NSW Legislative Council, 3 December 1940, p 91 (Pharmacy Amendment Bill).

53 *Erskine May*, 24th ed, p 546.

54 See *Minutes,* NSW Legislative Council, 21 October 1986, pp 375; *Hansard,* NSW Legislative Council, 21 October 1986, pp 4993-4995 (Judicial Officers Bill).

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

56 *Minutes,* NSW Legislative Council, 13 October 1987, p 1111.

the second reading was moved, the debate was to be adjourned after the mover's second reading speech, to the next sitting day or a later day. According to the Government, the proposed procedure would enable members to consider the contents of the bill prior to the second reading debate. The Opposition was opposed to the sessional order, stating that it would limit debate and allow the government to introduce bills without warning and referred to the provision in the Assembly for a bill to be adjourned for a future day which must be at least five clear days ahead. An amendment by the Hon Fred Nile to refer the proposed sessional order to the Standing Orders Committee was agreed to.[57]

On 24 May 1988, at the commencement of a new session and a change of government, a sessional order varying the rules for introducing public bills in the Council was agreed to. The sessional order differed from the one proposed the previous year in that it continued to require notice to be given of a motion for leave to be given to bring in a bill, but provided that, after the mover's second reading speech, the debate was to be adjourned for five clear days ahead and also introduced the provision for a minister to declare a bill to be an urgent bill. In supporting the motion, the Opposition stated:

> In its early days of office the Government has been at pains to ensure that in respect of legislation originating in this House, there shall be a minimum of five clear days after the Minister's second reading speech before the debate is resumed. We applaud that initiative and congratulate the Government taking that step. There may be instances of urgent necessity, in which case permission of the House may be sought to enable the bill to be dealt with sooner. The proposed measure will give honourable members the opportunity to prepare to debate bills.[58]

The sessional order was adopted in the same terms in subsequent sessions until 24 May 1995, when the House adopted the sessional order with the variation that debate was to be adjourned until a future day which must be at least 'five calendar days ahead'. The provision of the sessional order was ultimately incorporated in standing order 137. The provision for declaring a bill to be an urgent bill was incorporated into standing order 138.

There is no record of the reasons for the change from 'clear day' to 'calendar day'. However, there may have been confusion as to the meaning of a 'clear day', particularly whether it meant a 24-hour period, a sitting day, or a calendar day.[59] In 1982, during debate on the special adjournment of the House, members argued the meaning of 'future day' in SO 166 of 1895.[60]

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57 *Minutes,* NSW Legislative Council, 15 October 1987 pp 1142-1143.

58 *Hansard,* NSW Legislative Council, 24 May 1988 p 360.

59 A 1901 judgment in the Supreme Court of Victoria defined the meaning of 'clear day' as 'a calendar day as distinguished from a succession of twenty-four hours from any given starting point, whatever that starting point may be'. Dougherty (Administratrix, Etc) v Stockwell [1901] VicLawRp 32; (1900) 26 VLR 198 (3 September 1900) p 202.

60 *Hansard,* NSW Legislative Council, 30 June 1982, pp 31-33.

According to precedent, and consistent with the *Interpretation Act 1987*, the day the motion is moved is excluded in the calculation of time. If a motion that the second reading debate be adjourned 'until five calendar days ahead' is moved on a Wednesday the debate cannot resume until the following Tuesday.

Since 1856, the Council standing orders have applied the established parliamentary practice that the stages of a bill should be considered over consecutive sittings in order that they be given due consideration. Accordingly, the motion for the second reading of an Assembly bill can only proceed immediately after the first reading if standing orders have been suspended, or the bill declared urgent. Under standing order 113 of 1856 and 126 of 1870, after the first reading and printing, a motion would be moved that a future day be fixed for the second reading. The motion could be debated and amended.[61]

Expedited passage of a bill

Since 1856, the Council standing orders have provided for the well-established parliamentary practice that the various stages of a bill should be considered on subsequent sittings in order that the bill be given due consideration.

In the first decades of the bicameral parliament, the majority of bills were considered according to the standing orders. However, from the outset of responsible government the House sought to expedite the passage of certain bills and to circumvent the requirements under the standing orders for bills to be considered over subsequent days. By the late 1890s it was common for the House to expedite the passage of a bill.

There were two mains means for achieving this. The first was for the House to allow motions to progress a bill to be moved 'with concurrence' or 'by consent'. This practice was applied to the motion that the second or third reading be set down for a later hour,[62] to the motion for the second reading[63], to the motion for the adoption of the report from committee of the whole when reported with amendments,[64] and to the motion for the third reading.[65] The terms 'with concurrence' or 'by consent' were seemingly used interchangeably. Although this practice was relatively infrequent in the first decades of the bicameral parliament, the practice of moving a motion to progress a bill with the concurrence of the House became common in the 1890s and was applied to all bills, whether introduced in the Assembly or the Council. During the period between 1949 and 1984, when all government bills were introduced in the Assembly, the practice continued to be applied to Assembly bills received by the Council, and, later, when the

61 *Minutes,* NSW Legislative Council, 14 September 1859, p 12; 29 November 1938, pp 110-111.

62 *Minutes,* NSW Legislative Council, 8 June 1893, p 341 (Municipal Wharves Bill); 4 July 1895, p 256 (Loan Bill (No 2)); 29 November 1900, p 247 (Presbyterian Church of Australia Bill).

63 *Minutes,* NSW Legislative Council, 22 December 1921, p 108 (Loan Bill).

64 *Minutes,* NSW Legislative Council, 29 March 1865, p 37 (Felon's Apprehension Bill).

65 See also SO 44, which provides for the third reading of a bill to be considered as formal business. Under this procedure, the third reading is dealt with at the commencement of the next sitting, rather than waiting for the matter to be called on in the order that the bill occurs on the Notice Paper. A motion considered as formal business cannot be amended or debated.

suspension of standing orders on Assembly bills became routine the practice ceased to be applied to Assembly bills but was applied to Council bills.

The second means was to suspend standing orders to allow a bill to proceed through all stages in any one sitting. (See SO 198 for further detail on the suspension of standing orders). In October 1856, after the first bill to be received from the Assembly was read a first time, a motion was moved that the rules of proceeding be suspended to allow the bill to pass through all stages. An amendment to add at the end a paragraph that the procedure should not be drawn into a precedent for the future was agreed to.[66]

Standing orders were suspended, or were sought to be suspended, by various means and at various stages of consideration of a bill, including:

- by consent, before a Council bill was introduced[67]
- by standing orders being suspended as a matter of necessity and without previous notice prior to being received from the Assembly[68]
- on notice after first reading[69]
- on contingent notice to be moved on the bill being read a first time,[70] on the order of the day for the second reading,[71] or on the motion for consideration in committee of the whole[72]
- after the second reading 'as a case of necessity'.[73]

In 1933, on a motion being moved on notice for the suspension of standing orders to allow the Unemployment Relief Tax Bill to proceed through all stages, the President ruled that it was undesirable to suspend standing orders for a bill the contents of which the House was unaware and suggested that the motion be deferred until the bill had reached the House.[74]

On 15 December 1910, a Government notice of motion was given for the suspension of standing orders to allow the passing of 20 named bills through all their stages during

66 *Minutes,* NSW Legislative Council, 2 October 1856, p 15 (Railways and Immigration Loan Bill).
67 *Minutes,* NSW Legislative Council, 15 November 1927, p 30 (Navigation Amendment Bill).
68 *Minutes,* NSW Legislative Council, 28 June 1949, p 152 (Emergency Powers Bill).
69 *Minutes,* NSW Legislative Council, 18 December 1901, p 216 (see, for example, Hay Irrigation (Amending) Bill.
70 *Minutes,* NSW Legislative Council, 29 and 30 November 1944, p 46 (Appropriation Bill).
71 There are numerous examples – see below.
72 In November 1860, a contingent notice was given that, on the order of the day for the further consideration in committee being read, a motion would be moved for the suspension of standing orders to allow the bill to pass through all its remaining stages in one day. When the order of the day was called on, the motion was not moved and the notice lapsed. This appears to be the first contingent notice of motion given in the Council. *Minutes,* NSW Legislative Council, 7 November 1860, p 40; 8 November 1860, p 44 (New South Wales Census Bill for 1861).
73 *Minutes,* NSW Legislative Council, 23 August 1899, p 52 (Adulteration of Liquors Bill).
74 *Hansard,* NSW Legislative Council, 28 June 1933, p 57.

one sitting of the House.[75] The motion was moved the next sitting day and amended by consent to omit nine of the named bills.[76] This practice became a point of contention as to whether the notice of motion, once used in relation to some of the named bills, remained valid for the excluded bills, or had lapsed. In May 1932, the President ruled that a notice of motion for the suspension of standing orders relating to three named bills had already been disposed of earlier in the day, when it was amended by leave, and moved in relation to two of the bills.[77]

Contingent notices of motions continued to be given for the suspension of standing orders to allow bills introduced in either House to proceed through all stages in one sitting until 1949, when bills ceased to be introduced in the Council[78] and contingent notices were given in relation only to Assembly bills. On 8 May 1984, leave was given to bring in the Dairy Industry (Amendment) Bill as formal business, the first bill introduced in the Council since 1949. The bill proceeded through all stages according to standing orders.[79] In the following months, it became common for Council bills for which ministers in the Council had responsibility, to be introduced in the Council and for standing orders to be suspended, on contingent notice, to allow the bills to proceed through all stages in one sitting.[80]

In March 1986, a sessional order was proposed by the Government to provide that, on any bill being read a first time, a motion could be moved that standing orders be suspended to allow a bill to proceed through all stages in one sitting.[81] According to the Leader of the House, the sessional order would simplify the procedure for suspending standing orders in relation to bills, but he anticipated that bills would follow normal procedure except in certain cases.[82] The Opposition was opposed to the motion as it was seen to override the provisions of standing order 264 in relation to legislation.[83] Following the adoption of the sessional order, standing orders were regularly suspended to allow bills introduced in the Council, or received from the Assembly, to proceed through all stages in one sitting.

However, in the next session, which commenced on 27 April 1988, following an election and change of government, the sessional order was not again proposed and the practice of giving contingent notices for the suspension of standing orders to allow named bills to proceed through all stages in one sitting resumed, but only in regard to bills received from the Assembly.

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75 *Minutes,* NSW Legislative Council, 15 December 1910, p 29.

76 *Minutes,* NSW Legislative Council, 19 December 1910, pp 31-32.

77 *Minutes,* NSW Legislative Council, 11 May 1932, pp 535-536.

78 Except the Law of Evidence bills.

79 *Minutes,* NSW Legislative Council, 8 May 1984, p 35; 9 May 1984, p 60; 10 May 1984, p 73; 15 May 1984, p 84.

80 See, for example, *Minutes,* NSW Legislative Council, 24 October 1984, p 193 (Wheat Marketing Bill); 24 October 1984, p 194 (Canned Fruits Marketing Amendment Bill).

81 *Minutes,* NSW Legislative Council, 20 March 1986, p 99.

82 *Hansard,* NSW Legislative Council, 20 March 1986, p 1288.

83 See *Hansard,* NSW Legislative Council, 20 March 1986, pp 1281-1310, for complete debate.

In May 1988, a sessional order was adopted which was intended to slow the progress of a Council bill by requiring that debate on the second reading be adjourned for five clear days ahead after the mover's second reading speech, but also provided that the House could declare a bill urgent so that it could pass through all stages in one sitting.[84] The provisions of the sessional order with minor modifications were later incorporated into SO 137 and SO 138. (See above for further detail).

As a consequence of the sessional order, Council bills were no longer routinely the subject of contingent notices for the suspension of standing orders. The adjournment of debate after the mover's second reading speech for five days became common practice and it was relatively rare for the Council to declare a Council bill an urgent bill.[85] However, the practice of moving the third reading of a Council bill 'with concurrence' after the adoption of the report from committee of the whole, rather than setting the third reading down for the next sitting day, as required by the standing orders, continued.

In 2002, a procedure was employed to expedite the passage of a number of separate and unrelated bills received from the Assembly and read a first time. On the order of the day being read, the House agreed to the suspension of standing and sessional orders, moved by a minister on contingent notice, to allow the moving of a motion forthwith relating to the conduct of business of the House. The House then agreed to a motion that three named bills be considered together at the second reading stage, and that the questions on the motions for the second reading of the bills and subsequent stages be dealt with separately in respect of the separate bills.[86]

In September 2009, the Government ceased giving contingent notices of motions on individual Assembly bills, instead relying on this general contingent notice. The contingent notice applying to any bill was given by most members at the commencement of each new session until the adoption of a sessional order in 2015.[87]

138. URGENT BILLS

(1) A Minister may declare a bill to be an urgent bill, provided that copies have been circulated to members.

(2) The question – That the bill be considered an urgent bill – will be put immediately, without amendment.

(3) When a bill has been declared urgent, the second reading debate and subsequent stages may proceed immediately or at any time during any sitting.

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

85 See, for example, *Minutes,* NSW Legislative Council, 13 November 1996, p 437 (Children (Care and Protection) Amendment (Disallowed Regulation) Bill)**;** 1 December 1998, p 979 (Courts Legislation Further Amendment Bill); 10 August 2016, pp 1032-1034 (Greyhound Racing Prohibition Bill 2016).

86 *Minutes,* NSW Legislative Council, 4 December 2002, p 557.

87 *Minutes,* NSW Legislative Council, 6 May 2015, pp 55-62.

Development summary		
1988-1995	Sessional order	Urgent bills
1995-2003	Sessional order	Urgent bills
2003	Sessional order 138	Urgent bills
2004	Standing order 138	Urgent bills

Under the standing order, and under the sessional order in operation between 1988 and 2004, after the first reading and printing, a minister can declare the bill to be an urgent bill provided that copies of the bill have been circulated to members. The second reading debate and subsequent stages of an urgent bill may proceed immediately or at any time during any sitting.

Operation

Since the adoption of a sessional order in 1988, 18 Council bills have been declared urgent, with five of these bills being declared urgent following the adoption of SO 138.[88] Although the original sessional order referred to any bill except a bill received from the Assembly, SO 138 does not include this exemption. There is nothing in the standing order to prevent a minister declaring an Assembly bill urgent. However, there have been no Assembly bills declared urgent under SO 138, mainly as the Council suspends standing orders on motion to allow virtually every bill it receives from the Assembly to proceed through all stages in one sitting.

Under SO 138, after the bill has been read a first time and printed, the minister states 'I declare the bill to be an urgent bill'. The President puts the question immediately, without amendment or debate.

Under SO 138(1) a bill can only be declared urgent 'provided that copies have been circulated to members'. In 2011, this provision was the subject of a point of order and subsequent ruling of the President. After the House had agreed to the Transport Legislation Amendment Bill 2011 being declared urgent, a point of order was taken that the minister was unable to declare the bill to be an urgent bill as copies of the bill had not been circulated to members. The President upheld the point of order and ruled that the bill could only proceed once sufficient copies of the bill were available in the House.[89] Sufficient copies having then been circulated to members, the minister again declared the bill to be urgent and the motion was agreed to.[90]

88 See, for example, *Minutes,* NSW Legislative Council, 27 October 1993, p 329 (Crimes Legislation (Review of Convictions) Amendment Bill); 3 December 1996, pp 529-530 (Workers Compensation Amendment Bill); 25 May 2005, p 1403 (Poultry Meat Industry Amendment (Prevention of National Competition Policy Penalties) Bill 2005); 28 August 2008, p 752 (Electricity Industry Restructuring Bill 2008 (No 2) and Electricity Industry Restructuring (Response to Auditor-General Report) Bill 2008); 23 August 2011, p 355 (Transport Legislation Amendment Bill); 30 January 2014, p 2305 (Mining Legislation Amendment Bill (ICAC Operations Jasper and Acacia) Bill 2014).

89 *Hansard,* NSW Legislative Council, 23 August 2011, p 4365.

90 *Minutes,* NSW Legislative Council, 23 August 2011, p 356.

Declaring a bill urgent under the sessional order for cut-off date for government bills

The provisions of standing order 138 for a bill to be declared urgent are distinct from a sessional order which allows a government bill to be declared urgent after a cut-off date towards the end of the session. The sessional order first adopted in 2002 is intended to prevent a large volume of legislation being considered in a short time frame by requiring that when a bill is introduced by a minister, or is received from the Legislative Assembly after the deadline provided in the sessional order, debate on the motion of 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 the next sittings. The sessional order provides for limited debate on the motion for urgency. Although the sessional orders have varied in this regard, in general there has been a provision for the minister, the Leader of the Opposition and one crossbench member to speak to urgency before the question is put by the Chair.[91] The Council readopted the cut-off date each session, except for 2005, 2007 and 2008.

The concept of the cut-off date was not a new one for the Legislative Council. On 15 December 1859, a motion for a cut-off date was moved, debated and then, by leave, withdrawn due to a lack of support by the Government.[92] During the debate the member noted that a cut-off date was frequently adopted by the House of Lords and cited an example from 9 May 1856:

> That this House will not read any Bill a Second Time after Tuesday, the 22nd Day of July, except Bills of Aid or Supply, or any Bill in relation to which the House shall have resolved, before the Second Reading is moved, that the Circumstances which render Legislation on the Subject of the same expedient are either of such recent Occurrence or real urgency as to render the immediate Consideration of the same necessary.

Background and development

On 24 May 1988, a sessional order varying the rules for introducing public bills was agreed to.[93] The sessional order specifically exempted Assembly bills from its provisions. The sessional order was principally for the purpose of requiring that, after the mover's second reading speech on a Council bill, the debate was to be adjourned for five clear days ahead. However, the sessional order also introduced the provision for a minister to declare a bill to be an urgent bill, and, if agreed to, the second reading could be moved forthwith or at any time during any sitting of the House. The question on urgency was to be put forthwith without amendment or debate. Under the sessional order, the bill could only be declared urgent provided that copies had been circulated among

91 *Minutes,* NSW Legislative Council, 20 May 2003, pp 89-90; 11 May 2004, pp 776-777; 20 September 2006, p 200; 2 September 2009, pp 1310-1311; 10 August 2011, p 332; 12 June 2012, p 1042. In 2004, the sessional order expressly exempted the Appropriation Bill and cognates from the terms of the cut-off. In 2004 and 2006, provision was made for two crossbench members to speak to the motion for urgency. In 2009, provision was made for two crossbench members to speak for five minutes each.

92 *Minutes,* NSW Legislative Council, 15 December 1859, p 43.

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

members. The sessional order adopted in 1990 provided that the second reading debate and subsequent stages could proceed forthwith or at any time if the bill was declared urgent.[94] The sessional order was adopted in the same terms in subsequent sessions until May 1995, when the House adopted the sessional order with the variation that debate was to be adjourned until a future day which must be at least five *calendar* days ahead.[95]

Prior to this sessional order, there was no provision to declare a bill urgent and it was necessary to suspend standing orders, on notice, or by leave, to allow a Council bill to proceed through all stages in one sitting.[96]

SO 138, adopted as a sessional order in 2003, provides for urgent bills in the same terms as the 1995 sessional order.

139. COGNATE BILLS

(1) Cognate bills may be introduced on one motion for leave and proceed through all subsequent stages, except committee of the whole, in a similar manner as a single bill.

(2) At the request of any member, the motion will be put as separate motions.

(3) In committee of the whole cognate bills will be considered separately, unless the committee agrees unanimously.

Development summary		
1986	Sessional order	Cognate bills
2003	Sessional order 139	Cognate bills
2004	Standing order 139	Cognate bills

Bills that are cognate usually relate to a single legislative scheme. It is often the case that a cognate bill has little or no significance except when read along with the principal bill and understood as part of a scheme.

Standing order 139 allows such bills to be considered together in a similar manner as single bills with the exception that all bills are considered separately in committee of the whole. The standing order also provides for members to request that the motions on bills introduced as cognate bills to be considered separately.

Operation

Under SO 139(1) cognate bills may be introduced on one motion for leave and proceed through all subsequent stages, except committee of the whole, in a similar manner as a single bill.

94 *Minutes,* NSW Legislative Council, 22 February 1990, p 26.

95 *Minutes,* NSW Legislative Council, 24 May 1995, p 26.

96 See, for example, *Minutes,* NSW Legislative Council, 24 May 1984, p 222 (Dairy Industry (Further Amendment) Bill).

Under SO 139(2), members can request that the question on the second reading,[97] or the third reading,[98] or both the second and third[99] readings of cognate bills be put separately. Once the question on the motions are to be put separately, amendments can then be moved to the motion on the single bill: to refer the bill to a committee,[100] to move a 'this day six month' amendment on one or more of the bills,[101] or to provide for the question on the single bill to be resolved on division or negatived, or for the bill to proceed as a single bill. Notwithstanding that the provision had been adopted by way of sessional order, rather than separate a cognate bill by request, amendments have been moved to the motion that the cognate bills be read a second time with the exception of one of the bills.[102]

In 1998, during the second reading debate on the Fair Trading Amendment Bill and six cognates bills, a member requested that the question on the second reading of the bills be put seriatim, and moved a 'this day six month' amendment to two of the bills.[103] At the conclusion of debate, the Chair proceeded to put the questions on the second reading. After the question on the first three bills had been disposed of, business was interrupted for questions, following which the House adjourned. On the next sitting day the order of the day was read as follows:

> Order of Day read for resumption of putting of the question in seriatim: That these Bills be now read a second time.
>
> Upon which Mr Jobling has moved:
>
> 1. That the question on the second reading of the Landlord and Tenant (Rental Bonds) Amendment (Penalty Notices) Bill be amended by omitting 'now' and adding at the end the words 'this day six months'. (Amendment already disposed of 16 June 1998.)

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97 See, for example, *Minutes,* NSW Legislative Council, 10 November 2010, p 2208 (Australian Jockey and Sydney Turf Clubs Merger Bill 2010 and Totalizator Amendment Bill 2010); 25 October 2012, p 1336 (Parliamentary Electorates and Elections Amendment (Redistributions) Bill 2012 and Election Funding, Expenditure and Disclosures Further Amendment Bill 2012); 18 June 2013, p 1819 (Government Sector Employment Bill 2013 and Members of Parliament Staff Bill 2013); 25 June 2015, p 251 (Appropriation Bills).

98 *Minutes,* NSW Legislative Council, 20 November 2012, p 1393 (Parliamentary Electorates and Elections Amendment (Redistributions) Bill 2012 and Election Funding, Expenditure and Disclosures Further Amendment Bill 2012).

99 *Minutes,* NSW Legislative Council, 25 June 2003, p 175 (Human Cloning and Other Prohibited Practices Bill and Research Involving Human Embryos (New South Wales) Bill).

100 *Minutes,* NSW Legislative Council, 18 June 2013, p 1819 (Government Sector Employment Bill 2013 and Members of Parliament Staff Bill 2013); 1 June 1999, p 114 (Pay-roll Tax Amendment (Apprentices Concession and Rate Reduction) Bill and cognates).

101 *Minutes,* NSW Legislative Council, 3 June 1998 p 534 (Fair Trading Amendment bill and six cognates); 23 August 1990, pp 375-378 (Industrial Relations Bill and cognates).

102 *Minutes,* NSW Legislative Council, 6 March 1985, p 360 (Second-Hand Dealers and Collectors (Amendment) Bill and 5 cognates); 11 December 1995, pp 413-414 (Appropriation Bill and six cognates); 17 June 1997, p 803 (Appropriation Bill and six cognate bills).

103 See SO 140 for 'this day six month' amendment.

2. That the question on the second reading of the Property, Stock and Business Agents Amendment (Penalty Notices) Bill be amended by omitting 'now' and adding at the end the words 'this day six months'.

[Note: Second reading of Fair Trading Amendment Bill, Home Building Amendment Bill and Landlord and Tenant (Rental Bonds) Amendment (Penalty Notices) Bill agreed to 16 June 1998.]

All remaining questions on the bills were then put, the 'this day six month' amendment being negatived.[104]

A single bill introduced as a cognate bill can be discharged from the Notice Paper and withdrawn. For example, on the order of the day for resumption of the second reading of the Pay-roll Tax Amendment (Apprentices Concession and Rate Reduction) Bill 1999 and cognate bills being called on, a motion was moved and agreed to that the order of the day for one of the bills be discharged, and a message forwarded to the Assembly.[105] On the motion being agreed to, consideration of the remaining bills can continue. In 1996, standing orders were suspended, by motion on notice, to allow a motion to be moved for the discharge of the Sentencing Amendment (Parole) Bill as a cognate bill and for the bill to be withdrawn.[106]

Under SO 139(3), cognates bills are to be considered separately in committee of the whole unless the committee unanimously decides otherwise. The first part of SO 139(3), that cognate bills are to be considered separately in committee of the whole, has been a consistent rule since the House first adopted procedures for dealing with cognate bills in 1977 (see below for further detail). The second part of SO 139(3) was adopted for the first time in SO 139(3). The provision allows cognate bills to be considered together, so long as all members present agree. There are no instances of cognate bills being considered together in committee of the whole since the adoption of SO 139(3).

Consideration of unrelated bills together

Although not cognate, there have been occasions on which unrelated bills, or bills which concern the same subject matter but which were proposed by different members, have been considered together.

In 1989, two bills, one a Government bill and the other a private member's bill, seeking to amend the *Coroners Act 1980* were considered together. On the Government bill being received from the Assembly, the Hon Liz Kirkby MLC moved, on contingent notice, that standing orders be suspended to allow the notice of motion relating to her bill be called on forthwith; that standing orders be suspended to allow her bill to pass through all stages in any one sitting; that the two bills be considered together at every stage; and

104 *Minutes,* NSW Legislative Council, 17 June 1998, pp 562-565.
105 *Minutes,* NSW Legislative Council, 1 June 1999, pp 113-114.
106 *Minutes,* NSW Legislative Council, 17 October 1996, p 374.

that the questions for the several stages of the passage of the bills be put separately in respect of each bill.[107]

In support of her action, Ms Kirkby stated that she had been prepared for her bill to remain on the Notice Paper until an appropriate time, but that the introduction of the Government bill had precipitated her acting. Ms Kirkby also referred to a Senate precedent in support of her action. The Government opposed the motion, but the Opposition took the view that Ms Kirkby should have the opportunity of stating her case in support of her measure and supported consideration of her bill, but only until the conclusion of the second reading speech. The procedural motions for the bills to be considered together were agreed to on casting vote. The motions for the first reading and printing of the bills were moved consecutively, following which the Minister moved that standing orders be suspended to allow the Government bill to pass through all stages in one sitting. The Minister then moved that the Government bill be read a second time and gave his second reading speech and adjourned the debate until a later hour. Ms Kirkby then moved the motion for the second reading of her bill and gave her second reading speech, at the conclusion of which debate was adjourned for five calendar days as required by the standing orders. Debate on the second reading of the Government bill resumed and proceeded through all stages that day.[108] Ms Kirkby's bill lapsed on prorogation.

In 2002, a procedure was employed to expedite the passage of a number of separate bills received from the Assembly and read a first time. For example, on the order of the day being read, the House agreed to the suspension of standing and sessional orders, moved by a minister on contingent notice, to allow the moving of a motion forthwith relating to the conduct of business of the House. The House then agreed to a motion that three named bills be considered together at the second reading stage, and that the questions on the motions for the second reading of the bills and subsequent stages be dealt with separately in respect of each individual bill.[109]

Background and development

Prior to 1977, there was no provision for, or practice of, bills being considered simultaneously, even if they were cognate. The bills might be described as cognate in their respective explanatory notes, but would be considered separately by the Houses.[110]

Since 1977, the House has dealt with cognate bills in a range of ways, either at the request of individual members, or by motion.

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107 *Minutes*, NSW Legislative Council, 7 December 1989, p 1237; *Hansard,* NSW Legislative Council, 7 December 1989, p 14427 (Coroners (Miscellaneous Amendments) Bill and Coroners (Amendment) Bill).

108 *Minutes*, NSW Legislative Council, 7 December 1989, pp 1234-1239; *Hansard,* NSW Legislative Council, 7 December 1989, pp 14422-14440.

109 *Minutes*, NSW Legislative Council, 4 December 2002, p 557.

110 Prior to the concept of cognate bills, the amendment of different acts was contained in one bill, with clauses and sub-clauses effecting amendment to various Acts. See, for example, *Forestry, Soil Conservation and other Acts Amendment Act 1972,* which made amendment to five Acts.

At a meeting of the Standing Orders Committee on 16 November 1977, it was agreed that, from that time forward, bills of a cognate character could be dealt with simultaneously. The procedure to be adopted on such occasions would be as follows:

1. Prior agreement to be reached between the government and opposition leaders and to be notified beforehand to the President and Clerk.

2. A motion to be moved by leave after the President reads the respective Messages from the Assembly, forwarding the Bills for concurrence, in the following terms – 'That so much of the Standing Orders be suspended as would preclude the (Titles of Bills) being debated simultaneously and for questions with regard to the several stages for the passage of such Bills through the Council being put on one motion at each stage, but that such Bills be considered separately in Committee of the Whole'.[111]

The practice adopted only related to bills from the Legislative Assembly, the House in which almost all bills were at that time introduced.

At a meeting of the Standing Orders Committee on 3 September 1985, the committee discussed introducing a new standing order to allow that, if a minister intimated that certain bills were cognate, the bills could be dealt with on one motion for introduction and subsequent stages but the bills were to be considered separately in committee of the whole. The idea behind the proposed standing order was that as more bills were being introduced in the Council, there was a greater likelihood that cognate bills would be introduced and it was therefore appropriate to introduce a standing order that replicated the provision for cognate bills received from the Assembly.[112] No action was taken on the standing order on that occasion.

On 24 September 1985, a minister gave a contingent notice that, on two named bills being introduced in the Legislative Council, standing orders be suspended to allow the bills to be debated simultaneously and for the questions on the stages for the bills to be put on one motion at each stage, but that the bills be considered separately in committee of the whole.[113] On the same day, the Leader of the Government gave a notice of motion for leave to bring in the cognate bills. The bills were introduced on 26 September on one motion, following which standing orders were suspended on contingent notice to allow them to be considered together. The same procedure was used on 3 October 1985, 24 October 1985 and 13 November 1985.

In February 1986, a minister moved, according to notice and as formal business, that a sessional order be adopted to allow that if a minister intimated that certain Council bills were cognate, the bills could be dealt with on one motion for leave and subsequent

111 See, for example, *Minutes,* NSW Legislative Council, 25/26 March 1980 am, pp 455-456; *Hansard,* NSW Legislative Council, 25 March 1980, p 5767 (Contracts Review Bill and District Court (Contracts Review) Amendment Bill).

112 *Minutes,* Standing Orders Committee, 3 September 1985.

113 *Minutes,* NSW Legislative Council, 26 September 1985, p 633.

stages but the bills were to be considered separately in committee of the whole.[114] Under the sessional order, the first reading and subsequent stages of cognate bills received from the Assembly would proceed in a similar manner. This wording is identical to the proposed standing order discussed by the Standing Orders Committee in 1985.

The sessional order was readopted each session until the adoption of standing order 139 in 2004, which also introduced the provision that the different stages of a bill could be dealt with separately if any member so requested (SO 139(2)), and that in committee the committee could unanimously agree that the bills could be considered together (SO 139(3)).

140. SECOND READING

(1) On the order of the day being read for the second reading of a bill, the question will be proposed:
  (a) "That this bill be now read a second time", or
  (b) "That the order be postponed or discharged".

(2) An amendment may be moved to the question for second reading:
  (a) by leaving out "now" and inserting "this day 6 months", which if carried will finally dispose of the bill,
  (b) by referring the bill to a standing or select committee, or
  (c) by moving the previous question.

(3) A bill which has been ordered to be read "this day 6 months" may not be considered again in the same session.

(4) When a standing or select committee has reported on a bill, a future day may be fixed for the second reading.

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

Standing order 140 regulates the moving and disposal of a motion for the second reading of a bill. Standing order 140 is an amalgamation of former standing orders 167, 168

114 *Minutes,* NSW Legislative Council, 20 February 1986, p 26.

and 169 and continues to reflect the standard Westminster procedures for the second reading of a bill.

Operation

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

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

Agreeing to the motion that a bill be read a second time progresses the bill to the next stage, either to committee of the whole for consideration in detail, or, if leave is granted, to the third reading. Standing order 140 provides a number of alternative scenarios.

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

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

There are many examples during the 1920s and 1930s of bills being negatived then restored in the Council, but relatively few since that time.[115] In 1993, the Anti-discrimination (Homosexual Vilification) Amendment Bill, which had been negatived at the second reading on 21 May 1993, was restored on 12 October 1993, with the House also agreeing to a motion for standing orders to be suspended to allow the bill to proceed through all stages in one sitting, for the bill to be given precedence over all other government and general business until concluded and for the second reading being called on forthwith.[116] In 1995, the Conveyancers Licensing Bill was restored.[117] The procedure also became less common in the House of Commons upon which the practice is based. In that House, restoration became so rare that current practice now sees defeat

115 See, for example, *Minutes,* NSW Legislative Council, 5 November 1925, p 64; 22 December 1925, p 134 (Constitution (Amendment) Bill); 18 November 1925, p 69; 22 December 1925, p 134 (Government Railways (Amendment) Bill); 17 December 1925, p 122; 14 January 1926, p 150, on division (Sydney Corporation Amendment (Municipality of Waterloo) Bill); 1 December 1931, pp 392-393; 22 December 1931, p 414 (Local Government (Elections) Bill). In 1936, the third reading of the Local Government (Amendment) Bill was negatived, restored two days later and then lapsed on prorogation. *Minutes,* NSW Legislative Council, 23 June 1936, p 180; 25 June 1936, p 189.

116 *Minutes,* NSW Legislative Council, 21 May 1993, p 182; 12 October 1993, pp 266-272.

117 *Minutes,* NSW Legislative Council, 22 November 1995, pp 346-347.

of the second or third reading as fatal to a bill and no fresh bill in substantially the same terms can be introduced in the same session.[118]

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

Alternatively, when the order of the day for the second reading is called on, or when a motion for the second reading of a bill has been negatived, a motion that the order of the day for the second reading be discharged, if agreed to, will ensure the bill is not considered again in the same session.[119]

Postpone or discharge

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

The postponement of an order of the day for the second reading of a bill has no impact on the progress of the bill itself, and only delays its consideration.[120] Under standing order 45, the question on postponement must be put without amendment or debate.

The consequence of a motion to discharge the order of the day for the second (or third) reading of a bill, if carried, is to remove the bill from the Notice Paper and from any further consideration by the House. If the bill is an Assembly bill, a message is forwarded to the Assembly advising of the action taken by the Council. [121] If the bill is a Council bill, once an order of the day has been discharged the bill can be withdrawn to allow a second bill to be introduced under the original order of leave.

During the second reading debate on the Statutory and Other Offices Remuneration (Council of Auctioneers and Agents) Amendment Bill, it was pointed out that amendments made to the Auctioneers and Agents (Amendment) Bill, considered immediately prior to the present bill, meant the present bill was not required. The order of the day for the second reading was discharged and the bill withdrawn.[122]

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118 *Erskine May*, 24th ed, p 548.

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

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

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

122 *Minutes,* NSW Legislative Council, 16 March 1978, pp 941 and 942; 16 March 1978, p 13204.

Amendments to the second reading

Standing order 140 specifically provides for the question for the second reading to be amended by omitting 'now' and inserting instead 'this day six months', which if carried will finally dispose of the bill, or by referring the bill to a standing or select committee. The standing order also provides for the previous question to be moved on the second reading. (See below and SO 107 and SO 108).

This day six (6) months

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

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

However, there are precedents to the contrary. Following a 'this day six month' amendment agreed to on 8 December 1875, the order of the day for the second reading of the Matrimonial Causes Act Amendment Bill appeared on the Notice Paper for 25 May 1876, the second reading moved that day and a 'this day six months' amendment again agreed to.[123]

Between 1858 and 1981, there are numerous examples of 'this day six months' amendments being negatived[124] and agreed to.[125] The procedure has been used infrequently in recent years. The last time the amendment was agreed to was on the second reading of the Sydney Heliport Bill on 8 March 1994.[126] The amendment was negatived on the second reading of the Terrorism (Police Powers) Amendment (Preventative Detention) Bill in 2005 and twice in 2016.[127]

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

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

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

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

127 *Minutes,* NSW Legislative Council, 30 November and 1 December 2005 am, p 1798 (Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005); 10 August 2016, pp 1035-1036 (Greyhound Racing Prohibition Bill 2016); 16 November 2016, p 1339 (Independent Commission Against Corruption Amendment Bill 2016).

In 1998, the Opposition Whip, the Hon John Jobling, requested that the second reading of the Fair Trading Amendment Bill and the six cognates bills be put seriatim and moved that the question on two of the bills, the Landlord and Tenant (Rental Bonds) Amendment (Penalty Notices) Bill and the Property, Stock and Business Agents Amendment (Penalty Notices) Bill be amended by omitting the word 'now' and adding at the end 'this day six months'.[128] The question on the amendment of the Landlord and Tenant (Rental Bonds) Amendment was negatived on 16 June 1998 before business was interrupted for questions.[129]

The Minutes of Proceedings of 17 June 1998 record the order of the day being read as follows:

> Order of Day read for resumption of putting of the question in seriatim: That these Bills be now read a second time.
>
> Upon which Mr Jobling has moved:
>
> 1. That the question on the second reading of the Landlord and Tenant (Rental Bonds) Amendment (Penalty Notices) Bill be amended by omitting "now" and adding at the end the words "this day six months". (Amendment already disposed of 16 June 1998.)
>
> 2. That the question on the second reading of the Property, Stock and Business Agents Amendment (Penalty Notices) Bill be amended by omitting "now" and adding at the end the words "this day six months".

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

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

There have been variations to the six-month amendment considered by the House with differing consequences and success. In June 1877, a 'this day six month' amendment to the second reading of the Duty on Gold Abolition Bill was negatived on division. The committee of the whole on the bill later reported progress and obtained leave to sit again 'this day six months'. Further consideration of the bill in committee of the whole was not set down as an order of the day on the Notice Paper.[130]

An amendment to the motion for the second reading agreed to in 1994 that the bill be read 'this day twelve months' was deemed to have the same consequence as a 'this day six months' amendment and was removed from the Notice Paper.[131]

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

129 *Minutes,* NSW Legislative Council, 16 June 1998, pp 557-558.

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

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

In 1904, an amendment that a bill be read 'this day three months' was ruled to 'put the bill off the business-paper exactly the same as if he made it six months'. The amendment was put to the House by the President as a 'this day six months' amendment.[132] The amendment was negatived and the bill read a second time.

An amendment that cognate bills be read 'this day four months' was moved after a member had mistakenly moved that the debate be adjourned until 'this day four months'. On it becoming clear during debate on the motion for adjournment that the intention had not been to cut short debate on the second reading, the member withdrew his motion, by leave, and instead moved 'That the question be amended by the omission of the word "now" with a view to inserting at the end "this day four months"'. The amendment was put and negatived at the conclusion of the second reading debate.[133]

Reasoned amendments

A member who wants to place on record any specific reasons for not agreeing to a second reading of a bill may move a 'reasoned amendment'. The standing orders do not provide for the moving of a reasoned amendment, though there are numerous examples of the House amending the second reading to reject the bill and to provide reasons for doing so.[134]

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

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

In the Westminster Parliament, former practice held that a reasoned amendment was considered to be a motion to supersede the question to 'now' read the bill a second time and would leave the bill in the same position as if the bill had been negatived.[135] However, in modern practice, a reasoned amendment is considered fatal to the bill. As the original motion was agreed to as amended there is no longer an order of the day for the second (or third) reading of the bill to be restored.[136]

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

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

134 See, for example, *Minutes,* NSW Legislative Council, 6 August 1902, p 88 (Women's Franchise Bill); 26 June 1997, pp 888 and 892-993 (Public Trustee Corporation Bill).

135 Sir Barnett Cocks (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Butterworth and Co. Ltd, 17th ed, 1964), p 528.

136 *Erskine May*, 24th ed, p 550.

In contrast, Legislative Council practice views a bill rejected by a reasoned amendment as still being before the House and able to be restored to the business paper. For example, in 2001 the Workers Compensation Legislation Amendment Bill (No 2) 2001 was restored to the Notice Paper after a reasoned amendment was agreed to which provided that the House decline to give the bill a second reading until such time as the House had an opportunity to consider a motion for the appointment of a committee to review the bill. Immediately following, the House agreed to a motion to refer certain matters relating to the bill to a committee for inquiry and report. The President then made a statement that as the House had considered a motion to refer the matter to a committee it was therefore in order for a motion for the restoration of the bill to be moved. The bill was restored to the business paper, on motion, without notice.[137]

In 1989, a reasoned amendment was moved to the second reading of the Industrial Arbitration (Enterprise Bargaining) Amendment Bill. Debate on the bill was adjourned on motion of a minister, who was speaking to the amendment, to the first sitting day in 1990, effectively terminating further consideration of the bill.[138]

The most common form of a reasoned amendment is to move that the question be amended by omitting all words after 'That' and inserting instead 'this House declines to give the bill a second reading for the following reasons…' In 1998, a reasoned amendment varied the form of words to omit all words after 'That' and insert instead words to call on a named QC to consider the bill and for the bill to be read a second time on a stated day or after the report of the QC is tabled, whichever was the later.[139] The amendment was negatived.

In January 1978, a reasoned amendment to the second reading of the Constitution and Parliamentary Electorates and Elections (Amendment) Bill, which had been received from the Assembly a second time under section 5B of the *Constitution Act 1902*, was agreed to and the bill again returned to the Legislative Assembly. The amendment outlined reasons for again rejecting the bill and requested that the Parliament adopt the recommendation of the Select Committee to convene a State Constitutional Convention to review the method of election, the functions and powers of the Legislative Council.[140] The Assembly requested a free conference on the bill, which occurred, and the bill was ultimately agreed to at a referendum.

The previous question

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

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137 *Minutes,* NSW Legislative Council, 28 June 2001, pp 1073-1074, 1075-1077 and 1077-1078.

138 *Minutes,* NSW Legislative Council, 5 December 1989, p 1198.

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

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

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

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

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

The consequence of the previous question being carried is that the question on the second reading lapses with the same effect as the House negativing the second reading. The order for the second reading can be restored by motion on notice. If the previous question is negatived, the Chair must immediately put the question on the second reading, together with any amendments that had been moved to it (SO 108(2)). The effect of the vote is that in disagreeing that the question be *not* now put, the House has agreed that the question *be* now put.[141]

Although prior to 1895 the standing orders did not specifically provide for the previous question to be moved to the second reading, there are examples of its occurrence.[142]

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

Bills referred to a committee for inquiry and report

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

- refer a whole bill to a committee for inquiry and report[143]

141 *Erskine May*, 24th ed, pp 404-405.

142 *Minutes,* NSW Legislative Council, 27 June 1860, p 113 (Appropriation Bill for 1859-60); 26 March 1879, p 153 (Supreme Court (Additional Judge) Bill); 3 April 1883, p 73 (Judges Salaries and Pensions Bill); 30 July 1884, p 225 (Pastoral Dams Bill); Examples post-1895 include: *Minutes,* NSW Legislative Council, 10 June 1896, p 26 (Conditional Purchasers' Relief Bill).

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

- refer a whole bill and to give an instruction to a committee that it consider a specific matter relating to the bill[144]
- refer the provisions of a bill to a committee for inquiry while the bill itself proceeded through all stages[145]
- refer cognate bills to a committee while allowing the principle and other bills to continue.[146]

Although the procedure is intended to provide for a committee to examine a bill in greater detail than would be possible by the House there are relatively few examples of a bill being referred to a committee, the committee reporting to the House, and the bill then proceeding through all its stages.[147]

On a bill being referred to a committee, it is no longer before the House, but is recorded at the end of the Notice Paper as having been referred to a committee. Standing order 140(4) provides that following the report of a committee a future day may be fixed for the second reading. The standing order is the same in substance as its predecessor, standing order 169. On a committee reporting to the House, a motion is moved without notice that the second reading (or third reading[148]) stand an order of the day for a subsequent day.[149]

Background and development

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

Standing order 140(2) provides for amendments to the motion for the second reading, specifically a 'this day six months' amendment, or an amendment to refer the bill to a standing or select committee, or to move the previous question. Standing order 114 of 1856 and standing order 127 of 1870 provided for referral to a select committee, but neither provided for the motion to be moved as an amendment to the second reading,

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

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

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

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

148 See SO 148.

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

or for any other amendments to the second reading. Nonetheless, there are numerous examples of motions for the second reading being amended to refer a bill to a select committee,[150] for a reasoned amendment, and to have the bill read a second time 'this day three months', 'this day six months' or other length of time, as noted above.

Standing order 168 adopted in 1895 introduced the provisions for amending the second reading by omitting 'now' and inserting instead 'this day six months', by moving that the bill be referred to a select committee, or standing committee on the adoption of standing order 257A-C in 1982, and providing for the previous question to be moved. Current standing order 140(3), like its predecessor, specifically provides that a bill ordered to be read 'this day 6 months' may not be considered again in the same session. Like the 1856 and 1870 standing orders, it was not made clear in the 1895 standing orders that a referral to a committee by way of an amendment to the second reading was permitted. However, the practice of amending the second reading to refer bills to committees continued under SO 168.[151]

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

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

Bills referred to and amended by select committee

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

In 1925, the motion for the second reading of the Juvenile Migrants Apprenticeship (Repeal) Bill was amended to refer the bill to a select committee. The report of the select committee was tabled on 3 December 1925, together with the Minutes of Proceedings and transcripts of evidence, and a copy of the bill as amended and agreed to by the committee. On 9 December 1925, the motion for the second reading was again moved,

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

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

the minister advising that the committee had prepared a new bill, which included new clauses and a schedule, for consideration. The committee of the whole agreed to an amendment to one of the clauses inserted by the select committee and the new bill was reported to the House with an amendment. The bill was returned to the Assembly with the schedule of amendments agreed to.[152]

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

- as an amendment to the motion for the second reading[153]
- as an amendment to the motion that the House adopt the report from committee of the whole[154]
- by amendment to the motion that the bill be considered in committee of the whole.[155]

Counsel heard at the Bar of the House

The second reading is also the stage at which counsel have most often been heard on a bill at the Bar of the House. There is no provision in the standing orders for Counsel to be heard at the Bar of the House but there are a number of examples of contingent notices for motions for companies or individuals to be heard by Counsel at the Bar of the House.[156]

For example, in 1915, three contingent notices were moved separately and put as one question for a number of petitioners to be heard by Counsel at the Bar of the House.[157] In November 1952, a petition was presented from the Taxpayer's Association of NSW in reference to the Stamp Duties (Amendment) Bill praying to be heard by Counsel at the Bar of the House. Standing orders were suspended to allow consideration of the petition and a motion was then agreed to that on the order of the day for the second reading being read the House should forthwith hear the Counsel's submission. On the order of the day for the second reading being read the House agreed to motions that Counsel for the petitioners be heard, that Counsel be called in and that Counsel be permitted to

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

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

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

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

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

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

address the House from the Bar. The President informed the House that he had adopted a ruling from a former President, that the Counsel could show how his clients would be affected by the bill but not comment on questions of public policy more generally. Having been heard, the Counsel withdrew and consideration of the bill proceeded.[158]

141. COMMITTAL

(1) After the second reading, unless the bill is referred to a standing or select committee:

(a) the President may inquire of the House if leave is granted to proceed to the third reading of the bill forthwith, or

(b) the House will immediately resolve itself into a committee of the whole for consideration of the bill, or

(c) a future day may be appointed on motion for consideration of the bill in Committee of the Whole

(2) After a bill has been read a second time a motion may be moved:

(a) without notice for referring the bill to a committee,

(b) on notice for an instruction to the committee of the whole.

Development summary		
1856	Standing order 114	Going into committee
1870	Sessional order 127	Going into committee
1895	Standing order 171 Standing order 172 Standing order 232	Committal President leaves Chair without Question for the Bill to be further considered When instructions should be moved
1991 2003	Sessional order Sessional order 141	Committal Committal
2004	Standing order 141	Committal

Standing order 141 provides that after a bill is read a second time, it can proceed directly to the third reading if all members present agree. If the House is not in agreement, the House must resolve into a committee of the whole to consider the bill in detail immediately, or the order of the day for consideration may be set down for a future day. The standing order alternatively provides that after the second reading is agreed to, a motion may be moved without notice to refer the bill to a committee, or a motion may be moved on notice for an instruction to committee of the whole. If such an instruction is agreed to, the order of the day for consideration in committee could then be set down for a future day, or the House would resolve into committee of the whole.

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

Operation

The procedures followed after a bill has been read a second time result in one of three outcomes:

- the bill proceeds to the third reading forthwith
- the bill is considered in committee of the whole
- the bill is referred to a standing or select committee.

Leave to proceed to third reading forthwith

The provision for leave to be granted to proceed to the third reading forthwith allows the House to circumvent the requirement to consider each bill in committee of the whole. All members present must agree to proceed to the third reading – an objection from any one member would require the bill to be considered in committee of the whole.

When there are no amendments proposed to a bill, the House generally grants leave to proceed to the third reading. However, there have been instances where leave has not been granted and:

- the House has resolved into committee of the whole forthwith to consider amendments previously circulated[159]
- the House has resolved into committee of the whole forthwith even though no amendments were to be proposed in the bill[160]
- the committee stage has been set down as an order of the day for a subsequent day.[161]

A strict reading of SO 141(1)(a) in isolation of other standing orders suggests that, if leave is granted to proceed to the third reading forthwith, the motion for the third reading could then be moved. However, this is not the case. Leave only allows the House to skip consideration in committee of the whole. To proceed further would be contrary to parliamentary practice[162] and other standing orders[163] which require the various stages of a bill to be considered on separate days. The motion for the third reading should be set down for a subsequent day, unless standing orders have been suspended, to allow the bill to pass through all stages in one sitting, the bill has been declared urgent under SO 138, or the motion for the third reading is moved with concurrence.

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159 *Minutes*, NSW Legislative Council, 24 June 2008, pp 700-701 (Clean Coal Administration Bill 2008).

160 *Minutes*, NSW Legislative Council, 29 May 2001, p 971 (Local Government Amendment (Graffiti Removal) Bill).

161 *Minutes,* NSW Legislative Council, 7 June 1995, p 115 (Criminal Legislation Amendment Bill).

162 Based on the Westminster tradition that the stages of the passage of a bill are to take place on different dates.

163 For example, SO 148 provides that when the report of the committee is adopted a future day may be fixed for the third reading.

Consideration in committee of the whole

Under the 1895 standing orders, the motion to resolve into committee of the whole was moved in the prescribed terms 'That the President do now leave the Chair, and the House resolve itself into a committee of the whole to consider the Bill in detail'.[164] SO 141 has omitted that requirement, instead providing that the House will 'immediately' resolve into committee if leave is not granted to proceed to the third reading forthwith, or if a future day is not appointed on motion for consideration of the bill in committee (SO 141(1)(b)). However, notwithstanding that provision, the practice of a member moving 'That you do now leave the Chair', etc, remains the mechanism by which the House resolves into committee. There is no amendment or debate allowed on the motion[165] – this stands in contrast to the procedure for resolving into committee for consideration of a matter other than a bill, the motion for which can be amended or debated. If the motion is negatived, the bill drops from the Notice Paper.[166]

Under SO 141(1)(c), consideration in committee can be set down for a future day. This motion takes the form: 'That consideration of this bill in committee of the whole stand an order of the day for next sitting day/[a named day].' Although the standing order requires that the order be set down for a future day, the practice has nevertheless developed of consideration in committee being set down for a later hour.[167] The motion to set down consideration for a future day (or later hour) may be debated[168] or amended,[169] as members may desire to debate the date on which the bill is proposed to be considered, or move an amendment to propose an alternative date.

In one notable exception to the established procedure set out in the standing orders, in 1948 the House agreed to postpone consideration in committee *after* the House had already agreed to the motion that the Chair leave the chair and the House resolve into committee, owing to the absence of the Chairman of Committees and all three Temporary Chairs. On that occasion, the House subsequently resolved:

> That the necessary action consequential on the resolution of the House,— 'That the President do now leave the Chair and the House resolve itself into a committee of the whole to consider the bill in detail,'— be postponed and stand an order of the day for a later hour of the sitting.[170]

The President left the chair, and the House resumed three hours later to consider the bill in committee.[171]

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164 1895 SO 171.

165 See President's ruling, *Hansard,* NSW Legislative Council, 29 October 1986, p 5668.

166 See, for example, *Minutes*, NSW Legislative Council, 27 July 1875, p 139; 17 April 1879, p 174.

167 See, for example, *Minutes*, NSW Legislative Council, 5 December 2007, p 427; 19 November 2013, p 2224; 11 November 2015, p 563.

168 See, for example, *Minutes*, NSW Legislative Council, 9 June 1865, p 117.

169 'This day six month' amendment, *Minutes*, NSW Legislative Council, 18 April 1894, p 102, carried; 7 November 1878, p 45, by leave withdrawn.

170 *Minutes,* NSW Legislative Council, 4 August 1948, p 178; *Hansard,* NSW Legislative Council, 4 August 1948, p 3572.

171 *Minutes,* NSW Legislative Council, 4 August 1948, p 178.

Other alternatives following the second reading

SO 141(2) provides for two alternative motions to be moved following the second reading being agreed to: to refer the bill to a committee, or to move an instruction to the committee of the whole.

These procedures must occur before the House determines, under SO 141(1), to resolve immediately into committee of the whole, or to set down consideration in committee for a future day.

A motion to refer a bill to a select or standing committee may be moved without notice as a superseding motion and can be debated and amended. If agreed to, the bill is referred to a committee and has the effect of a superseding motion – the referral will halt the progress of the bill until the committee reports and the bill is restored, on motion, to the Notice Paper at the second reading stage. If defeated, the other procedures available under SO 141(1) can still be exercised.

A motion for an instruction to committee of the whole may only be moved if prior notice has been given (SO 141(2)), however, this requirement was omitted under a sessional order agreed to in 2015, which amends SO 180.[172] Under the terms of the sessional order, an instruction may be moved without notice after the second reading and before the House resolves into committee, or when the order of the day is read for resumption of committee.[173]

An instruction must comply with the rules provided under SOs 179 to 181 (which govern instructions to committee of the whole), discussed further in those chapters.

Under SO 180(2), an instruction may alternatively be moved as an amendment on the question for the adoption of the report of the committee. This procedure may be called on if the necessity for an instruction to broaden the powers of the committee of the whole becomes apparent after the committee has commenced its consideration of the bill, the House having missed the opportunity provided under SO 141(2).

Background

Prior to the adoption of the 1856 standing orders, the Standing Orders Committee originally recommended that the provision for the House to resolve into committee following the second reading of a bill take the following form:

> After the second reading, unless the bill, on motion for that purpose, be previously referred to a Select Committee, the Council shall (either then, or at a future time) resolve itself into a committee of the whole for consideration of the bill in detail.

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172 *Minutes*, NSW Legislative Council, 6 May 2015, p 61.

173 See, for example, *Minutes*, NSW Legislative Council, 24 June 2015, p 233. Note that in this example the motion was moved after the Deputy President called on the Clerk to read the order of the day but prior to the order of the day being read. See discussion under SO 180 regarding the more appropriate procedure, which would see the motion moved *after* the order of the day was read for consideration in committee of the whole.

However, during consideration of the proposed standing orders in committee of the whole, the terms were amended to require that a future day be appointed for consideration. Members stated that this would ensure that bills were not considered 'hurriedly', reducing the opportunity for errors to be made.[174]

The 1870 standing orders omitted the requirement that a future day be appointed in favour of the terms originally proposed by the committee, enabling the House to appoint a time for consideration which may be either the same day or a future day (1870 SO 127).

While neither the 1856 or 1870 standing orders specified the form that the motion to resolve the House into committee should take, the House adopted the form favoured by the House of Commons ('that the House resolve itself into a committee of the whole House'). The motion was formalised in the 1895 rewrite in slightly amended terms, 'That the President do now leave the chair, and the House resolve itself into a committee of the whole to consider the Bill in detail' (1895 SO 171). As noted above, the 2004 standing orders omitted the requirement for this motion to be moved, however the motion has continued to be moved as a matter of practice.

Until 1895, the standing orders allowed debate or amendment of the motion.[175] The motion was amended to provide that the President do *not* now leave the chair;[176] to add an instruction and to nominate a member as Chair;[177] to omit all words after 'That' and insert instead that consideration of the bill stand an order of the day for this day six months[178] or another time,[179] and to refer the bill to a committee.[180] Although debate and amendment of the motion was prohibited under 1895 SO 171, an attempt by a member to debate the motion in 2000 was permitted when the President ruled that the member be permitted to conclude his remarks, by leave.[181]

In 1982, consequential to the House adopting new SOs 257A-C which made provision for the appointment of standing and select committees, SO 171 was amended to provide that a bill could be referred to a standing committee.[182]

Until 1991, all bills, unless referred to a select or standing committee, were required to be considered in committee of the whole, even if no amendments had been circulated or foreshadowed by members (SO 171). However, on 4 December 1991, a sessional order was agreed to on the motion of the Leader of the Government, without debate, to provide that if a bill was not referred to a select or standing committee:

174 *Sydney Morning Herald*, 28 November 1856, p 4.
175 For debate on, see, for example, *Minutes*, NSW Legislative Council, 17 March 1857, p 83 (District Courts Bill); 19 March 1873, p 94 (Public Gates Bill).
176 *Minutes*, NSW Legislative Council, 5 February 1857, p 58.
177 *Minutes*, NSW Legislative Council, 10 March 1864, p 149.
178 *Minutes*, NSW Legislative Council, 11 April 1878, p 69.
179 *Minutes*, NSW Legislative Council, 22 August 1866, p 24.
180 *Minutes*, NSW Legislative Council, 6 February 1879, p 104.
181 *Hansard*, NSW Legislative Council, 23 November 2000, pp 10714-10716.
182 *Minutes*, NSW Legislative Council, 17 March 1982, p 262.

- the President may inquire if leave was granted to proceed to the third reading forthwith, or
- a motion may be made to resolve the House into committee, without amendment or debate, or
- consideration in committee could be set down for a future day.[183]

The provisions are now adopted in SO 141(a).

Provision for a member to move an instruction to the committee of the whole after the second reading was first made in 1895 (SO 272). The background to and operation of this procedure is discussed in detail under SO 180.

142. CONSIDERATION IN COMMITTEE

(1) In committee of the whole, the preamble will stand postponed without question put, and the clauses will be read in their order separately by the Chair.

(2) On each clause the question will be put – That the clause, as read, stand a clause of the bill.

(3) In reading the clauses of a bill it will be sufficient to read the numbers only.

(4) The discussion must be confined to the clause or amendment before the committee.

(5) A clause may be postponed, whether or not it has been amended.

(6) In considering a bill, the committee may, by leave, consider clauses, parts, divisions or schedules together, and in the case of cognate bills, may consider a bill in whole or in part.

Development summary		
1856	Standing order 115	Proceedings in committee
1870	Sessional order 128	Proceeding in committee
1895	Standing order 173 Standing order 174 Standing order 178 Standing order 181	Title and preamble postponed – clauses read and put Debate must be relevant Clauses postponed Preamble
2003	Sessional order 142	Consideration in committee
2004	Standing order 142	Consideration in committee
2011	Sessional order	Time limits to debate on government bills

The commentaries on SO 142 and SO 143 are dealt with together.

183 *Minutes*, NSW Legislative Council, 4 December 1991, p 310.

143. ORDER OF CONSIDERATION

(1) The order below will be followed in considering a bill:

(a) Clauses as printed, and proposed new clauses,
(b) Postponed clauses (not having been specially postponed until after consideration of other clauses),
(c) Schedules as printed,
(d) Proposed new schedules,
(e) Preamble,
(f) Title.

(2) In re-considering a bill, the same order will be observed as far as possible.

Development summary		
1895	Standing order 179 Standing order 180 Standing order 181 Standing order 182	Order in which clauses shall be taken New clauses and schedules Preamble Title agreed to
2003	Sessional order 143	Order of consideration
2004	Standing order 143	Order of consideration

The committee of the whole House may only consider those matters referred to it by the House (SO 173(1)), and amendments to bills can only be made in committee of the whole (SO 144(6)). SO 142 and SO 143, read together, set out the order in which each section of a bill must be considered and the other procedures that apply in committee.

However, notwithstanding the order set out under SO 143, alternative practices have developed over time with a view to more flexible procedures for consideration in committee. For many years, the committee considered clauses and other parts of a bill, by leave, under the provisions of SO 142(b). From 2014, this practice was further facilitated when the House moved to an alternative procedure inspired by practice in the Australian Senate by considering the bill as a whole, also by leave. Under the practice, a member may move an amendment that occurs at any point in the bill at any time, however, the other rules and standing orders governing consideration in committee of the whole continue to apply.

Operation

The order of consideration

Under the standing orders, bills are considered from beginning to end, with the exception of the preamble and the (long) title[184] which stand postponed until last, as amendments made to the other sections of a bill may require consequential amendments to be made to the preamble or title (SOs 142(1) and 143 (1)(e) and (f)).

184 The long title outlines the scope and principle of the bill.

The committee is required to consider each section of a bill separately. For this reason, under SO 143 the committee considers: each clause as printed, together with any proposed new clauses; then any postponed clauses (discussed below); then any schedules; then any proposed new schedules; and then finally the preamble and title.

Under SO 142(3), in reading the clauses of a bill it is sufficient to read the numbers only. In practice, under SO 142(2), the question on each clause is: 'That the clause, as read, stand a clause of the bill'.

The reference to 'clause' in SO 142 can be read interchangeably for any section of a bill – that is, after the consideration of a clause, the question will be put: 'That the clause, as read, be agreed to', but equally the question on the consideration of a schedule, division, part, title or preamble of a bill will be: 'That the schedule/etc, as read, be agreed to'. If amendments have been made to a clause or schedule (or other component) of the bill, the question is: 'That the clause, as amended, stand a clause of the bill'.[185]

Omitting a clause (or other section of a bill)

An amendment to omit a clause is out of order, as the proper procedure is to vote against the clause standing part of the bill (see SO 142(2)).[186] An amendment proposing to omit the effective words of a clause or offer another amendment equating to a direct negative of the clause would similarly be ruled out of order.[187] The motion to vote 'no' to the question that the clause stand can be put after amendments to the clause have been moved and resolved, or at the conclusion of consideration of the bill, prior to the question being put on the bill as a whole.

There are good reasons for this rule. In principle, a bill, the second reading of which has been agreed to by the House, should not be altered or rejected without sufficient reason. On that basis, the House should be able to enhance or improve the bill before simply rejecting it. A member moving to omit a whole clause may discourage others from moving amendments to the clause that may enhance or rectify the contents, enabling it to be retained. An amendment to omit the words would also run contrary to the provisions of SO 142(2), which sets out the procedure for voting against a clause. The procedure set out under the standing order is therefore the more effective form to achieve the intended goal of omitting a clause (or other section) in its entirety.

This principle is similar to that which deems an amendment to a motion to omit all words after 'That' without inserting instead new words, in an effort to defeat the motion, to be trifling with the procedures of the House. The member should instead simply vote 'No' to the motion (see SO 109 – Moving of amendments).

185 SO 144(4) states that the question will be 'That the clause, as amended, be agreed to', however, in practice the Chair usually puts the question in the form listed above.

186 Ruling: Chair Fazio, *Hansard*, NSW Legislative Council, 24 June 2009, p 16726.

187 *Erskine May*, 24th ed, pp 576-577.

Considering sections of a bill together

The requirement to consider a bill in order from beginning to end, under SO 143, ensures that any amendments made by the committee during its consideration which necessitate consequential amendments to a later clause or schedule may be made. Under SO 142(5), the House has the power to postpone the consideration of a clause until the other matters in neighbouring clauses have first been resolved. This provision assists the House by allowing members to resolve a matter that occurs late in a bill, first, then return to consideration of the remainder of the bill. This provision has not been used by the House under the current standing orders, but was used in the past to assist in the consideration of consequential amendments.[188]

In cases where it would assist the committee to consider parts of a bill together, or the effect of a series of consequential amendments on the same subject matter together, SO 142(6) authorises the committee to consider, by leave, clauses, parts, divisions or schedules together, and, in the case of cognate bills, consider a bill in whole or in part. This provision was first adopted in the 2004 standing orders, though it formalised the practice that had operated in the chamber over a number of years. The provision provides the committee with flexibility to consider related clauses or amendments in a manner that will not impede the flow of debate. Until 2014, the consideration of clauses and schedules together, by leave, was a matter of routine practice.

In 2014, a new practice for considering a bill in committee of the whole was implemented to provide the committee with even greater flexibility than that available under SO 142(6). On the committee commencing its consideration of a bill, the Chair inquires whether leave is granted to consider the bill as a whole. If leave is granted, a member may move an amendment to any part of the bill in any order. The procedure was adopted with a view to facilitating more free-flowing debate on similarly themed amendments or bill provisions. Although most bills are now considered 'as a whole', the committee is still at liberty to consider a bill according to the traditional method set out in the standing orders, and on one recent occasion has chosen to do so.[189]

The procedure for considering a bill as a whole was inspired by practice in the Australian Senate,[190] though it should be noted that the provisions of the Council's standing orders vary to those of the Senate, where the standing orders make no provision for amendments or clauses to be considered together during the consideration of complex bills. By contrast, the Council adopted the procedure to further enhance the flexibility of procedures already available under SO 142(6).

While consideration of a bill as a whole enables members to consider amendments in any order and occurring at any place in a bill, the default position is that amendments to

188 For example, *Hansard*, NSW Legislative Council, 8 September 1937, pp 716-723; 23 August 1938, pp 1207-1211.

189 *Hansard*, NSW Legislative Council, 19 November 2014, p 3073.

190 See discussion in Rosemary Laing, *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009), pp 379-382.

a bill are considered in the order in which they occur from beginning to end (determined with the guidance of a running sheet prepared by the Clerks), in the absence of a request from a member or other reason to proceed to the contrary. The decision to consider a bill as a whole does not override the other standing orders governing the committee stage of a bill. For example, rules regarding the admissibility of amendments, debate and the moving of amendments that would reverse a decision of the committee continue to apply.

If the committee does not agree to consider the bill as a whole, the committee will consider the bill clause by clause according to procedure set out under SOs 142 and 143, and the Chair will propose the question on the first clause of the bill. The committee then continues its consideration of the bill in the traditional manner.

Cognate bills

The procedure for the consideration of cognate bills in committee of the whole is the same as that for single bills. Cognate bills are considered separately in committee of the whole, unless unanimous consent is given to deal with them together (SO 139(3)).

If no amendments are proposed to one or more of the cognate bills, the Chair puts the question on the bill as a whole, with leave of the committee (SO 142(6)).

Procedure on reconsideration or recommittal

Under SO 143(2), the rules for the order and consideration of bills in committee equally apply to a bill that is reconsidered under SO 146(2), or recommitted under SOs 147 or 149. The new practice for considering a bill as a whole would most likely not be required in these circumstances, as any matters referred (for examples, Schedules 1 and 4) have already been identified by the House for consideration – there is no onus on the committee to consider the matters referred in the order they are listed in the bill. However, if the entire bill was reconsidered or recommitted, the 'bill as a whole' procedure may be applied. A bill has not been recommitted since the adoption of the new procedure in 2014.

Rules for debate in committee of the whole

Under SO 142(4), discussion in committee of the whole must be confined to the clause or amendment before the committee. Successive Chairs of Committee have ruled that members must address only the amendments under consideration rather than seek to revisit the second reading debate or the merits of the bill in principle.[191]

191 For example, Rulings: Deputy President Fazio, *Hansard*, NSW Legislative Council, 29 October 2003, p 4291; 8 June 2005, p 16594; 25 March 2009, p 13704; Rulings: Deputy President Gardiner, *Hansard,* NSW Legislative Council, 2 June 2011, p 2099; 2 May 2012, p 10892; Rulings, Deputy President Khan, 20 October 2015, p 4515; 10 November 2015, p 5495.

Under SO 173(5), a member may speak more than once during the committee of the whole, however, since 2011 a sessional order has been adopted which has applied time limits to debate in committee on government bills. Members may speak for 15 minutes at any one time, though may seek leave to speak for a further 15 minutes.[192] These time limits do not apply to debate on private members' bills. In practice, as members typically make multiple contributions to debate in a consultative or questioning style during committee, the effect of the sessional order has not been particularly noticeable during debate.

Background and development

1856 SO 115 provided limited instruction on the procedure for consideration in committee of the whole:

> In a Committee of the whole House, the question shall be put on each Clause of the Bill separately; leaving the Preamble to be last considered.

This provision continued to apply in 1870 (SO 128) and was readopted in 1895 (SO 173, 181), however, the 1895 standing orders also applied a number of additional provisions, which continue to be reflected in current SOs 142 and 143.

1895 SO 173 provided that it would be sufficient for the Chair to 'read' the clause by stating its number, and specified that the question put by the Chair on each clause would be 'That the clause, as read, stand a clause of the bill'. While the standing order was based on the terms of the Assembly's equivalent standing orders,[193] the Assembly did not include provision for the Chair to only read the number of each clause, exposing the Assembly to a lengthier procedure for consideration. The adoption of the new provision formalised the practice that had become commonplace in the Council in recent years.

1895 SO 174[194] also introduced the requirement that debate be relevant to the 'matter of that clause or amendment' under discussion, a principle that had been upheld by rulings of the Chair over successive years prior to that date. SO 178[195] provided a new option for a clause to be postponed, whether or not it had been amended.

The rules for the order in which a bill should be considered were also clarified in 1895. The standing orders provided that:

- both the preamble and the title would be postponed until after the consideration of any clauses (1895 SO 173)
- the clauses and schedules should be taken in the order in which they stood in the bill, and when the bill had been gone through, postponed clauses and schedules should then be considered and disposed of (1895 SO 179)[196]

192 *Minutes*, NSW Legislative Council, 3 August 2011, pp 296-298.
193 Assembly 1894 SOs 258 and 259.
194 1895 SO 174 adopted the terms of 1894 Assembly SO 260.
195 1895 SO 178 adopted the terms of 1894 Assembly SO 265.
196 1895 SO 179 adopted the terms of 1894 Assembly SO 267.

- the same practice applied if the bill was recommitted (1895 SO 179)[197]
- new clauses and schedules would be considered either at the place they would be inserted, or after the original clauses and schedules had been dealt with (1895 SO 180)[198]
- after the preamble had been agreed to, the title would be considered (1895 SO 182).[199] (The standing order also required that if any amendment had been made in the bill that did not come within the original title, the title must be amended and the amendment specially reported to the House. This provision is discussed under SO 144).

These provisions continued to apply until they were incorporated into the 2004 rewrite in slightly amended terms. Also adopted was paragraph (6), which provides for the committee to consider multiple sections of a bill together, with the agreement of all members present.

144. AMENDMENTS IN COMMITTEE

(1) An amendment may be made to any part of the bill, provided it is relevant to the subject matter of the bill and otherwise in conformity with the rules and orders of the House.

(2) No new clause or amendment may be proposed which is substantially the same as one already negatived by the committee, or which is inconsistent with one that has been agreed to by the committee, unless a recommittal of the bill has intervened.

(3) No amendment or new clause may be inserted which reverses the principle of the bill as read a second time.

(4) If a clause is amended, a further question will be put "That the clause as amended, be agreed to".

(5) If an amendment has been made in the bill, not coming within the original title, the title will be amended, and that amendment will be specially reported to the House.

(6) No clause, schedule or amendment in substance may be proposed in any bill, except in committee of the whole.

(7) A clause may be negatived, even if amended, and a new clause proposed in its place.

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197 This also adopted the terms of 1894 Assembly SO 267 (see above), though the Assembly provision referred to 'reconsideration' rather than recommittal.

198 1895 SO 180 adopted the terms of 1894 Assembly SO 268, though the Assembly provision was more restrictive and did not allow consideration of a new clause at the place at which it was intended to be inserted.

199 1895 SO 182 adopted the terms of 1894 Assembly SO 271.

Development summary		
1856	Standing order 108	Contents, and title
1870	Sessional order 121	Contents, and title
1895	Standing order 175 Standing order 176 Standing order 177 Standing order 182	Amendments to clauses All amendments to be made in committee A new clause may be proposed in lieu of a clause negative with that object Title agreed to
2003	Sessional order 144	Amendments in committee
2004	Standing order 144	Amendments in committee

SO 144 outlines the rules for the consideration of amendments in committee of the whole. Since 1988, the government has made available the service of the Parliamentary Counsel to assist members of the House in drafting amendments, however, the admissibility of amendments is a matter for the Chair of Committees, on the advice of the Clerk and with reference to practice and precedent.

In addition to the rules outlined in the standing order, several additional rules have developed as a matter of practice and have been consistently upheld by the Chair:

- amendments should be lodged prior to the House resolving into committee of the whole to enable members and the Clerk-at-the-Table to examine the effect of the amendments and assist the orderly consideration of complex and controversial bills
- amendments received after the House has resolved into committee will only be accepted at the discretion of the Chair, and
- amendments in committee of the whole must be lodged in written form (SO 109(7)).[200]

Other rules applying to amendments are discussed under SO 109.

Operation

SO 144 outlines the foundation principles that apply to the admissibility of amendments, and the parameters within which the committee may amend a bill during its consideration. Amendments to bills can only be made in committee of the whole (SO144(6)).

200 For example, Ruling: Deputy President Healey, *Hansard,* NSW Legislative Council, 18 February 1982, pp 2165-2169; Ruling: Deputy President Healey, *Hansard,* NSW Legislative Council, 12 November 1985, p 9260. See also, memorandums sent to members by Deputy President Kelly and Deputy President Khan, available from the Clerk. On occasion, members have moved amendments, or moved amendments to amendments, without first circulating a written amendment. It is for the Chair to decide whether to accept such an amendment. At a minimum, it would be expected that proceedings in committee would be paused while the amendment is put in writing and circulated for the information of members.

Admissibility of amendments

The committee is bound by the decision of the House on the second reading to agree to a bill in principle. Therefore, an amendment may be made to any part of the bill, provided it is relevant to the subject matter of the bill (SO 144(1)), and no amendment or new clause may be inserted which reverses the principle of the bill as read a second time or equates to a negative of the bill (SO 144(3)).[201] The subject matter of a bill is determined by reference to the long title, which sets out the objects of the bill. When leave is given to bring in a bill during the initial stages, the House has agreed to consider a bill with the limited purpose as set out in the long title, so all amendments must be within the leave originally given (SO 144(1)). However, while the long title can be taken as an indication of the subject matter, it does not conclusively determine the question. The explanatory note and minister's second reading speech may also be helpful in understanding the scope of a bill. In any case, the question of relevance is interpreted liberally to ensure members have maximum freedom to move amendments. Amendments that are outside the leave of a bill, or are otherwise at variance with the rules and conventions of the House, are not admissible unless the House gives the committee the power to consider such amendments by way of an instruction. This procedure is discussed further under SO 179.

The terms of an amendment must conform with the rules and orders of the House (SO 144(1)). Chairs have ruled amendments out of order on the basis that they were vague, trifling, or tendered in a spirit of mockery.[202] An amendment would also be ruled inadmissible if it referred to or was not intelligible without subsequent amendments, or if it was otherwise incomplete.[203]

Although amendments may not be moved which are destructive to the principle of a bill, there is nothing to prevent the committee of the whole from negativing a clause or clauses which would have the effect of nullifying the bill or rendering the bill meaningless, and reporting the bill, as amended, to the House.[204]

Under SO 144(5), if an amendment is made to the bill which does not fall within the original title, the title must also be amended and that amendment be 'specially reported to the House'. This is achieved by the Chair informing the President, when reporting the outcome of the committee's deliberations, that 'the bill is reported with amendments, including an amendment to the long title' (or 'amendments', if applicable). This is a fairly common occurrence.[205]

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201 Rulings: President Peden, *Hansard,* NSW Legislative Council, 27 September 1937, pp 519-520; 8 December 1937, pp 2355-2356; Ruling: Deputy President Farrar, *Hansard,* NSW Legislative Council, 30 September 1941, p 1386.

202 Ruling: Deputy President Griffin, *Hansard,* NSW Legislative Council, 20 October 2010, p 26361; Ruling: Deputy President Khan, *Hansard,* NSW Legislative Council, 10 November 2015, p 5498.

203 Ruling: Deputy President Griffin, *Hansard,* NSW Legislative Council, 20 October 2010, p 26361.

204 Sir William McKay (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 23rd ed, 2004), p 601.

205 For example, *Minutes*, NSW Legislative Council, 29 June 1998, p 617; 21 September 2004, p 1009; 25 November 2011, p 379; 28 March 2012, p 857; 24 June 2015, p 234.

From time to time, issues arise in relation to the powers of the Council to amend 'money bills', which seek to appropriate public revenue, and taxation bills imposing any new tax, rate or impost. The Council does not admit any limitation on its powers in respect of money bills other than that such bills must originate in the Assembly, that the Council may only suggest amendments (by way of a message to the Legislative Assembly) to a 'bill appropriating revenue or moneys for the ordinary annual services of the Government', and that a 'bill appropriating revenue or moneys for the ordinary annual services of the Government' may be presented to the Governor for assent under section 5A of the *Constitution Act 1902*, notwithstanding that the Legislative Council has not consented to the bill. Deadlocks between the Houses on all other appropriation bills and all taxation bills may be dealt with by the Council in the normal way under section 5B of the *Constitution Act 1902*. In June 2015, the Chair of Committees gave a comprehensive ruling on the Council's ability to amend 'money bills'.[206]

Amendments to an external agreement or national law

On occasion, the House is required to consider a bill to give effect to an agreement between the Commonwealth and State governments. While the Council does not concede any limitation to its power to amend intergovernmental legislation, questions have arisen as to the power of state legislatures to amend the terms of the agreement (usually attached as a schedule to the bill), due to the inherent risk that an amendment may result in the legislation in one state being inconsistent with the legislation passed in other jurisdictions. While it is clear that members may vote against the clause or schedule to reject the agreement, the admissibility of any amendment moved to an external agreement or national law would be considered on a case by case basis by the Chair.

Amendments that reverse a decision of the committee

Under SO 144(2), no new clause or amendment may be proposed which is substantially the same as one already negatived by the committee, or which is inconsistent with one that has been agreed to by the committee, unless a recommittal of the bill has intervened. This also reflects the provisions of SO 173(3), which state that a motion contradictory to the previous decision of a committee of the whole may not be entertained in the same committee.

Where the will of the committee has changed over the course of debate, or members wish to correct an unintended consequence of amendments agreed to or negatived, the bill can be reconsidered or recommitted (see SOs 146, 147 and 149). However, if the contradictory amendment is proposed as a result of confusion as to the question being put, or an error occurs in voting or in counting out a division, the vote on the original amendment can instead be taken again.

206 *Hansard*, NSW Legislative Council, 24 June 2015, pp 1727-1728.

Consideration of clauses to which amendments have been agreed and voting 'no' to a clause

Under SO 144(4), if a clause is amended, a further question will be put 'That the clause as amended, be agreed to'. This provides the committee with an opportunity to consider the sum effect of multiple amendments agreed to the clause, and to reject the clause if they consider that it should not stand in its new form. Related to this principle, SO 144(7) provides that a clause may be negatived, even if amended, and a new clause proposed in its place. During the years in which the House considered amendments according to the traditional method for committee of the whole, this occasionally occurred.

However, as noted under SO 142, since 2014, the House has favoured an alternative method of considering a bill 'as a whole', by leave. Under this practice, once the question on the amendment has been put, a further question is not put on each individual clause. Instead, the House considers only one final question: 'That the bill, as amended/as read, be agreed to'. However, on occasion a member may request that the question be put on an individual clause (or other component of the bill), particularly where the member wishes to vote 'no' to the question that the clause stand (with a view to omitting the clause – an amendment to omit a clause or other section is deemed out of order, as discussed under SO 142). Where this occurs, an instruction to this effect is usually included in the running sheet prepared by the Clerks-at-the-Table, noting the member's request, particularly where the request has been advised ahead of time.

Background and development

The provisions of SO 144(5) were first adopted in 1856 (SO 108, readopted as 1870 SO 121), with the exception of the requirement that an amendment to the long title be reported to the House, which was first adopted in 1895 (SO 182). The provisions of SO 144(1), (3), (6) and (7) were also adopted in 1895 (SOs 175, 176 and 177).[207] Paragraphs (2) and (4) were adopted in 2004, however, the provisions of those paragraphs applied as a matter of practice prior to 2004.

The rules applied consistently until the rewrite of the standing orders in 2004, when the matters of practice outlined in paragraphs (2) and (4) were also formalised within the standing orders.

145. Uncompleted proceedings in committee

No notice may be taken of any proceedings of a committee of the whole, or of a standing or select committee, on a bill, until those proceedings have been reported.

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207 Of these standing orders that were first adopted in 1895, SOs 176 (which required amendments to be made in committee) and 182 (Title agreed to) closely mirrored their Assembly counterparts, being 1894 Assembly SOs 262 and 271. 1895 SO 175 (Amendments to clauses) considerably varied the rules for amendments from those adopted in the Assembly, and the provisions of 1895 SO 177 (which provided for a new clause to be proposed where a clause had been negatived) were only adopted by the Council.

Development summary		
1895	Standing order 183	Proceedings in committee not to be noticed until reported
1982	Standing order 183	Proceedings in committee not to be reported
2003	Sessional order 145	Uncompleted proceeding in committee
2004	Standing order 145	Uncompleted proceeding in committee

SO 145 reflects the principle that while the House may vest the committee of the whole with responsibility to consider bills and make amendments where necessary, the House retains the ultimate authority to determine the final outcome of any matters referred. Proceedings in committee therefore are not formally acknowledged until reported to the House, at which point the House has the opportunity to accept or reject the report. This principle is also discussed under SO 177.

Similarly, no notice may be taken of the proceedings of a standing or select committee until that committee has formally reported to the House.

Operation

When the committee of the whole has concluded its consideration of the matters referred, or wishes to continue consideration at a later time, the committee must report its progress to the House. A member will then move that the House adopt the report – this procedure is discussed further under SOs 146 and 177.

If the committee does not report the progress of its consideration, the proceedings lapse, or terminate, and the bill drops from the Notice Paper. This would occur by a member moving a dilatory motion under SO 177(4) 'That the Chair do now leave the Chair'.[208] Although the committee can terminate proceedings in this manner, the bill may consequently be revived by the House, because the committee itself does not have the power to terminate a bill. Under SO 177(3), a member may move a motion, on notice, to restore the bill, and the proceedings will be resumed at the point where they were previously interrupted.

If a bill has been referred to a standing or select committee for inquiry and report under SO 140(2), no notice may be taken of the proceedings and deliberations of that committee until the committee reports. In recent years, the provisions of bills, rather than the bills themselves, have been referred to a committee for inquiry in some cases, allowing the bill to progress while the committee undertakes its inquiry. In these instances, if the unreported proceedings of that committee were raised during debate on a stage of the bill, the matter would likely be dealt with under the provisions of

208 For example, *Hansard,* NSW Legislative Council, 2 May 1989, p 7045; *Minutes,* NSW Legislative Council, 2 May 1989, pp 620-621. During consideration of a bill in 1989, the Leader of the Opposition moved: 'That the Chair do now leave the Chair'. The motion was agreed to and the House resolved immediately out of committee and proceeded to the dinner break. When the House resumed later that evening, the House proceeded to consideration of the next item of business and the bills were not considered again. The bills were not restored to the paper that session.

SO 224, which prohibit the unauthorised disclosure of committee proceedings prior to the committee's report to the House.

Background

The principle regarding unreported proceedings operated as a matter of practice prior to 1895.[209] The principle was first formalised in the standing orders in 1895 (SO 183), drawn from the Assembly's equivalent standing order.[210] When 1895 SO 183 was first adopted, it made reference only to select committees. In 1982, the Legislative Council agreed to a message from the Legislative Assembly inviting the Council to adopt new standing orders to provide for the establishment of standing committees (see SO 206), together with consequential amendments to insert reference to standing committees into various standing orders that had previously only made reference to select committees, including SO 183.[211]

It is not uncommon for proceedings of standing or select committees to not be reported, particularly where the inquiry is interrupted by prorogation.

146. REPORT FROM COMMITTEE

(1) When the consideration of a bill in committee of the whole has been concluded the question will be put "That the Chair report the bill (or the bill as amended) to the House", and if that question is agreed to the Chair will leave the chair and report the bill, if necessary with an amended title.

(2) On the motion that the Chair report the bill, the reconsideration of any clauses may be moved as an amendment.

(3) When a bill is reported, the adoption of the report may be moved immediately, or a future day fixed for that purpose.

Development summary		
1856	Standing order 116 Standing order 117	Report from committee Adoption of report
1870	Standing order 129 Standing order 130	Report from committee Adoption of report
1895	Standing order 184 Standing order 185	Bill reported to the House Adoption of report may be immediately moved
2003	Sessional order 146	Report from committee
2004	Standing order 146	Report from committee

209 For example, *Hansard,* NSW Legislative Council, 20 December 1894, p 3787; *Minutes,* NSW Legislative Council, 21 February 1894, p 122.

210 Assembly 1894 SO 272.

211 *Minutes*, NSW Legislative Council, 17 March 1982, p 262.

This standing order provides a procedure for the committee of the whole to reconsider particular clauses or other parts of a bill to which amendments have previously been agreed to, and for the House to agree to or reject the outcome of the committee's consideration of the bill. This is the point at which any amendments made by the committee are formally accepted – the proceedings of the committee are not recognised until the House adopts the committee's report (see SO 145). SO 146 should be read in conjunction with SO 177, which also addresses reports from the committee and, in particular, the procedure for the committee to report progress and seek leave to sit again to continue its consideration of the bill at a later time.

Operation

When a committee of the whole has concluded its consideration of a bill, the committee reports the outcome of its consideration to the House by a member – usually the member with carriage of the bill – moving a motion: 'That the Chair leave the Chair and report the bill without amendment / with an amendment / with amendments'.[212] The motion 'that the Chair leave the Chair …' must include the instruction to report the outcome of the bill for proceedings on the bill to proceed – if the committee agrees only 'That the Chair do now leave the Chair', proceedings on the bill will be terminated and the bill will lapse and drop from the Notice Paper (see SOs 145, 177(4)).

Under SO 146(2), an amendment may be moved to this motion to instead require the reconsideration of any clauses or other parts of the bill. An amendment of this type is drafted to supersede the motion to report the bill (that is: 'That the question be amended by omitting all words after "That" and inserting instead "the committee reconsider [clause x/schedule x/etc]"').[213] This is an opportunity for the committee to revisit any decisions previously made while still in committee, rather than waiting for the House to order the recommittal of the bill under SOs 147 or 149 (these being the only other opportunities provided for by the standing orders for decisions previously made in committee to be revisited). The provision for 'reconsideration' is a new provision first adopted in the 2004 rewrite, and was taken from practice in the Senate.[214] The *Annotated Standing Orders of the Australian Senate* notes that this addition was made by a senator to preserve the South Australian practice of allowing for the reconsideration of a bill before it had been reported out of committee.[215] Prior to 2016, when a motion to reconsider a matter in committee of the whole was agreed to, it was recorded in the Minutes of Proceedings under the heading 'In committee', even though the proceedings of the

212 This motion is in slightly different terms to the motion listed in the standing order, as the motion has remained in the same form as that which applied under the previous standing orders. The slight variation is inconsequential in its effect.

213 For example, *Hansard,* NSW Legislative Council, 22 June 2004, p 9764; 10 November 2004, p 12526; 17 November 2004, p 12939; 29 May 2013, pp 21071-21072.

214 Australian Senate SO 120.

215 Laing, *Annotated Standing Orders of the Australian Senate*, p 386.

committee of the whole were not ordinarily reflected in the minutes.[216] From 2016, all proceedings in committee were recorded in the minutes.

If the question on the motion for the Chair to report the outcome of the committee's consideration is negatived, consideration in committee of the whole continues.[217] If the question is agreed to, the President resumes the chair and the Chair of Committee reports the outcome of the committee's consideration to the President; the President then repeats that report to the House.

After the report of the committee has been announced to the House, a member (again, usually the member with carriage of the bill) will move that the House adopt the report. This motion can be moved immediately, or the motion may be set down for a future day (SO 146(3)). The motion can be debated,[218] however, it would not be in order for debate to revisit the discussion which has taken place in committee or during the first or second reading debate.

The adoption of the report is the House's opportunity to accept or reject the outcome of the committee's consideration of the bill, or move that the bill be recommitted for further consideration (see SOs 147 and 177 for discussion of the amendments that may be moved to this motion). The proceedings of the committee on the bill are not recognised until the House has adopted the report (SO 145).

In some cases, the committee will report progress with a view to postponing further consideration of a bill until a later time – this procedure is discussed under SO 177.

In one rare instance, the House rescinded the motion to adopt the report of the committee in order to allow the further consideration of a message from the Assembly regarding the Council's amendments to a bill in committee of the whole.[219]

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216 For example, *Minutes*, NSW Legislative Council, 4-5 December 2003, p 504; 22 June 2004, p 873; 10 November 2004, p 1110; 17 November 2004, p 1142; 29 May 2013, p 1782.

217 For example, *Hansard*, NSW Legislative Council, 17 June 2009, p 16151; 12 September 2012, p 15003.

218 For example, *Minutes*, NSW Legislative Council, 19 October 1882, pp 42-43; 20 November 1906, p 129; 27 February 1935, p 292; 2 April 1941, p 161.

219 On 15 June 1942, the House resolved into committee of the whole to consider a message from the Assembly disagreeing and agreeing to various amendments made by the Council to a bill. The committee reported that it had resolved to insist on some amendments and not insist on others, and the House adopted the report. A select committee was then appointed to draw up reasons for insisting on one of the Council's amendments. When the report was tabled, the adoption of the report was set down as an order of the day for a later hour of the sitting. When the order of the day for consideration of the select committee's report was called on later that day, the order was postponed, and a motion was moved as a matter of necessity without previous notice for the rescission of the motion to adopt the original report from the committee of the whole on the Assembly's message. The motion was agreed to, and a second motion was moved to require that the Assembly's message be recommitted with a view to further consideration in committee of the whole. (*Minutes*, NSW Legislative Council, 11-16 June 1942, p 218).

Motion to move an instruction to committee of the whole

Under SO 179, the House may move a motion to provide an instruction to the committee of the whole that it have the power to consider matters not otherwise referred to it, or extend or restrict its authority. In most cases, instructions are moved for the purposes of authorising the committee to consider amendments that would otherwise fall outside the long title of the bill.

Under SO 180(2), a motion for an instruction may be moved as an amendment on the question for the adoption of the report of the committee. This circumstance would most likely arise in the event that, during consideration in committee, a point of order was taken that an amendment fell outside the leave of the bill, particularly if the amendment was moved on the floor and was not verified by the Chair and the Clerk prior to the House resolving into committee. To enable the committee to consider the amendment, the committee could move that the Chair report progress (or report the outcome of its consideration, if the committee wished to finalise its consideration of the bill first), then when the motion for adoption of the report is moved in the House, the motion would be amended to move an instruction. If that instruction was agreed to, a member would then move that the House resolve into committee of the whole for the further consideration or recommittal of the bill.

Background

The general provisions of SO 146 have been reflected in the standing orders since 1856. The standing orders provided that 'when the bill has been settled in committee, it shall be reported by the Chairman to the Council, with or without amendments, as the case may be' (1856 SO 116). The standing orders also provided that where a bill was reported without amendment, the adoption of the report could be moved immediately; however, if the bill was reported with amendment a future day must be fixed for that purpose (1856 SO 117). In 1870, this provision was simplified to stipulate that the adoption of the report could be moved immediately or a future day appointed, regardless of whether amendments had been made to the bill (1870 SO 130).[220] Interestingly, this amendment reflected the words of the standing order originally proposed by the Standing Orders Committee in 1856, which were in turn amended during consideration of the draft rules in committee of the whole to arrive at the terms adopted for 1856 SO 117.

The 1895 standing orders continued these provisions,[221] with the addition of specific reference to the Chair reporting the outcome of the bill (i.e. with or without amendment) 'and if necessary with an amended title' (1895 SO 184).

As noted above, the provision for a member to move an amendment to the motion for the Chair to report the outcome, in order to require the further consideration of particular clauses or other parts of the bill, was first adopted in 2004. The few examples of this

220 The committee's report and the subsequent debate on the report in the House did not canvass the reasons for the amendments made.

221 1895 SOs 184 and 185, drawn from the Assembly's 1894 SOs 273, 274 and 275.

procedure date from the period in which the new standing orders operated as sessional orders, or in which SO 146 was in force.[222]

147. RECOMMITTAL OF REPORT

On the motion for adoption of the report the bill may, on motion, be recommitted, in whole or in part.

Development summary		
1856	Standing order 119	Recommittal of bill
1870	Standing order 132	Recommittal of bill
1895	Standing order 185	Recommittal on Motion for adoption of report
2003	Sessional order 175	Recommittal of report
2004	Standing order 145	Recommittal of report

Recommittal under SO 147 is an instruction from the House to the committee of the whole that it re-examine a bill, or parts of a bill. A bill recommitted can be further amended, or decisions previously made can be reversed. For example, words inserted can be removed and words omitted from the bill can be reinserted.[223] Under SO 147, on the motion for the adoption of the report from committee of the whole, a motion may be moved that the bill, or parts of the bill, be recommitted.

Reconsideration of a bill is also provided under SO 146(2), which permits the committee of the whole to amend the motion that the Chair report the bill to the House so that it can re-examine any clauses of the bill.

SO 149 provides for recommittal before the motion for the third reading is determined.

Operation

SO 147 provides the House with the option to adopt the report from committee of the whole, or recommit the bill. Recommittal is moved as an amendment to the motion that the report be adopted to omit all words after 'That' and insert instead 'this bill be now recommitted with a view to the further consideration of _____'. The amendment can be debated[224] and amended.[225]

There is no provision to set recommittal down for a future time. If it is intended to postpone further consideration of the bill until a later time, the proper course is to set

222 For example, *Hansard*, NSW Legislative Council, 4 December 2003, p 6016; 3 June 2004, p 9572; 10 November 2004, p 12526; 17 November 2004, p 12939; 29 May 2013, pp 21071-21072.

223 See, for example, Independent Commission Against Corruption Bill (No. 2) – amended on recommittal to restore to original wording, *Hansard,* NSW Legislative Council, 14 June 1988, p 1891.

224 Ruling, Deputy President O'Conor, *Hansard,* NSW Legislative Council, p 1439.

225 *Minutes*, NSW Legislative Council, 10 January 1868, p 154; 14 January 1868, p 155.

down the order of the day for adoption of the report for a later hour or future day under SO 146, and amend the motion when it is called on.

There is no limit on the number of times a bill can be recommitted. However, while many bills have been recommitted a second time, it is unusual for recommittal a third or fourth time. In 1993, the Homefund Restructuring Bill was recommitted to consider certain clauses and schedules and was reported a second time with further amendments. On the motion for the adoption of the second report the bill was again recommitted for further consideration of the whole bill. The bill was reported a third time with further amendments, the report adopted and the bill read a third time and returned to the Assembly with amendments.[226] In 1864, the Seamen's Laws Amendment and Consolidation Bill was reported from committee of the whole a fourth time.[227]

If the report has already been adopted, recommittal can be moved on the third reading. An amendment to the motion to adopt the report from committee to recommit the bill can include an instruction to committee of the whole under SO180(2). Recommittal is discussed further under SO 149.

Background and development

The provision for the recommittal of a bill, in whole or in part, on the motion for adoption of the report from the committee of the whole has applied consistently since 1856.

148. THIRD READING

(1) When the report of the committee of the whole is adopted, a future day may be fixed, without notice or debate, for the third reading.

(2) When the order of the day for the third reading of a bill is called on, the question will be proposed "That this bill be now read a third time".

(3) An amendment may be moved to that question:

(a) by leaving out "now", and adding "this day 6 months", which, if carried, will finally dispose of the bill during the present session, or

(b) the previous question may be moved.

(4) Before the bill may be read a third time, the Chair of Committees must certify in writing that the bill is in accordance with the bill as reported, which the President will announce to the House.

Development summary		
1856	Standing order 118 Standing order 120 Standing order 121	Day for third reading Verifying printed copy Amendments on third reading

226 *Minutes*, NSW Legislative Council, 15 and 16 December 1993 am, pp 463-464.

227 *Minutes*, NSW Legislative Council, 16 February 1864, p 128.

Development summary		
1870	Standing order 131 Standing order 133 Standing order 134	Day for third reading Verifying printed copy Amendments on third reading
1895	Standing order 187 Standing order 188 Standing order 189 Standing order 190	Day fixed for Third reading Certificate of Chairman before Third Reading Motion for Third Reading Amendments on Motion for Third Reading
2003	Sessional order 148	Third reading
2004	Standing order 148	Third reading

The third reading is the final stage of consideration of a bill and the final opportunity for members to speak in support of, or in opposition to, the bill or to seek to delay or defeat the bill. The standing order sets out the procedure for moving the third reading and the amendments that can be moved to that motion.

Operation

Under SO 148(1), and in accordance with parliamentary practice, the third reading of a bill must occur on a day subsequent to the second reading and committee of the whole. In practice, the majority of bills are permitted to proceed through all stages in one sitting as standing orders have been suspended, the bill has been declared urgent under SO 138, or the third reading is moved with the concurrence of the House.[228]

The third reading of a bill can be set down for the next sitting day and considered as formal business under SO 44. This procedure allows the third reading to be dealt with at the commencement of the next sitting, rather than waiting for the matter to be called on in the order that the bill occurs on the Notice Paper. A motion considered as formal business cannot be amended or debated. (See SO 44).

When a Council bill is amended in committee of the whole, a 'second print' of the bill, incorporating the amendments agreed to, is prepared by Parliamentary Counsel for consideration at the third reading. Setting the third reading down on the next sitting day allows time for Parliamentary Counsel and the Clerk to ensure that the bill available for the third reading is the bill as reported from committee of the whole.

SO 148(2) provides that when the order of the day for the third reading of a bill is called on, the question will be proposed 'That this bill be now read a third time'. Under SO 148(3), the motion can be amended to *omit* 'now', and add at the end 'this day 6 months'. SO 148(3) specifies that if the 'this day six month' amendment is agreed to it will finally dispose of the bill 'during the present session'. According to *Odgers' Australian Senate Practice*, if such an amendment is carried, the bill is 'disposed of with an indication of finality greater than

228 See SO 137, 'Expedited Passage of a Bill' for a discussion on moving the third reading 'with concurrence'.

if the motion for the third reading is simply rejected'.[229] There are few examples of 'this day six month' amendments being moved and even fewer of such amendments being agreed to.[230] On one occasion, the question to omit the word 'now' was agreed to, but the question that the words 'this day six months' be added at the end was negatived. A further amendment that the words 'this day week' be added at the end was then agreed to.[231] Amendments were also moved for the third reading to be read 'this day three months'.[232]

According to SO 148, no other amendments are permitted on the third reading, the rationale being that once the bill has passed the second reading, and the report from committee of the whole has been adopted, the House should finally decide whether to pass the bill or reject it. However, while no other amendments are permitted on the third reading under the standing orders, there are precedents for amendments to refer a bill to a committee[233] and reasoned amendments.[234]

Debate on the third reading is a last opportunity for members to put on record their support or opposition to a bill and the scope of debate is limited to that purpose. Presidents' rulings have consistently limited debate to whether the bill should or should not pass.[235]

Under SO 148(3)(b), the previous question may be moved on the third reading. The previous question is a dilatory motion which can be moved at any time during debate by a member with the call. The objective is to force the House to decide whether to have the original question put. The previous question is not moved as an amendment but as a distinct motion.[236] See SOs 107 and 108 for further information on the previous question and earlier form of the question.

The consequence of the previous question being carried on the third reading is the same as if the House had negatived the third reading. The order for the third reading can be restored by motion on notice. If the previous question is negatived, the Chair must immediately put the question on the third reading together with any amendments that had been moved to it (SO 108 (2)). The effect of the vote is that in disagreeing that the question be *not* now put, the House has agreed that the question *be* now put.[237]

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229 Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), pp 320-321.

230 See, for example, motions carried, *Minutes,* NSW Legislative Council, 6 June 1860, p 100 (Bank Statements and Abstracts Regulation Bill); 1 October 1884, p 285 (Municipal Ways Improvement Bill). See, for example, motions negatived, *Minutes,* NSW Legislative Council, 27 September 1882, p 28 (Evidence in Summary Convictions Bill); 7 July 1898, p 45 (Immigration Restriction Bill).

231 *Minutes,* NSW Legislative Council, 9 June 1887, p 106 (Divorce Extension Bill).

232 *Minutes,* NSW Legislative Council, 11 February 1857, p 61 (Bonded Warehouses Duty Bill).

233 See, for example, *Minutes,* NSW Legislative Council, 7 December 2000, pp 823-825; *Hansard,* NSW Legislative Council, 7 December 2000, p 11754 (Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000).

234 *Minutes,* NSW Legislative Council, 29 and 30 October 1991 am, pp 225-226; *Hansard*, NSW Legislative Council, 29 October 1991, pp 3562-3567 (Industrial Relations Bill).

235 See, for example, *Hansard,* NSW Legislative Council, 15 March 1892, p 6458; 4 May 1989, p 7451; 29 June 2001, p 15934.

236 See SO 140 – Second Reading, for more detail concerning the previous question.

237 *Erskine May*, 24th ed, pp 404-405.

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

SO 148(4) provides that, before the bill may be read a third time, the Chair of Committees must certify in writing that the bill is in accordance with the bill as reported, which the President will announce to the House. This is achieved by the Clerk providing a prepared certificate for the Chair to sign on the conclusion of proceedings in committee of the whole. On the motion for the third reading being moved, the certificate is provided to the President who, before putting the question on the third reading, states: 'I have a certificate from the Chair of Committees that the bill is in accordance with the bill as reported from the committee of the whole'.

Background and development

SO 148(1) continues the practice under previous SO 187 of 1895, that when the report from committee of the whole is adopted a future day is to be set for the third reading. Under 1856 SO 118 and 1870 SO 131, on a future day for the third reading being set 'the bill as reported shall in the mean time be printed'.

In practice, the third reading of the majority of bills proceeds on the same day as committee of the whole as standing orders have been suspended, the bill has been declared urgent under SO 138, or the third reading is moved with the concurrence of the House.[238]

(See SO 137 for detail on the expedited passage of a bill, including suspension of standing orders and moving the third reading by consent, and SO 198 for detail on the suspension of standing orders).

Under 1856 SO 121 and 1870 SO 134, amendments to the content of the bill could also be moved on the third reading so long as notice had been given, although in 1863 amendments to a bill were moved on the motion for the third reading, standing orders having been suspended, by leave, as a matter of necessity.[239] The provision for amending a bill on the third reading was omitted from the 1895 standing orders.

Under SO 148(2) on the order of the day for the third reading of a bill being called on, the question is moved 'That this bill be now read a third time', replicating the provisions of SO 189 of 1895 SO 189. Earlier standing orders did not specify the terms or requirement for the motion for the third reading.

The provisions under SO 148(3) for the 'this day 6 months' amendment and the previous question are consistent with 1895 SO 190. The amendment that a bill be read 'this day six months' was originally used because it would result in the order of the day lapsing on prorogation of the House at the conclusion of the session. The practice of ordering that a bill be read a third time (or more often second time) 'this day six months' became tantamount to the rejection of the bill, even if the session extended beyond the six-month

238 See SO 137, 'Expedited Passage of a Bill' for a discussion on moving the third reading 'with concurrence'.

239 *Minutes,* NSW Legislative Council, 30 December 1863, p 88.

period. Consequently, on such a motion being agreed to, the item is removed from the Notice Paper and the bill is not considered again in the same session. See standing order 140, relating to the second reading of a bill, for further information on a 'this day six month' amendment.

The requirement for the Chair of Committees to certify in writing that the bill is in accordance with the bill as reported was contained in similar terms in 1895 SO 188, 1870 SO 133 and 1856 SO 120.

149. RECOMMITTAL ON THIRD READING

When the order of the day for the third reading is called on and before the motion for the third reading is carried, the bill may, on motion, be recommitted in whole or in part.

Development summary		
1856	Standing order 119	Recommittal of bill
1870	Standing order 132	Recommittal of bill
1895	Standing order 190	Amendments on Motion for Third Reading
2003	Sessional order 149	Recommittal on third reading
2004	Standing order 149	Recommittal on third reading

SO 149 provides a final opportunity for the House, in committee of the whole, to re-examine a bill before it is read a third time, or rejected.

Operation

Under SO 149, a motion may be moved for a bill, or parts of a bill, to be recommitted to the committee of the whole for further consideration. The terms of SO 149, which are in identical terms to Senate SO 123, are different to those of former standing orders (see below). Whereas under former rules the recommittal of a bill on the third reading was moved as an amendment to the question for the third reading, under SO 149, recommittal is moved as a dilatory motion. When the third reading of the bill is before the House, a motion 'That this bill be recommitted for further consideration of _____' is moved.[240] If agreed to, the motion for recommittal supersedes the motion for the third reading. When the second (or third and so on) report from committee of the whole is adopted, the third reading is set down for a future day under SO 148.

There is no limit to the number of times a bill can be recommitted. In 1935, the Legal Practitioners (Amendment) Bill was considered in committee of the whole three times. The first report from committee of the whole was adopted and the third reading set down for the next sitting day. The motion for the third reading was amended to recommit the bill for further consideration of a particular clause. On the committee reporting the bill with further amendments, the motion that the report be adopted was amended to

240 See *Odgers' Australian Senate Practice*, 13th ed, p 321.

recommit the bill for further consideration of the same clause. The committee reported the bill for the third time, and the third report from the committee was adopted.[241]

There are numerous examples since 1856 of bills being recommitted on the third reading: to recommit a bill for further consideration of stated clauses and schedules;[242] for further reconsideration of the whole bill,[243] and for the reconsideration of stated clauses and for the addition of a new clause.[244] There are no examples of a bill being recommitted on the third reading since the adoption of SO 149 as a sessional order in 2003.

Background and development

1856 SO 119 and 1870 SO 132 provided for recommittal of a bill on the motion for the adoption of the report or on the order for the third reading being called on or moved. 1895 SO 186 provided for recommittal on adoption of the report from committee of the whole and SO 190 provided for recommittal on the motion for the third reading being moved.

Under these former standing orders, an amendment was moved to the question 'That this bill be now read a third time' to omit 'now read a third time' and to insert instead 'recommitted for the further consideration of _____'.

Under SO 149 adopted in 2003, the procedure for recommitting a bill on the third reading is moved as a superseding motion. SO 149 is in identical terms to Senate standing order 123.

150. CORRECTION

Amendments of a formal nature may be made, and the Chair of Committees or Clerk may correct clerical or typographical errors, in any part of a bill.

Development summary		
1895	Standing order 192	Correction of Errors
2003	Sessional order 150	Correction
2004	Standing order 150	Correction

SO 150 allows the Clerk or the Chair of Committees to make amendments of a clerical or typographical nature to a bill. Anything more substantial would require amendment in committee of the whole.

241 *Minutes,* NSW Legislative Council, 13 February 1935, p 264; 14 February 1935, pp 270-271. See also 29 March 1977, pp 352-353 (Anti-Discrimination Bill recommitted on third reading) ; 2 and 3 August 1989, p 809 (Workers Compensation (Benefits) Amendment Bill recommitted on third reading).

242 *Minutes,* NSW Legislative Council, 18 March 1874, p 132; 19 April 1950, p 297; 6 June 1995, p 108.

243 *Minutes,* NSW Legislative Council, 3 August 1989 am, p 803.

244 *Minutes,* NSW Legislative Council, 3 December 1920, p 129.

Operation

There have been few occasions on which amendments or bills have required the Clerk to correct clerical or typographical errors, but there have been minor drafting errors corrected in amendments[245] or in a bill. [246]

For example in 2005, after the House had agreed to the Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005, it was discovered that a Government amendment agreed to by the House on 1 December 2005 to proposed section 26ZB(6) and (7), to omit 'or the summary' wherever occurring, contained a consequential and typographical error. The amendment should have included proposed section 26ZB(8). Under SO 150, the Clerk of the Parliaments corrected the record so that the amendment included 26ZB(8).

There is also a practice of the Clerk changing a bill when a bill is considered over consecutive years and when a second bill of the same name is before the House. These changes only occur in specific circumstances outlined below.

Procedures for changing the year of a bill

Prior to 1973, when a bill was introduced in one year and passed in the next, the year would be changed by amendment in committee of the whole. This resulted in costly reprinting of the bill before it was read a third time, even if the year was the only amendment to the bill.

To address this, on 14 February 1973, an agreement was reached between the Clerks, Presiding Officers, the Premier and the Leader of the Government in the Legislative Council to apply the practice operating in the Imperial Parliament, that any amendments to the date in the citation title of a bill would be made at the direction of the Clerk in the House in which the bill originated before it was printed on vellum. Consequently, bills would retain the year of introduction until it had been passed by both Houses.[247]

However, this practice was inconsistently applied over the years. In some cases, the year was changed when the bill was forwarded from one House to the other and in others the year was changed on resumption of debate.

In 2012, the Clerks agreed that the year of introduction would be retained in the bill title throughout the progression of the bill between the Houses and that the only time the year of a bill is to change during its consideration by the Parliament is when a bill introduced one year is amended in the originating House in the next year and a second print is prepared.

245 See Proceedings in Committee of the Whole on the Relationships Register Bill 2010; Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005.

246 Motor Accidents Compensation Bill 1999.

247 *Minutes,* NSW Legislative Council, 28 February 1973, p 219.

'*(No. 2) bills*'

The inclusion of '(No. 2)' after the year of the bill in the short title and in the citation clause, indicates that the bill is the second bill with the same name as a bill previously introduced into the Parliament in that calendar year, and which is still before one or other House. For these '(No. 2)' bills, the (No. 2) is not a permanent part of the title and is removed, by the Clerk striking out the (No. 2) in the short title and the citation clause, when the bill progresses past the point at which the first bill stalled. From that point forward the (No. 2) is no longer a part of the title and the records of proceedings and relevant databases are modified accordingly.

Consequently, a bill can be introduced in one House with (No. 2) in the title but forwarded to the other House without (No. 2) in the title. The Council can also introduce a bill with (No. 2) after the year in the title even if the bill of the same name was introduced in the Assembly and had not yet reached the Council. For example, in 2008 the Electricity Industry Restructuring Bill 2008 (No. 2) was introduced in the Legislative Council, a bill of that name being on the Legislative Assembly business paper. If the bill introduced in the Council had progressed, which in this case it didn't, the (No. 2) would have remained in the title of the bill when forwarded to the Legislative Assembly and struck out by the Clerk in that House when it passed the point in that House at which the first bill had stalled.

This type of '(No. 2)' bill is to be distinguished from bills in which the '(No. 2)' appears before the year of the bill in the title. Bills of this type have the same name as a bill already passed by Parliament in that calendar year.[248] The (No. 2) in this case remains a permanent part of the title.

Background and development

Under SO 192 adopted in 1895, clerical, typographical, or other obvious errors could be corrected in any part of a bill by the Chairman of Committees or Clerk before it is sent to the Assembly for its concurrence.

There were no equivalent standing orders prior to 1895. A standing order in similar terms was adopted by the Legislative Assembly in 1894.

151. TRANSMISSION TO ASSEMBLY

(1) When a bill originated in the Council has been passed, the Clerk will certify at the top of the first page: "This (public) bill originated in the Legislative Council and, having this day passed, is now ready for presentation to the Legislative Assembly for its concurrence".

(2) After the third reading a bill will be deemed to have passed and the Clerk will so certify, and the bill will be sent, with a message, to the Assembly for concurrence.

248 For example, the Statute Law Miscellaneous Provisions Bill (No. 2) 2011.

Development summary		
1856	Standing order 123	Proceedings after passing
1870	Standing order 136	Proceedings after passing
1895	Standing order 191	Title and Certificate of Clerk
1922	Standing order 191	Transmission to Assembly – Bill passed – Message to Assembly
1986–2003	Sessional order	Bill passed – Message to Assembly
2003	Sessional order 151	Transmission to Assembly
2004	Standing order 151	Transmission to Assembly

After the third reading, the bill is deemed to have passed the Council and is ready for presentation to the Assembly for concurrence. The Clerk signs a certificate to that effect on the title page of the bill, which is forwarded, with a message to the Speaker signed by the President, to the Assembly.

Operation

On a bill being read a third time, the Clerk signs and dates a certificate on the title page of the bill which states: 'This (public) bill originated in the Legislative Council and, having this day passed, is now ready for presentation to the Legislative Assembly for its concurrence'.

A message forwarding the bill for concurrence is signed by the member in the chair when the bill is read a third time, and the bill, along with the message, is delivered to the Assembly by the Usher of the Black Rod. Before proceeding to the Assembly, a record of the message is entered in a register which remains on the Table while the House is sitting. On returning from the Legislative Assembly, the Clerk to whom the message was delivered is also noted in the message book.

Background and development

SO 122 of 1856 provided that after the third reading, a motion would be moved 'That this Bill do pass'. SO 123 of 1856 provided that:

> If the Bill be Passed, its Title shall be settled, and the Clerk shall certify at the top of the first page the date of its passing, and the Bill may be sent to the Assembly, with a Message, requesting their concurrence therein.

These provisions resulted in three motions being moved after the bill had been read a third time, each needing to be agreed to before the next was moved: 'That the bill be now passed' or 'That the bill do now pass', followed by 'That the title of this bill be …', and finally 'That the bill be forwarded to the Assembly'.[249]

249 See, for example, *Minutes,* NSW Legislative Council, 2 October 1856, p 16; 10 March 1869, p 68; 4 July 1895, p 256.

Although 1895 standing orders omitted the requirement after the third reading for the motion 'That this bill do now pass', it continued to be moved in practice. SO 123 was readopted in 1895 as SO 191 with the additional provision that the Message to the Assembly was to be signed by the President.

On 2 August 1922, the House considered a report of the Standing Orders Committee which recommended the amendment of several standing orders and the rescission of two standing orders, including SO 191. The committee recommended the adoption of a new standing order in its place:

> After the Third Reading the Bill shall be deemed to have passed the House, and the Clerk shall so certify and the only further question necessary shall be a motion directing that the Bill be sent, with a Message, to the Legislative Assembly for concurrence. Such Message shall be signed by the President.[250]

During debate on the committee's report in committee of the whole, it was observed that the proposed new standing order would have the effect of dispensing with the two procedural motions following the third reading of a bill. Under the new SO, the Clerk would simply certify the bill as having been passed by the House and the House would then agree, on motion, that the bill be sent with a message to the Assembly for concurrence. It was noted during debate that the standing order had been in operation in the Assembly for many years to no ill effect and its adoption would have the benefit of bringing uniformity between the two Houses.[251]

In 1986, a sessional order was adopted which varied the terms of standing order 191 to remove the need for the final motion authorising the bill to be forwarded to the Assembly:

> After the third reading the Bill shall be deemed to have passed the House and the Clerk shall so certify, and the Bill shall be sent, with a Message, to the Assembly for concurrence.[252]

In the following session, during debate on the motion that the sessional order be again adopted, it was noted that amendments to the motion had been used by the Council in the past to state an opinion or qualification regarding a bill.[253] For example, in 1894, the motion that the Appropriation Bill be returned to the Assembly without amendment was amended to insert additional words asserting the right of the Council to amend all bills.[254] In 1899, the motion that a message be forwarded to the Assembly returning the Australasian Federation Enabling Bill (which authorised a vote of the electors of New South Wales to be taken) with amendments was amended to add words that by passing the bill the Council did not express approval of the Draft Commonwealth of Australia Constitution Bill as amended at the Conference of Prime Ministers which was

250 *Minutes,* NSW Legislative Council, 2 August 1922, pp 32-33 (The report did not follow a reference from the House, either in that or a previous session).
251 *Hansard,* NSW Legislative Council, 3 August 1922, pp 794-796.
252 *Minutes,* NSW Legislative Council, 20 February 1986, p 27.
253 *Hansard,* NSW Legislative Council, 24 May 1988, p 359.
254 *Minutes,* NSW Legislative Council, 21 December 1894, p 126.

not in agreement with the resolutions concerning the Draft Commonwealth of Australia Constitution Bill passed by the Houses of the Parliament of New South Wales during the previous session.[255]

The sessional order was adopted each session until the provision was adopted as standing order 151(1) in 2004 with the addition of the words of the certificate to be signed by the Clerk: 'This (public) bill originated in the Legislative Council and, having this day passed, is now ready for presentation to the Legislative Assembly for its concurrence'.

Standing order 151(1) is in almost identical terms to Senate standing order 125(1).

Standing order 155 requires the Clerk's certificate that an Assembly bill has been passed with or without amendment.

In 1986, it was also agreed that the Houses would adopt a common style of message when forwarding bills for concurrence.[256] The style was adopted from the commencement of the February 1987 sittings as follows:

> **Mr PRESIDENT**
>
> The Legislative Assembly having this day passed a Bill intituled 'An Act to …..' presents the same to the Legislative Council for its concurrence.
>
> L B Kelly
> Speaker
>
> Legislative Assembly
> 3 December 1986

152. LEGISLATIVE ASSEMBLY AMENDMENTS TO BILLS ORIGINATED IN THE COUNCIL

(1) When a bill has been returned from the Assembly with amendments, the message and the amendments will be printed and a time fixed for taking them into consideration in committee of the whole either forthwith, at a later time, or this day 6 months.

(2) Amendments made by the Assembly may be agreed to with or without amendment, or disagreed to, or the consideration of them postponed, or the bill ordered to be laid aside.

(3) An amendment may not be proposed to an amendment of the Assembly that is not relevant to it, and an amendment may not be moved to the bill unless it is relevant to, or consequent upon, the acceptance, amendment or rejection of an Assembly amendment.

(4) When amendments made by the Assembly have been agreed to by the Council without amendment, a message will be sent informing the Assembly accordingly.

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255 *Minutes,* NSW Legislative Council, 21 March 1899, p 26.

256 The agreement and an example of the new form of message, was set out in a minute from the Clerk Assistants in the Assembly and the Council.

(5) If Assembly amendments have been agreed to with amendments, the bill will be returned with a schedule of those amendments, and a message requesting the concurrence of the Assembly.

(6) If Assembly amendments have been disagreed to, the bill may be laid aside, or it may be again sent to the Assembly, with a message requesting its reconsideration.

(7) When a bill is returned to the Assembly with amendments made by the Assembly disagreed to, the message accompanying the bill must also contain reasons for the Council not agreeing to the amendments proposed by the Assembly.

(8) The reasons will be drawn up by a committee appointed (on motion without notice) for that purpose when the House adopts the report of the committee of the whole disagreeing to the amendments, or may be adopted by motion at that time.

(9) When amendments have been made by the Council on the amendments of the Assembly, a schedule of those amendments will be prepared, certified by the Clerk, and accompany the bill.

Development summary		
1856	Standing order 124	Amendments by Assembly
1870	Standing order 137	Amendments by Assembly
1895	Standing order 193 Standing order 194 Standing order 195 Standing order 196 Standing order 197	Time fixed for consideration of How disposed of Must be considered in Committee Further proceeding after consideration of Amendments When Amendments disagreed from, reasons to accompany
2003	Sessional order 152	Legislative Assembly amendments to bills originated in the Council
2004	Standing order 151	Legislative Assembly amendments to bills originated in the Council

Standing order 152 sets out the procedures to be followed if the Assembly returns a Council bill with amendments.

Operation

On receiving a message from the Legislative Assembly returning a Council bill with amendments, the message and the amendments are to be printed and a time fixed for consideration in committee of the whole either forthwith, at a later time or this day six months.[257]

257 See SO 140 for a discussion on the consequences of the House agreeing to set a bill down for 'this day six months'.

The motion that the message be considered in committee of the whole has been debated and amended. For example, in 1993, on a message being received from the Assembly returning the Legal Profession Reform Bill and cognate Maintenance and Champerty Abolition Bill with amendments, the Attorney General moved that consideration in committee of the whole stand an order of the day for a later hour of the sitting. The motion was amended to omit 'a later hour' and insert instead 'forthwith'.[258]

In committee of the whole, the House considers whether to agree or disagree with the amendments made by the Assembly in the bill.

In committee of the whole, it is usual practice for the member with carriage of the bill to move that the committee agrees or does not agree with the amendments made by the Assembly. In the case of a government bill, the most likely scenario is for a minister to propose that the committee agree with the amendments made by the government-controlled Assembly. Members then have the opportunity to amend the motion to insert 'does not' before 'agree' or omit 'does not' as the case may be, or to reject some amendments and not others, or propose further amendments in substitute of amendments made by the Assembly.

The Council has agreed to Assembly amendments,[259] agreed to amendments with further amendments,[260] agreed to amendments with further amendments including an amendment in the long title and the short title,[261] disagreed to some amendments and agreed to others with amendments[262] and disagreed to amendments.[263]

As the Council has agreed to the bill, and the only argument remains on the amendments in question, any further amendments proposed must be relevant to or consequent on the acceptance, amendment or rejection of an Assembly amendment (SO 152 (3)), and must not relate to the substantive parts of the bill which have already been settled.

Under SO152 (4), when amendments made by the Assembly have been agreed to without amendment, a message is sent informing the Assembly accordingly. Under SO 152(5), if the Assembly amendments have been agreed to with amendments, the bill is returned with a schedule of those amendments, and a message requesting the concurrence of the Assembly.

Under SO 152(6) and (7), if the Assembly amendments have been disagreed to:

- the bill may be laid aside

258 *Minutes*, NSW Legislative Council, 19-20 November 1993 am, p 444.

259 *Minutes,* NSW Legislative Council, 5 December 2007, p 429 (Law Enforcement and Other Legislation Amendment Bill 2007); 11 November 2010, p 2225 (Surrogacy Bill 2010).

260 *Minutes,* NSW Legislative Council, 3 December 1929, pp 113-115 (Constitution (Further Amendment) Bill).

261 *Minutes,* NSW Legislative Council, 19 April 1994, pp 114-115 (message); 20 April 1994, pp 135-136 (Workers Compensation Legislation (Further Amendment) Bill).

262 See, for example, *Minutes*, NSW Legislative Council, 22 October 1858, p 91 (District Court Bill).

263 *Minutes,* NSW Legislative Council, 17 April 1861, p 123 (Commissioner at Newcastle Appointment Bill).

- it may be again sent to the Assembly, with a message requesting its reconsideration, or
- it can be returned to the Assembly with a message accompanying the bill which must also contain reasons for the Council not agreeing to the amendments proposed by the Assembly.

There are no records of a bill being ordered to be laid aside in the Council. Prior to 1910, it was common for the Assembly to lay aside Assembly bills when it disagreed with amendments agreed to by the Council because in its view the Council did not have the power to make the amendments.[264] Practice in the Australian Parliament suggests that the laying aside of a bill during a disagreement on amendments has the same effect as an amendment to the second reading that the bill be read 'this day six months'. In 1880, the President ruled that the practice of laying a bill aside was not considered equivalent to the rejection of the bill but, rather, a mode of avoiding the necessity for rejection.[265]

SO 152(6) also introduces the option for the Council to again send the bill to the Assembly with a message requesting its reconsideration. While former standing orders did not provide this option, there was nothing in the standing order to prohibit it. However, no records can be found of it occurring.

Under SO 152(7), when a Council bill is returned to the Assembly with amendments made by the Assembly disagreed to, without an alternative proposal, the Council must provide reasons.[266] Since the adoption of SO152(7) there have been no incidents of reasons being adopted on motion. Under SO 152(8) the reasons are to be drawn up by a committee appointed (on motion without notice) for that purpose when the House adopts the report of the committee of the whole disagreeing to the amendments, or may be adopted by motion at that time.[267]

On 26 November 1929, the House resolved in committee of the whole to agree to some but disagree to one of the Assembly amendments made in the Constitution (Further Amendment) Bill. On the report from committee of the whole being adopted, a motion that a select committee be appointed to draw up reasons for disagreeing to the amendment made by the Assembly was agreed to. The House was then suspended until 4.00 pm the next day, at which time the report of the Select Committee, in which the reasons were contained, was laid on the table and set down for consideration. On 3 December, a motion that the report

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264 See, New South Wales Legislative Council, *Consolidated Index to the Minutes of the Proceedings and Printed Papers*, 1874-1893, vol 2, pp 165-166; New South Wales Legislative Council, *Consolidated Index to the Minutes of the Proceedings and Printed Papers*, 1894-1913, vol 3, pp 115-116; New South Wales Legislative Council, *Consolidated Index to the Minutes of the Proceedings and Printed Papers*, 1914-1934, vol 4, p 55.

265 See point of order and ruling of President Hay: *Hansard,* NSW Legislative Council, 10 March 1880, pp 1425-1428 (Stamp Duties Bill (No. 2)).

266 See, for example, *Minutes,* NSW Legislative Council, 12 March 1857, p 77; 12 April 1861, p 114; 28 May 1884, p 162; 14 July 1886, p 185.

267 Under SO 157(1), reasons are also required to be given when the Council disagrees with amendments made by the Assembly to amendments made by the Council in an Assembly bill.

of the select committee be adopted was amended to recommit the Assembly's amendments for further consideration of the amendment disagreed to. The committee reported that it had resolved to agree to the Assembly's amendment with further amendments. The House adopted the second report of the committee of the whole and a message was forwarded to the Legislative Assembly including a schedule of the amendments proposed as required by standing order. On the following day, a message was received from the Assembly agreeing to the Council's amendment made to its amendment.[268]

Transmitting bills between the Houses

In a memorandum of 13 June 2012,[269] the Clerk of the Parliaments and the Clerk of the Legislative Assembly agreed to arrangements for transmitting bills between the Houses where amendments are in dispute.

In the past, the practice had been that a bill was forwarded to the other House for concurrence and returned to the originating House with or without amendments. Beyond that point, the bill would be retained in the originating House and any further consideration of the bill would be on messages communicating disagreement, or proposing further amendments. The basis of this approach was that only the amendments to the bill were in dispute, and those parts of the bill which had already been agreed to could not be reconsidered.

It was agreed that, in future, the bill itself would be transmitted to the other House on all occasions on which there are disagreements on amendments or further amendments proposed. However, the bill would not be transmitted when the originating House sends a message agreeing to amendments proposed by the other House, or when either House retains the bill and advises the other House that it requests a conference on a bill, or that the bill has been laid aside.

Background and development

The 1856 and 1870 standing orders merely provided that any bill returned from the Assembly with amendments was to be considered in committee of the whole. This provision was continued in SO 195 of 1895 and is currently provided in SO 152(1).

The provisions of SO 152 are the same in substance as those provided for in the 1895 standing orders, with minor variation, and are in almost identical terms as Senate SO 126. The 1895 standing orders are based on those adopted in the Legislative Assembly in 1894.

Like its predecessor 1895 SO 193, the current standing order requires that a time be fixed for consideration of the message and amendments in committee of the whole, either forthwith or at a later time, or this day six months.

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268 *Minutes,* NSW Legislative Council, 26-27 November 1929 am, p 101; 3 December 1929, pp 113-114; 4 December 1929, p 118.

269 Memorandum from Legislative Assembly Procedural Research and Training and Legislative Council Procedure Office, to the Clerk of the Legislative Assembly and the Clerk of the Parliaments, dated 13 June 2012.

The provision under SO 152(3) that an amendment may not be proposed to an amendment of the Assembly that is not relevant to it, and an amendment may not be moved to the bill unless it is relevant to, or consequent upon, the acceptance, amendment or rejection of an Assembly amendment, was adopted as a standing order for the first time in 2004. The standing order codifies longstanding practice that only those portions of the bill on which there is disagreement over amendments can be further reconsidered.

Under SO 152(8), the reasons for disagreeing to Assembly amendments is to be drawn up by a committee appointed, on motion without notice, for that purpose when the House adopts the report of the committee of the whole disagreeing to the amendments, or may be adopted by motion at that time. The provision for reasons to be adopted on motion was included in the standing orders for the first time in 2003. SO 152 is drafted in similar terms to the equivalent Senate standing order which includes the provision for reasons to be adopted on motion. There have been no precedents of reasons being determined, by a committee, or on motion, since 2003.

153. BILL AGAIN RETURNED FROM THE ASSEMBLY

(1) If the Legislative Assembly returns a bill with a message informing the House that it:

(a) insists on its original amendments to which the Council has disagreed,

(b) disagrees to amendments made by the Council to the original amendments of the Assembly, or

(c) agrees to amendments made by the Council on the original amendments of the Assembly, with further amendments,

the House in committee of the whole may:

(a) agree, with or without amendment, to the amendments to which it had previously disagreed, and make, if necessary, consequent amendments to the bill,

(b) insist on its disagreement to such amendments,

(c) withdraw its amendments and agree to the original amendments of the Assembly,

(d) make further amendments to the bill consequent upon the rejection of its amendments,

(e) propose new amendments as alternative to the amendments to which the Assembly has disagreed,

(f) insist on its amendments to which the Assembly has agreed,

(g) agree, with or without amendment, to such further amendments of the Assembly making consequent amendments to the bill, if necessary, or

(h) disagree to the further amendments and insist on its own amendments which the Assembly has amended,

and if agreement is not reached or if the bill is again returned by the Assembly with any requirements of the Council still disagreed to, the House may order the bill to be laid aside, or request a conference.

(2) When the Assembly's amendments have been agreed to, or a conference is requested, or when the bill is finally passed in the Council, a message will be sent informing the Assembly accordingly.

(3) The Clerk will, at every stage, certify on the first page of the bill the action taken by the Council.

Development summary		
1856	Standing order 124	Amendments by Assembly
1870	Standing order 137	Amendments by Assembly
1895	Standing order 195 Standing order 198 Standing order 199	Must be considered in Committee When Assembly disagrees from Amendments on its Amendments Final agreement to Assembly's Amendments or Conference desired
2003	Sessional order 153	Bill again returned from the Assembly
2004	Standing order 153	Bill again returned from the Assembly

Standing order 153 sets out the options open to the Council if the disagreement between the Council and the Assembly on amendments made by the Assembly in a Council bill is not resolved under SO 152.

Operation

SO 153(1)(a) to (h) sets out the options open to the Council, in committee of the whole, if the Assembly returns a Council bill with a message informing the House that it insists on its original amendments, disagrees to amendments made by the Council to the Assembly amendments or agrees to those amendments but proposes further amendments.

Having considered the Assembly's message, the Council may:

- agree with the resolutions contained in the Assembly's message and return the bill to the Assembly advising of its decision, thereby resolving the disagreement
- continue to disagree with some or all of the resolutions contained in the Assembly's message, or propose further amendments and return the bill to the Assembly advising of its decision, or
- fail to reach agreement.

If agreement is not reached on the Assembly's message, or the Assembly continues to disagree with the Council's requirements, the Council may order the bill to be laid aside, or request a conference.

There are no records of a bill being ordered to be laid aside in the Council. It was common for the Assembly to lay aside Assembly bills when it disagreed with amendments agreed to by the Council because in its view the Council did not have the power to make the amendments. Practice in the Australian Parliament suggests that the laying aside of a bill during a disagreement on amendments has the same effect as an amendment to the

second reading that the bill be read 'this day six months'. In 1880, the President ruled that the practice of laying a bill aside was not considered equivalent to the rejection of the bill but, rather, a mode of avoiding the necessity for rejection.[270]

A conference requested by the House on the bill is conducted under the provisions of SOs 128-134. Provisions for conferences between the Houses have been in the standing orders since 1856, however, no conferences have been held on Council bills.

A disagreement between the Houses on a Council bill is finally resolved under these standing orders as the provisions for resolution of deadlocks under the *Constitution Act 1902* apply only to bills initiated in the Assembly.

There is only one recorded precedent of the Assembly returning a Council bill a second time due to continued disagreement over amendments in the bill. In 1892, the Broken Hill and District Water Supply Act Amendment Bill, a private bill, was returned by the Assembly with amendments including proposed new clauses and a new schedule in the bill.[271] In committee of the whole, the Council resolved to amend the new clause and the new schedule but to agree to all the other amendments made by the Assembly in the bill. A message was received from the Assembly agreeing to the Council's amendment in the new clause but disagreeing to the amendment in the new schedule. The Council, in committee of the whole, resolved not to insist on its amendment in the new schedule as proposed by the Assembly.[272]

The final paragraph of SO 153 provides that 'The Clerk will, at every stage, certify on the first page of the bill the action taken by the Council'.

Background and development

Under SO 152, on receiving a message from the Legislative Assembly returning a Council bill with amendments, the message and the amendments are to be printed and a time fixed for consideration in committee of the whole either forthwith, at a later time or this day six months.[273]

SO 153(1) restates the rule that the message and amendments from the Assembly must be considered in committee of the whole.

1895 SOs 195 and 198 similarly provided that the message from the Assembly and the amendments made by the Assembly were to be considered in committee of the whole. There was no requirement in the 1895 standing orders for the message and the amendments to be printed.

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270 See point of order and ruling of President Hay: *Hansard,* NSW Legislative Council, 10 March 1880, p 1427 (Stamp Duties Bill (No. 2)).

271 *Minutes,* NSW Legislative Council, 24 March 1892, p 301.

272 *Minutes,* NSW Legislative Council, 31 March 1892, p 324.

273 See SO 140 for a discussion on the consequences of the House agreeing to set a bill down for 'this day six months'.

1895 SO 199 provided 'If the Assembly's Amendment shall be agreed to, or a Conference is desired, or when the Bill is finally passed by the Council, a Message shall be sent informing the Assembly thereof', which provision is now in SO 153(2). The options available to the Council when the Assembly again returns a Council bill under SO 153(1) were not set out under the 1895 standing orders. The terms of SO 153(1) are taken from Senate SO 127.

The final paragraph of SO 153 which provides that 'The Clerk will, at every stage, certify on the first page of the bill the action taken by the Council', was first adopted in 2003 but is consistent with the requirement under SO 151(1) for the Clerk to certify, on the first presentation of the bill to the Assembly, that the bill is ready for such presentation and with SO 155 for the return of an Assembly bill with or without amendment.

1856 SO 24 provided only that any bill returned from the Assembly with amendments was to be considered in committee of the whole.

154. BILLS RECEIVED FROM THE LEGISLATIVE ASSEMBLY

(1) Bills coming to the Council for the first time from the Assembly will be proceeded with in the same manner as bills originated in the Council, except for initiation.

(2) Whenever the President has several messages from the Legislative Assembly to report transmitting bills for concurrence, the President may inquire if leave is granted for procedural motions for the first reading, printing, suspension of standing orders where applicable, and fixing the day for the second reading, to be dealt with on one motion without formalities.

Development summary		
1856	Standing order 125	Bills initiated in Assembly
1870	Standing order 138	Bills initiated in Assembly
1895	Standing order 203	Bills coming the first time from Assembly
1992–2003	Sessional order	Messages from Assembly Transmitting Bills
2003	Sessional order 154	Bill received from the Legislative Assembly
2004	Standing order 153	Bill received from the Legislative Assembly

Standing order 154(1) provides for bills received from the Assembly for the first time to proceed in the same manner as bills originated in the Council, except for initiation.

Standing order 154(2) provides that when several messages are received from the Assembly transmitting bills for concurrence, the House may give leave for the procedural motions on the bills to be moved in one motion, rather than each motion – first reading and printing, suspension of standing orders and setting the second reading down as an order of the day – to be moved separately on each bill.

Operation

Under SO 154(1), bills received from the Assembly for the first time proceed in the same manner as bills originated in the Council, except for initiation. In practice, this means that there is no requirement to seek the leave of the House to introduce the bill, and there is no requirement for a bill received from the Assembly to be adjourned for five calendar days after the second reading speech of the mover.

Since 1856, the Council has applied the established parliamentary practice that the stages of a bill should be considered over consecutive sittings in order that they be given due consideration. Accordingly, although not specifically prescribed in the standing orders, the motion for the second reading of an Assembly bill can only proceed immediately after the first reading if standing orders have been suspended or the bill has been declared urgent. Under SO 113 of 1856 and SO 126 of 1870, after the first reading and printing, a motion would be moved that a future day be fixed for the second reading. The motion could be debated and amended.[274]

Despite parliamentary practice, since 1856 the House has regularly suspended standing orders to allow a bill from the Assembly to proceed through all stages in the current or any one sitting of the House.[275] It is only on rare occasion that a motion for suspension of standing orders is not moved, or that such motion is disagreed to.[276]

Prior to May 2015, the usual procedure for suspending standing orders to allow a bill to pass through all stages in any one sitting was by motion on contingent notice.[277] In May 2015, a sessional order was adopted to vary SO 154 to provide that, on a bill from the Assembly being presented for the concurrence of the Legislative Council, a motion for the suspension of standing orders could be moved without notice to allow the bill to proceed through all its stages on that day or in any one sitting.[278]

If the suspension of standing orders is agreed to, the order of the day is set down for a later hour or next sitting day or proceeds forthwith. If standing orders are not suspended, a future day is to be appointed for the second reading.

Alternatively, a minister can declare a bill to be an urgent bill provided that copies have been circulated to members. (See SO 138 for further discussion on declaring a bill urgent).

Under SO 154(2), on several messages being received from the Assembly transmitting bills for concurrence, the President will report the messages and inquire as to whether leave is granted for the procedural motions to be dealt with on one motion. If leave

274 *Minutes,* NSW Legislative Council, 14 September 1859, p 12; 29 November 1938, pp 110-111; *Hansard,* NSW Legislative Council, 29 November 1938, pp 2988-2989.

275 See, for example, *Minutes,* NSW Legislative Council, 2 October 1856, p 15 (Railways and Immigration Loan Bill).

276 See, for example, *Minutes,* NSW Legislative Council, 27 February 2013, p 1498 (Road Transport (Repeal and Amendment) Bill 2013).

277 See SO 137 for further detail on the expedited passage of a bill.

278 *Minutes,* NSW Legislative Council, 6 May 2015, pp 61-62.

is granted, the minister may move that the bills be read a first time, printed, standing orders suspended where applicable, and the second reading of the bills set down for a later hour of the sitting, or next sitting day, or separate motions may be moved to set some bills done for a later hour and others on the next sitting day. For example, on 28 April 1992, shortly after the provision was first adopted by way of a sessional order,[279] leave was granted for procedural motions on a number of bills to be dealt with on one motion, following which the minister moved that some of those bills be read a first time, printed, standing orders suspended on contingent notice for remaining stages and second reading of the bills set down as orders of the day for a later hour. The remainder of the bills were read a first time, printed, standing orders suspended on contingent notice for remaining stages and second reading of the bills set down for next sitting day.[280]

If leave is not granted for the procedural motions to be moved on one motion, the motions for the first reading and subsequent motions on each bill are put separately, the provisions of SO 154(1) applying to each bill. Leave has not been granted on a number of occasions.[281] In 2003, under sessional order, objection was taken leave for procedural motions to be dealt with on one motion in relation to two of the nine bills reported by the President. The remainder of the bills were dealt with on one motion.[282]

Background and development

The 1856, 1870 and 1895 standing orders provided for a bill received from the Assembly to be immediately read a first time, on motion, without notice, and to proceed in all respects as public bills initiated in the Council.

Under SO 154, in a variation to earlier standing orders, bills received from the Assembly for the first time will proceed in the same manner as bills originated in the Council, *except for initiation*, thereby making it clear that the requirement under SO 137 for leave to be sought before a bill can be introduced does not apply to bills received from the Assembly.

The provision under SO 154(2) for procedural motions to be dealt with on one motion was first introduced in 1992. On 4 March 1992, the House adopted 18 sessional orders, the last of which related to messages from the Assembly transmitting bills for concurrence.[283] The provision allowed the President to inquire if leave was granted for the procedural motions for the first reading, printing, suspension of standing orders (where applicable) and setting down the order of the day for the second reading to be dealt with on one

279 *Minutes,* NSW Legislative Council, 4 March 1992, p 26.

280 *Minutes,* NSW Legislative Council, 28 April 1992, p 108.

281 See, for example, *Minutes,* NSW Legislative Council, 24 June 2003, pp 148-149 (Australian Crime Commission (New South Wales) Bill, Bail Amendment Bill and Pacific Power (Dissolution) Bill); 23 September 2008, pp 758-760 (Retirement Villages Amendment Bill 2008); 17 March 2010, pp 1709-1710 (Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010); 20 October 2010, pp 2101-2102 (Parliamentary Budget Officer Bill 2010); 10 November 2010, pp 2212-2214 (Food Amendment Bill 2010).

282 *Minutes,* NSW Legislative Council, 24 June 2003, pp 148-149.

283 *Minutes,* NSW Legislative Council, 4 March 1992, p 26.

motion without formalities. The provision was readopted each session until adopted as standing order 154(2) in 2004.

155. Return of Legislative Assembly bill

(1) When a bill has been passed by the Council with or without amendment, it will be returned to the Assembly by message, with the Clerk's certificate that the bill has been agreed to by the Council without amendment, or with the amendments indicated by the accompanying schedule, as the case may require, requesting the concurrence of the Assembly to the amendments.

(2) When any amendments have been made by the Council to a bill which has been first passed by the Assembly, a schedule of the amendments will be prepared containing reference to the page and line of the bill where the words are to be inserted or omitted, and describing the amendments proposed, and this schedule will be certified by the Clerk and will accompany the bill.

Development summary		
1856	Standing order 126 Standing order 127	Amendments to such bills Returning bills to Assembly
1870	Standing order 137 Standing order 138 Standing order 139 Standing order 140	Amendments by Assembly Bills initiated in Assembly Amendments to such bills Returning bills to Assembly
1895	Standing order 204 Standing order 208	Certificate, when returns to the Assembly Schedule of Council's Amendments
2003	Sessional order 155	Return of Legislative Assembly bill
2004	Standing order 155	Return of Legislative Assembly bill

Standing order 155 sets out the requirements when returning an Assembly bill. The bill is returned with a Clerk's certificate that the bill has been agreed to by the Council with or without amendment/s, a message returning the bill and, if any amendments are made requesting that the Assembly concur with the amendments, a schedule, certified by the Clerk, setting out the amendments agreed to by the Council.

Operation

When an Assembly bill is passed by the Council it is returned to the Assembly with a message. The Clerk certifies on the first page of the bill that the bill has been agreed to by the Council without amendment. If amended, the message, signed by the President or other member in the chair when the bill is read a third time, will request the concurrence of the Assembly in the amendments set out in the accompanying schedule.

Under SO 155(2) the schedule of amendments must contain reference to the page and line of the bill where the words are to be inserted or omitted, and describes the amendments proposed. Since 2014, schedules of amendments have also included the

unique identifying number of the sheet of amendments prepared by the Parliamentary Counsel's Office, on which the amendment was circulated.

On occasion, a message returning an Assembly bill with amendments has included the terms of an additional message agreed to by the Council. For example, in 1919, the message returning the Hydro-electric Development (Construction) Bill advised that although the Council had resolved not to insist on its amendment disagreed to by the Assembly in the bill it did not admit that its amendment involved appropriation and asserted its right to amend bills which did not appropriate money. The Council further asked that its actions not be regarded as a precedent in waiver of the principle involved.[284]

In another example, in 1994 the Council returned the Independent Commission Against Corruption (Amendment) Bill to the Assembly with an amendment which established a new Part of the bill concerning parliamentary ethical standards. Division 1 of the proposed part concerned the designation of a Legislative Council committee under the Act. Division 2 of the proposed part concerned the Legislative Assembly. In deference to the sovereignty of the Assembly, rather than propose the Assembly committee in its amendment, the Council returned the bill with amendments and the following addition paragraph:

> Further, the Legislative Council invites the Legislative Assembly to propose an amendment as Division 2 of proposed Part 7 A in the Council's proposed amendment in the Bill, relating to Parliamentary Ethical Standards for the Legislative Assembly.[285]

Background and development

There are numerous examples of the Council amending Assembly bills and returning the bill to the Assembly in accordance with the standing orders since 1856.

The 1856 standing orders provided that all bills 'returned' to the Council with amendments must be considered in committee. If amendments were made to an Assembly bill, the bill was to be returned to the Assembly with the amendments and a message requesting the Assembly's concurrence in the amendments. The standing orders also required that every bill initiated in the Assembly and having been passed by this Council be returned to the Assembly.

The 1895 standing orders, which are in similar terms to the equivalent standing orders adopted in the Legislative Assembly the year before, introduced the requirement that a bill passed by the Council would be returned with a Clerk's certificate, the form of which was prescribed by the standing orders: 'That the Council has this day agreed to this Bill with [or without] Amendment'. If the bill was amended, the message was to request the Assembly's concurrence in the amendments. A schedule of amendments was to be

284 *Minutes*, NSW Legislative Council, 17 December 1919, pp 207-208; See also 29 March 1899, pp 35-36 (Advances to Settlers Bill).

285 *Minutes*, NSW Legislative Council, 1 December 1994, pp 445-447.

prepared containing reference to the page and line of the bill where the amendments occurred and a description of the amendments. The bill, message and schedule, certified by the Clerk, would be returned to the Assembly.

The 2004 standing orders are in similar terms as the 1895 standing orders with some modernisation. In addition, the standing order omitted the form of words to be used in the Clerk's certificate, although they continue to be used in practice.

In 2014, the Clerk of the Parliaments initiated a minor variation in the preparation of schedules of amendments agreed to by the Council on Assembly bills to provide additional information to that required by SO 155(2). From the beginning of the second session of the 55th Parliament, as well as containing reference to the page and line of the bill where the words are to be inserted or omitted, and describing the amendments proposed, schedules would henceforth include, for each amendment agreed to, the unique identifying number of the sheet of amendments on which the amendment was circulated.

156. DISAGREEMENT WITH COUNCIL AMENDMENTS

(1) If the Assembly returns a bill with amendments made by the Council disagreed to, or further amendments made, the message returning the bill will be printed and a time fixed for taking it into consideration in committee of the whole, or the House may order that the amendments be considered immediately or "this day 6 months".

(2) Where the Assembly:

(a) disagrees to amendments made by the Council, or

(b) agrees to amendments made by the Council with amendments, the Council may:

(c) insist or not insist on those amendments,

(d) make further amendments to the bill consequent upon the rejection of its amendments,

(e) propose new amendments as alternative to the amendments to which the Assembly has disagreed,

(f) agree to the Assembly amendments to its own amendments, with or without amendment, making consequent amendments to the bill if necessary,

(g) disagree to its amendments and insist on its own amendments which the Assembly has amended, or

(h) order the bill to be laid aside,

and unless the bill is laid aside, a message will be sent to the Assembly advising of the Council's action.

Development summary		
1895	Standing order 205 Standing order 206	When Assembly returns Bills with Amendments on Council's Amendments Further proceeding after they are considered
2003	Sessional order 156	Disagreement with Council amendments
2004	Standing order 156	Disagreement with Council amendments

Under SO 155, when an Assembly bill is returned to the Assembly with amendments, the bill must be accompanied by a message requesting the concurrence of the Assembly in the amendments, and a schedule of the amendments agreed to.

SO 156 sets out the action that may be taken by the Council if the Assembly disagrees with amendments made by the Council in an Assembly bill or proposes further amendments in the bill to which the Council disagrees. If the Council continues to disagree with the Assembly on the amendments to the bill, unless it lays the bill aside, it must, under SO 157, return the bill to the Assembly along with reasons for its actions. If further amendments are made by the Council, a schedule of the further amendments will accompany the bill and message.

Operation

A message from the Assembly returning a bill with amendments made by the Council disagreed to, or further amendments made, is taken into consideration in committee of the whole, on motion, forthwith,[286] at a later time,[287] or 'this day six months'.[288] The proposed time for taking the message into consideration in committee of the whole can be amended.

The standing order and precedent provide the House, in committee of the whole, with maximum flexibility in seeking to resolve the disagreement with the Assembly on amendments.

In committee of the whole, it is usual practice for the member with carriage of the bill to move that the committee not insist on the amendments disagreed to by the Assembly. This has most commonly been a minister in charge of a government bill who is proposing that the committee not insist on amendments disagreed to by the government majority in the Assembly. Members then have the opportunity to amend the motion to omit 'not insist' and insert instead 'insists' or to insist on some amendments and not others, to insist on its amendments with amendment or to propose further amendments in substitute of amendments disagreed to by the Assembly.

286 See, for example, *Minutes,* NSW Legislative Council, 30 June 1992, pp 207-208 (Swimming Pools Bill).

287 See, for example, *Minutes,* NSW Legislative Council, 26 August 2011, p 388 (Graffiti Legislation Amendment Bill).

288 There appears to be only one precedent of an amendment for a message to be taken into consideration this day six months, which was by leave withdrawn. *Minutes,* NSW Legislative Council, 3 November 1896, p 199 (Patents Law Amendment Bill).

The report of committee of the whole can be recommitted. (See SO 147). In 1989, the motion for adoption of the report that the Council insist on its amendments was amended to recommit the message. The committee reported a second time that it did not insist on the amendments but proposed further amendments. The second report was adopted and a message forwarded to the Assembly for concurrence.[289] A report from committee of the whole can also be reconsidered by amendment to the motion that the Chair report to the House, or the Chair may be directed to report progress and seek leave to sit again. (See SO 146 and SO 177).

If the Council resolves to not insist on its amendments, or agrees with the amendments made by the Assembly to the Council amendments, a message is returned to the Assembly advising of its determination.

There is no limit to the number of occasions a bill can be returned to the Assembly seeking its concurrence in the actions of the Council. In 1976, Council amendments in the Dairy Industry Authority (Amendment) Bill were disagreed to by the Assembly. The Council subsequently insisted on its amendments, the Assembly insisted on its disagreement, the Council further insisted on its amendments and, finally, the Assembly did not further insist on its amendments. [290]

However, under SO 158, where the Assembly has disagreed with amendments made by the Council in a bill first passed by the Assembly, further amendments may only be made which directly arise from that disagreement. This standing order ensures that no new issues can be raised during the exchange of messages on disagreements to amendments. No amendments may be proposed to any part of the bill which has been agreed to and are not the subject of, or immediately affected by, the amendments under disagreement unless consequential on an amendment already agreed to by the House.

There are numerous examples of the Assembly:

- disagreeing to amendments made by the Council[291]
- agreeing with some but not agreeing with other amendments made by the Council[292]
- agreeing with some, disagreeing with some and agreeing to others with amendment[293]

289 *Minutes,* NSW Legislative Council, 28 November 1989, pp 1150-1151 (Local Government (Work on Private Land) Amendment Bill).

290 *Minutes,* NSW Legislative Council, 1 and 2 December 1976 am, pp 229 and 230; 2 December 1976, p 239; 23 February 1977 p 259; 1 March 1977, p 271.

291 *Minutes,* NSW Legislative Council, 24 September 1931, pp 324-325 (Crown Lands (Amendment) Bill); 22 February 1989, pp 414-417 (Residential Tenancies (Amendment) Bill).

292 *Minutes,* NSW Legislative Council, 4 April 1944, p 114 (Law Reform (Miscellaneous Provisions) Bill); 29 June 1943, pp 200-201 (Sydney Turf Club Bill).

293 *Minutes,* NSW Legislative Council, 13 August 1931, pp 252-254 (Insurance Companies Deposits Bill).

- agreeing to amendments with amendments and proposing further amendment as a consequence.[294]

In response, the Council has:

- insisted on its amendments[295]
- insisted on amendments in an amended form[296]
- not insisted on amendments[297]
- not insisted and agreed to Assembly's further amendment with amendments[298]
- not insisted but proposed further amendments[299]
- agreed to the Assembly's amendments on the Council amendments and to the Assembly's consequential amendments[300]
- insisted on amendments, insisted on an amendment and disagreed to the Assembly's amendment thereon, and agreed to the Assembly's further amendment consequent on its agreement to a Council amendment[301]
- insisted on certain amendments and insisted on an amendment with an amendment[302]
- insisted on its amendments with a further amendment[303]
- insisted on some amendments, not insisted on a portion of one amendment but insisted on another portion, insisted on some amendments with amendment, and not insisted on others[304]

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294 *Minutes,* NSW Legislative Council, 10 June 1942, pp 210-211 (Workers Compensation (Silicosis) Bill).

295 *Minutes,* NSW Legislative Council, 29 June 1943, pp 203-204 (Transport (Administration) Bill); 1 October 1931, pp 352-354 (Coal Mines Regulation (Amendment) Bill); 10 April 1991, p 121 (Industrial Arbitration (Voluntary Unionism) Amendment Bill).

296 *Minutes,* NSW Legislative Council, 23 and 24 May 1990 am, pp 236-242 (Education Reform Bill).

297 *Minutes,* NSW Legislative Council, 2 December 1994, pp 466-467 (Protected Disclosures Bill); 2 March 1989 am, p 458 (Freedom of Information Bill); 29 June 2000, pp 580-581 (Industrial Relations Amendment Bill); 13 June 2002, p 226 (Local Government (Enforcement of Parking and Related Offences) Bill).

298 *Minutes,* NSW Legislative Council, 18 November 1998, pp 891-892 (Local Government Legislation Amendment (Elections) Bill).

299 *Minutes,* NSW Legislative Council, 23 November 1998, pp 911-914 (Rural Lands Protection Bill); 13 November 2001, pp 1258-1259 (Public Finance and Audit (Auditor General) Bill); 21 September 1989, pp 919-922 (Grain Handling Authority (Corporatisation) Bill).

300 *Minutes,* NSW Legislative Council, 11 to 16 June 1942, p 216 (Workers Compensation (Silicosis) Bill).

301 *Minutes,* NSW Legislative Council, 29 June 1943, pp 201-202 (Sydney Turf Club Bill).

302 *Minutes*, NSW Legislative Council, 29 September 1931, pp 340-342 (Boiler Inspection and Engine-Drivers Bill).

303 *Minutes,* NSW Legislative Council, 21 September 1931, pp 308 (Greater Sydney Bill).

304 *Minutes,* NSW Legislative Council, 11 to 16 June 1942, pp 217-218 (Motor Vehicles (Third Party Insurance) Bill).

- insisted on some amendments, insisted on other amendments with amendments, not insisted on an amendment but proposed an amendment in lieu thereof and not insisted on other amendments[305]
- not insisted on some amendments and agreed to the Assembly's amendments on those amendments, agreed to the Assembly's amendment on one amendment with a further amendment and not insisted on its other amendments.[306]

If the Council resolves under SO 157 that it disagrees to the amendments made by the Assembly to the Council's amendments, unless the bill is laid aside, the Council returns the bill to the Assembly with a message providing reasons for the Council not agreeing to the amendments proposed by the Assembly.

However, in 2011, rather than seeking to resolve a disagreement with the Assembly under the provisions of SO 156 and SO 157, on the Assembly returning the Graffiti Legislation Amendment Bill 2011 with a message disagreeing to the amendments made by the Council in the bill,[307] the Council sought a conference on the bill. In committee of the whole to consider the Assembly's message, the motion that the Council not insist on its amendments was amended to request a free conference with the Assembly.[308] A message was later received from the Assembly rejecting the request for a free conference.[309] The disagreement was resolved when the Council agreed to an instruction to committee of the whole to give the committee power to consider the first message received from the Assembly disagreeing to the Council's amendments together with the message rejecting the request for a free conference. The committee reported that it had resolved not to insist on its amendments disagreed to by the Assembly but proposed further amendments.[310] The Assembly agreed to the Council's proposed further amendments.[311]

There is nothing to prevent the Council from requesting a free conference with the Assembly at any time, as it did in 2011. However, such a request was not in accordance with section 5B of the *Constitution Act 1902* which prescribes the procedures and time frames required to be met before a conference can be requested. Had the Assembly agreed to the request for the conference in 2011 and agreement not been reached on amendments to the bill, the Assembly would not have been able to avail itself of the deadlock provisions in section 5B.

305 *Minutes,* NSW Legislative Council, 17 September 1946, pp 30-32 (Coal Industry Bill).
306 *Minutes,* NSW Legislative Council, 4 April 1963, p 220; the Assembly disagreed with the Council's amendment to its amendment, the Council did not insist on its amendment, 29 August 1963, pp 246 (Local Government (Boundaries Commission) Amendment Bill).
307 *Minutes,* NSW Legislative Council, 26 August 2011, pp 387-388.
308 *Minutes,* NSW Legislative Council, 13 September 2011, pp 426-427.
309 *Minutes,* NSW Legislative Council, 21 August 2012, p 1144.
310 *Minutes,* NSW Legislative Council, 21 August 2012, pp 1148-1149.
311 *Minutes,* NSW Legislative Council, 22 August 2012, p 1156.

Background and development

Prior to 1895, the standing orders relating to disagreements on amendments to bills first passed by the Assembly were rudimentary – amendments were to be considered in committee, and amendments were to be returned to the Assembly with a message requesting their concurrence therein.

1895 standing orders 205 and 206 were in similar terms to the Legislative Assembly standing orders adopted the year before. These standing orders were more prescriptive than their predecessors, requiring the message from the Assembly to be considered in committee of the whole forthwith, or on a day to be fixed on motion without notice or 'this day six months', that the amendments made by the Assembly could be agreed to with or without further amendment, or disagreed to, and the original amendments made by the Council insisted on. If the amendments made by the Assembly on the Council's amendments were agreed to without further amendment, or disagreed to, and the original amendments made by the Council insisted on, a message was to be sent to the Assembly to that effect. If the amendments made by the Assembly were agreed to with further amendments, the message was to request the concurrence of the Assembly therein.

Standing order 156 adopted in 2004 is in similar terms as the Senate standing order relating to amendments to a bill originating in the House of Representatives, although the Senate standing order does not provide for the amendments be considered immediately or 'this day 6 months'. Standing order 156 adopts the provision that the message returning the bill will be printed. There is no practice in the Council for formally ordering that a message received under this standing order be printed.

The current standing order is more explicit in the action that can be taken by the Council in seeking to resolve a disagreement with the Assembly on amendments to bills, and codifies the precedents taken by the Council on disagreements with the Assembly.

In 2012, the Clerk of the Legislative Assembly and the Clerk of the Parliaments agreed that when there is disagreement between the Houses on amendments, the bill will accompany the message conveyed between the Houses. The practice had been that once a bill had been returned to the originating House, only the message, and accompanying schedule when required, would be conveyed between the Houses.

157. Assembly amendments to Council amendments

(1) When a bill is returned to the Assembly with amendments made by the Assembly to the Council's amendments disagreed to, the message returning the bill will also contain reasons for the Council not agreeing to the amendments proposed by the Assembly.

(2) The reasons will be drawn up by a committee appointed for that purpose when the Council adopts the report of the committee of the whole disagreeing to the amendments, or may be adopted by motion at that time.

(3) When further amendments are made by the Council to the Assembly amendments on the Council's original amendments to a bill which has been first passed by the Assembly, a schedule of the further amendments will be prepared, will be certified by the Clerk and will accompany the bill.

(4) The Clerk will, at every stage, certify on the first page of the bill the action taken by the Council.

Development summary		
1895	Standing order 206 Standing order 207 Standing order 209	Further proceedings after they are considered When Assembly's further Amendments disagreed from, Reasons to be stated. Form of Schedule of Council's Amendments on Assembly's Amendments
2003	Sessional order 157	Assembly amendments to Council amendments
2004	Standing order 157	Assembly amendments to Council amendments

Under SO 156, if the Assembly returns a bill to the Council disagreeing to the Council amendments or with further amendments made in the bill, unless the Council agrees with the action taken by the Assembly, it can return the bill to the Assembly advising that:

- it insists on its amendments,
- it does not insist on its amendments,
- it insists on some amendments and not others,
- it insists on its amendments but with amendments, or
- it proposes further amendments in substitute of amendments disagreed to by the Assembly.

Alternatively, the Council can lay the bill aside.

Under SO 157, when the Council returns a bill to the Assembly with amendments made by the Assembly to the Council's amendments disagreed to, it must provide reasons for the Council not agreeing to the amendments proposed by the Assembly. If the Council proposes further amendments a schedule of the further amendments will accompany the bill and message.

Deadlocks on amendments in a bill first passed by the Assembly may ultimately be resolved under the provisions of the *Constitution Act 1902*.

Operation

If the Assembly returns a bill to the Council agreeing to the Council amendments with amendments, the Council has two options. One option is for the Council to agree to the amendments made by the Assembly to the Council amendments and return the

bill with a message advising the Assembly of its concurrence in the amendments.[312] The other option is for the Council to disagree to the amendments made by the Assembly to its amendments and provide reasons for not agreeing with the Assembly amendments.

Under SO 157, when a bill is returned to the Assembly with amendments made by the Assembly to the Council's amendments disagreed to, the message returning the bill must contain reasons for the Council not agreeing to the amendments proposed by the Assembly. The reasons are drawn up by a committee appointed on motion without notice for that purpose or may be adopted by motion at that time. There are several examples of select committees being appointed to draw up reasons for disagreeing to an Assembly message, but relatively few in the limited circumstances outlined in SO 157.[313]

When the Council returns a bill to the Assembly disagreeing to the amendments made by the Assembly on its amendments, the reasons have generally been drawn up by a select committee forthwith and agreed to by the Council. However, in 1916, a select committee reported that it had not concluded its deliberations and sought leave to sit again on the next sitting day and the bill was referred back to the select committee, on motion, for further consideration.[314]

The motion for adoption of the report of the select committee appointed to draw up reasons can be amended to recommit the Assembly's message for further consideration.[315]

If the Council further amends the Assembly amendments which were made to the Council's original amendments to an Assembly bill, a schedule of the further amendments is prepared and is certified by the Clerk. In practice, the schedule is included in the message returning the bill to the Assembly. For example:

> The Legislative Council having had under consideration the Legislative Assembly's Message, dated 3rd April, 1963, in reference to the Local Government (Boundaries Commission) Amendment Bill,-
>
> …
>
> Amendment No. 12-Agrees to the Assembly's amendment upon its amendment, but proposes to further amend it by adding the words, 'and the recommendation has not been disapproved by a resolution of which notice has been given within

312 See, for example, *Minutes,* NSW Legislative Council, 5 December 1994, p 481 (Independent Commission Against Corruption Bill).

313 See, for example, *Minutes,* NSW Legislative Council, 5 December 1963, p 352 (State Planning Authority Bill); 29 June 1943, pp 201-202 (Sydney Turf Club Bill); 13 August 1931, pp 252-253 (Insurance Companies Deposits Bill).

314 *Minutes,* NSW Legislative Council, 22 November 1916, p 193.

315 See ruling of President Peden, *Hansard,* NSW Legislative Council, 3 December 1929, pp 1889-1890; *Minutes,* NSW Legislative Council, 3 December 1929, pp 113-115 (Constitution (Further Amendment) Bill).

> fifteen sitting days by either House of Parliament', in which further amendment the Legislative Council requests the concurrence of the Legislative Assembly.[316]

The Clerk certifies the action taken by the Council on the first page of the bill.

Background and development

The provisions of SO 157 are similar to those adopted in 1895 with the additional provision that reasons for the Council not agreeing to the amendments proposed by the Assembly can be adopted on motion at the time, a provision which is contained in the equivalent Senate standing order. There are no examples of the House adopting reasons on motion since 2004.

The standing orders adopted in 1895 are similar to the equivalent standing orders adopted in the Legislative Assembly in 1894. There were no equivalent standing orders prior to 1895.

Prior to 1895, the standing orders did not require reasons to be given when a bill is returned to the Assembly with amendments made by the Assembly to the Council's amendments disagreed to. When amendments to bills were the subject of disagreement, resort was had to the practice of the Westminster Parliament. In 1857, the Council amended the Sydney Municipal Council Bill and returned it to the Assembly. The Assembly rejected some of the Council's amendments and amended others, forwarding a message to the Council conveying its resolution. The Council objected to the Assembly rejection of its amendments without providing reasons for doing so and referred the matter to the Standing Orders Committee. The committee found that, according to *Erskine May* and to the Journals of the House of Commons:

> … the Council is imperatively precluded, by the Rules and Usage of Parliament, and their own Standing Orders, founded thereon, from entertaining them, unless the Council be furnished, by Message, or in Conference, with the reasons of the Assembly for their disagreement.[317]

A message was forwarded to the Assembly embodying the reasons contained in the committee's report for its inability to further consider those amendments to which the Assembly disagreed. Some days later, the Council received a further message from the Assembly containing reasons for rejecting the Council's amendments. The Council accepted the reasons given by the Assembly in relation to most of its amendments but insisted on one, drawing up reasons for doing so. The Assembly subsequently informed the Council that it did not insist on its disagreement to that amendment.[318]

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316 *Minutes,* NSW Legislative Council, 4 April 1963, p 220 (Local Government (Boundaries Commission) Amendment Bill).

317 *Journal of the Legislative Council*, 1856-57, vol 1, p 783.

318 *Minutes,* NSW Legislative Council, 5 March 1857, p 72; 10 March 1857, p 74; 12 March 1857, pp 77-78; 13 March 1857, p 79.

The practice of drawing up reasons for insisting on amendments made in a bill originating in the Assembly continued as practice until 1988, although not required by the standing orders. The last time this occurred was also the last time a select committee was appointed to draw up reasons.[319] Reasons are only required when the Council disagrees with amendments made by the Assembly to amendments made by the Council in an Assembly bill, as provided in SO 157(1), and when a Council bill is returned to the Assembly with amendments made by the Assembly disagreed to, as provided in SO 152(7).

158. AMENDMENTS AFTER DISAGREEMENT

Where the Assembly has disagreed with amendments made by the Council in a bill first passed by the Assembly, further amendments may only be made which directly arise from that disagreement.

Development summary		
2003	Sessional order 158	Amendments after disagreement
2004	Standing order 158	Amendments after disagreement

Under SO 158, where the Assembly has disagreed with amendments made by the Council in a bill first passed by the Assembly, further amendments may only be made which directly arise from that disagreement. This standing order ensures that no new issues can be raised during the exchange of messages on disagreements to amendments. No amendments may be proposed to any part of the bill which has been agreed to and is not the subject of or immediately affected by the amendments under disagreement unless consequential on an amendment already agreed to by the House.

Operation

While the standing orders allow maximum flexibility to enable the House to resolve a disagreement with the Assembly, standing order 158 codifies established practice that only those parts of a bill on which there is continued disagreement over amendments can be considered.

Where amendments have been admitted outside this limited scope, the message returning the bill to the Assembly has included a statement that the agreement made by the Houses is not to be drawn into precedent. For example, in 1947, the Assembly proposed an amendment which sought to correct a drafting omission to part of a bill already agreed to by both Houses. The President ruled that, although the time for correcting the omission had passed, as the only other course for correcting it would be for an amending bill to be introduced and passed, it was competent for the committee to consider the amendment.[320]

319 *Minutes,* NSW Legislative Council, 11 October 1988, p 130 (Police Regulation (Reinstatement) Bill).
320 *Minutes,* NSW Legislative Council, 16 December 1947, pp 86-87 (Jury (Amendment) Bill).

In 1992, the Assembly advised by message that:

> As a consequence of the consideration of the Council amendments, the Assembly had this day resolved to reconsider all the clauses and schedules of the Bill concurrently with the consideration of the Council amendments and accordingly, the Assembly proposes the following further amendments in the Bill…
>
> …
>
> And the Legislative Assembly in requesting the concurrence of the Legislative Council in its disagreement from the Council amendments and the further amendments proposed by the Assembly in the Bill wishes to emphasise that the proposed amendments are not in derogation of the principles incorporated in the Bill and that it does not desire that its action be drawn into a precedent by either House.[321]

Before putting the question that he leave the chair and the House resolve into committee of the whole to consider the message, the Acting President made a statement indicating that it was competent for the committee of the whole House to consider the Assembly's proposed further amendments, given the reasons for the Assembly's request, and that such action was not to be drawn into a precedent by either House.[322]

Background and development

SO 158 has no predecessor but codifies established practice. Standing order 158 is in similar terms as Senate standing order 134.

159. LAPSED BILLS

(1) A bill which lapses by reason of a prorogation before it has reached its final stage may be proceeded with in the next session at the stage it has reached in the preceding session, if a periodic election for the Council has not taken place between the two sessions, under the following conditions:

(a) If the bill is in the possession of the House in which it originated, not having been sent to the other House, or, if sent, then returned by message, it may be proceeded with by resolution of the House in which it is, restoring it to the Notice Paper.

(b) If the bill is in possession of the House in which it did not originate it may be proceeded with by resolution of the House in which it is, restoring it to the Notice Paper, but such resolution may not be passed unless a message has been received from the House in which it originated, requesting that its consideration be resumed.

(2) A bill so restored to the Notice Paper may be proceeded with in both Houses as if its passage had not been interrupted by a prorogation, and, if finally passed, may be presented to the Governor for assent.

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321 *Minutes,* Legislative Council, 11 March 1992, pp 54-58 (Timber Industry (Interim Protection) Bill).

322 *Hansard,* Legislative Council, 11 March 1992, pp 940-942 (Timber Industry (Interim Protection) Bill).

(3) If a motion for restoration of a bill to the Notice Paper is not agreed to, the bill may be introduced and proceeded with in the ordinary manner.

Development summary		
1892	Standing order 145A	Public bills initiated in Council and interrupted therein by close of session may be taken up at stage previously reached. Council bills similarly interrupted in Assembly may, in ensuing session, upon motion, be at once again forwarded for concurrence
	Standing order 145B	Public or private bills from Assembly interrupted by prorogation may be taken up at stage reached in former session
1893	Standing order 145B	At the request of Assembly proceedings on Bill interrupted during a previous session by prorogation may be resumed
	Standing order 145C	At the request of Assembly proceedings on bills interrupted by prorogation may be resumed
1895	Standing order 200	Interruption and renewal of proceedings on bills
	Standing order 201	Resumption of proceedings at request of Assembly
	Standing order 202	Message from Assembly, relating to Bills interrupted which had been resumed
2003	Sessional order 159	Lapsed bills
2004	Standing order 159	Lapsed bills

A bill which lapses on the prorogation of the House before it has reached its final stage may be proceeded with in the next session at the stage it had reached in the preceding session if a periodic election for the Council has not taken place between the two sessions. The conditions on which a bill can be restored are set out under SO 159.

Operation

Under SO 159(a), a bill in the possession of the House in which it originated can be restored to the Notice Paper of that House by resolution. A Council bill in the possession of the Council at the time of prorogation is restored on motion moved on notice.[323] A motion for restoration of a bill following prorogation can be debated but the merits of the bill cannot be canvassed. Once a motion to restore a bill is agreed to, a subsequent motion is moved that the stage of the bill stand an order of the day for a future day.

In 1993, a Council bill which had lapsed on prorogation was restored to the business paper but was not progressed before it was discharged and the bill withdrawn. A second bill was subsequently introduced on the original leave. The bill was again interrupted by prorogation.[324]

323 See, for example, *Minutes,* NSW Legislative Council, 30 August 2006, pp 154-155 (Smoke-Free Environment Amendment (Removal Of Exemptions) Bill 2006), 18 September 1997, pp 52-53 (multiple bills).

324 *Minutes,* NSW Legislative Council, 22 April 1993, p 106; 14 October 1993, p 305 (Public Hospitals (Conscientious Objection) Bill).

Under SO 159(1)(b), a bill in the possession of the House in which it did not originate can be restored to the Notice Paper of that House by resolution, but only if a message is first received from the House in which it originated, requesting that its consideration be resumed.

A Council bill in the possession of the Assembly at the time of prorogation

A Council bill in the possession of the Assembly at the time of prorogation is restored by motion on notice, or by leave, that a message be forwarded to the Assembly requesting that the bill be restored to the Legislative Assembly's business paper.

For example, in 2014 leave was granted for the Leader of the Opposition to move a motion requesting that three named bills forwarded to the Legislative Assembly during the previous session of the Parliament and not dealt with prior to prorogation of the Legislative Council and Legislative Assembly, be restored to the Legislative Assembly's Business Paper. A motion was then moved for a message to be forwarded to the Assembly conveying the terms of the resolution of the House.[325] Some days later, a message concerning one of the bills was received from the Assembly that it had agreed to the bill without amendment.[326]

An Assembly bill in the possession of the Council at the time of prorogation

When an Assembly bill is in the possession of the Council when interrupted by prorogation, it cannot be restored to the Council's business paper unless a message has been received from the Assembly requesting that its consideration be resumed.

For example, in 1997, several messages were received from the Assembly requesting that Assembly bills 'forwarded to the Legislative Council for concurrence during the second session of the present Parliament and not dealt with because of prorogation be restored to the Council's business paper'. A motion moved by leave to restore the bills to the business paper and for the second reading of the bills to stand as orders of the day for the next sitting day was agreed to. [327]

Most commonly, bills are interrupted during the second reading stage. However, there are examples of bills being restored to the original order of leave to bring in the bill,[328] to consideration in committee of the whole,[329] and to consideration of a message from the Assembly concerning Council amendments to an Assembly bill.[330]

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325 *Minutes,* NSW Legislative Council, 9 September 2014, p 13.

326 *Minutes,* NSW Legislative Council, 17 September 2014, p 92 (Mutual Recognition (Automatic Licensed Occupations Recognition) Bill 2014).

327 *Minutes,* NSW Legislative Council, 18 September 1997, pp 50-52.

328 *Minutes,* NSW Legislative Council, 10 November 1988, p 224; 10 May 1990, p 147 (Citizens Initiated Referendums Bill).

329 *Minutes,* NSW Legislative Council, 28 July 1915, p 39 (Superannuation Bill).

330 *Minutes,* NSW Legislative Council, 3 March 1926, p 49 (Day Baking Bill).

The standing orders and practice provide that when a bill is restored, it is restored to the stage it had reached in the previous session. The order is not an order for resumption of an adjourned debate but an order for consideration of a bill at a particular stage.[331] Consequently, when the bill is called on, the question before the House when the bill was interrupted is moved again. For example, a bill interrupted during the second reading debate will be restored to the second reading stage and the motion for the second reading will again be moved.[332] In a precedent to the contrary, in 2014, following receipt of a message from the Assembly requesting the restoration of Assembly bills to the Council Notice Paper, a motion was agreed to for the bills to be restored to the state they had reached in the previous session, including the same adjournment status, member speaking and debate time.[333]

A bill restored to the Notice Paper proceeds as if its passage had not been interrupted by a prorogation, and, if finally passed, may be presented to the Governor for assent. (SO 159(2))

If a motion to restore a bill is not agreed to, the bill can be introduced again in the usual way.

The current standing order makes it clear that a bill interrupted by prorogation cannot be restored under the standing order if a periodic election has intervened.

Background and development

Provisions for restoring a bill interrupted by prorogation were first introduced in 1892.

In 1892, the Standing Orders Committee tabled a report in which it recommended the adoption of two new standing orders.[334] The first would provide that if a public bill introduced in the Council was interrupted in the Council by prorogation, the bill could be reintroduced in the next session with any amendments previously made in the Council, and pass through all the stages it had passed in the previous session without debate. If the bill had been transmitted to the Assembly, a message and the bill could be forwarded to the Assembly, again seeking the concurrence of the Assembly in the bill.

The second proposed standing order provided that, on a message being received from the Assembly requesting that a public or private bill forwarded to the Council during the previous session, but not finally dealt with due to prorogation, the Council could, on motion, order that the stage at which the bill had reached in the previous session be an order of the day for a future day. If that motion was negatived, a message would be forwarded to the Assembly advising of the action taken by the Council.[335]

331 *Odgers' Australian Senate Practice*, 13th ed, p 334.
332 See, for example, *Minutes,* NSW Legislative Council, 11 October 1990, p 461; 25 October 1990, p 597 (Interpretation (Amendment) Bill).
333 *Minutes,* NSW Legislative Council, 9 September 2014, p 17.
334 *Minutes,* NSW Legislative Council, 28 January 1892, p 205.
335 *Journal of the Legislative Council,* 1891-92, vol 49, Part 1, p 401.

The committee of the whole agreed to the first proposed standing order with an amendment to omit the provision for the restored Council bill to proceed through all the stages which it had passed in the previous session without debate and to insert instead that a Council bill interrupted in the Council could be restored to the stage it had reached in the previous session. The second standing order was agreed to as proposed.[336] On receipt of the Governor's approval of the new standing orders, numbered 145A and 145B, a message was forwarded to the Assembly inviting them to adopt similar standing orders for dealing with lapsed bills.[337]

The proposed rules were not universally supported, some members arguing that such a provision was inappropriate after dissolution of the Parliament and a change in membership of the Lower House, a matter that would be addressed in later standing orders.

On 18 October 1893, the Standing Orders Committee tabled a further report[338] in which it recommended the repeal of standing order 145B and the adoption of two new standing orders in its place to 'provide for every possible contingency that may arise in connection with either a public or private bill interrupted by the closing of a session', including messages on amendments to bills.[339] The standing orders were adopted on 25 October[340] and, on receipt of the Lieutenant-Governor's approval, a message was forwarded to the Assembly enclosing a copy of the new standing orders and inviting that House to adopt similar provisions.[341] On 22 November 1893, the Assembly notified the Council by message that it had adopted new standing orders, which were in the same terms as the Council standing orders 145B and 145C.[342]

In 1894, the Assembly repealed all its previous standing orders and adopted new standing orders, including rules for the restoration of bills interrupted by the closure of a session, which were expressed in different terms to the rules adopted in the previous year, but were the same in substance. In 1895, the Council repealed its standing orders and adopted new standing orders among which were the rules for the resumption of bills in the same terms as the equivalent Assembly standing orders adopted in 1894.

The standing order adopted in 2003 combines the provisions of the former three standing orders and is based on the revised Senate standing order adopted in 1989. A significant variation to earlier standing orders is the provision that a bill interrupted by prorogation cannot be restored under the standing order if a periodic election has intervened. In addition, the previous requirement that should a Council bill lapse while in the Assembly, the procedure was for the usual message to be sent to the Assembly

336 *Minutes,* NSW Legislative Council, 11 February 1892, p 222; *Hansard,* NSW Legislative Council, 11 February 1892, pp 5126-5127.
337 *Minutes*, NSW Legislative Council, 23 February 1892, p 238.
338 *Minutes*, NSW Legislative Council, 18 October 1893, p 19.
339 *Journal of the Legislative Council,* 1893, vol 51, p 89.
340 *Minutes,* NSW Legislative Council, 25 October 1893, p 24.
341 *Minutes,* NSW Legislative Council, 8 November 1893, p 33.
342 *Minutes,* NSW Legislative Council, 22 November 1893, p 40.

forwarding the bill again for concurrence was omitted. Instead, a bill can be proceeded with in the House in which it was not initiated, if a message is received from the House in which it originated requesting that its consideration be resumed.

160. PRESENTATION FOR ASSENT

(1) A bill originated in the Council and finally passed by both Houses will be printed and presented by the President to the Governor for Her Majesty's assent, having been certified by the Clerk accordingly.

(2) On the second sitting day of each month, a Minister is to table a list of all legislation that has not been proclaimed ninety days after assent.

Development summary		
1856	Standing order 128 Standing order 129	Presentation of bills to Governor Authentication of bills
1870	Standing order 141 Standing order 142	Presentation of bills to Governor Authentication of bills
1895	Standing order 210 Standing order 211	Presentation of bills to Governor Authentication of bills
1997–2003	Sessional order	Unproclaimed legislation
2003	Sessional order 160	Presentation for assent
2004	Standing order 160	Presentation for assent

Under section 8A of the *Constitution Act 1902*,[343] a bill that has passed both Houses must be presented to the Governor for Her Majesty's assent. SO 160 provides for the assent of Council bills. Without such assent, the bill cannot become an Act in force. The assent takes the form of the Governor signing the bill itself, then returning the bill to both Houses accompanied by a message confirming assent and requesting that the bill be forwarded for enrolment.

While the Governor's assent to a bill has the effect of enacting that legislation, the commencement of the provisions therein is determined under clause 2 of that Act. Some Acts commence on assent, while others commence on a date named in the bill or on a day to be proclaimed by the Governor (on the advice of the Executive Council) at a future date. In some cases, this has led to delay in those provisions coming into effect. To enable members to have effective oversight of the proclamation of such provisions, SO 160(2) requires that a list of legislation that has not be proclaimed 90 days after assent be tabled on the second sitting day of each month.

343 For the background to the adoption of this provision, and its precursors, see Lovelock and Evans, *New South Wales Legislative Council Practice,* p 388.

Operation

Under SO160(1), a bill originated in the Council and finally passed by both Houses is to be printed and presented by the President to the Governor for Her Majesty's assent, having been certified by the Clerk accordingly. The Legislative Assembly standing orders similarly provide for assent of bills introduced in that House.

In practice, the Clerk prepares and presents each bill for assent on behalf of the President.

The certification and assent process required under SO 160 entails a number of significant administrative and legal stages. If the bill has originated in the Legislative Council, the Parliamentary Counsel's Office provides a vellum copy of the bill to the Clerk for certification that the bill is in the form that has passed both Houses. This copy of the bill is labelled 'Passed by both Houses' as it incorporates any amendments that have been agreed to by both Houses. The vellum copy is provided to the Governor for assent and a second printed copy is provided to the Governor for archival purposes. A photocopy of this certified copy is then provided to the Solicitor-General for legal opinion. The Governor will not assent to the bill until the Solicitor-General's opinion as to the legality of the bill has been received.[344]

When the Governor is unavailable, the Lieutenant-Governor or the Administrator of the State has the power on behalf of the Crown to assent to bills.[345] However, there have been instances where assent has been given by the Chief Justice by deputation from the Lieutenant-Governor.[346]

There have been instances where bills have passed both Houses of Parliament but have not been assented to or have been delayed in the following circumstances:

- On advice from the Crown Law Officer that bills had lapsed due to the dissolution of Parliament,[347]
- On advice from the Solicitor-General that a bill was inconsistent with English law,[348]
- On advice from the Attorney General that approval by referendum was required prior to the Lieutenant-Governor's assent,[349]

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344 For the background to this requirement, and occasions on which the Governor has reserved assent to bills, see the corresponding discussion in *New South Wales Legislative Council Practice*.

345 *Constitution Act 1902*, s 9C; *Minutes*, NSW Legislative Council, 29 April 1879, p 187; 20 March 1861, pp 80-81; 13 November 2008, p 902; 19 November 2011, p 527.

346 *Minutes,* NSW Legislative Council, 28 May 1902, pp 7-9. Section 9D of the *Constitution Act 1902*, inserted in 1987, provides for the appointment of a deputy by the Governor which is a separate appointment from the assumption of administration by the Lieutenant-Governor or Administration where the Governor is unavailable.

347 *Minutes*, NSW Legislative Council, 23 June 1932, p 5.

348 There is no reference reported in the House. The bill was forwarded to the Governor for assent on 23 November 1979. (Sessional Return no. 3—*Journal of the Legislative Council* 1970-80, vol 169).

349 *Minutes,* NSW Legislative Council, 22 June 1933, p 14. The Governor assented to the bills upon receiving royal instructions from His Majesty following a referendum approving the bill.

- Due to a Supreme Court Injunction against the President for the presentation of bills to the Governor for assent. [350]

There are also examples of bills being agreed to by both Houses but not being assented to. In 1979, the Commercial Vessels Bill was returned to the Assembly with cognate Navigation (Commercial Vessels) Amendment Bill. The Commercial Vessels Bill was assented to as a reserved bill but its cognate was never assented to.[351]

The Legislative Assembly SO 197 provides that cognate bills shall not be presented to the Governor for assent until all bills have been passed. The Council has no such standing order.

Unproclaimed legislation

Under SO 160(2), on the second sitting day of each month, a minister is to table a list of all legislation that has not been proclaimed 90 days after assent. The list is prepared by the Parliamentary Counsel's Office and provided to the government for tabling.

Background

The provisions of SO 160(1) have applied since 1856, however, the provisions of SO 160(2) originate from resolutions passed in 1990.

Assent and certification

The provisions of SO 160(1) have consistently applied since 1856, as have the correlating statutory provisions.[352]

The provision in SO 160(1) for a bill passed by both Houses to be printed and presented by the President to the Governor was also contained in 1856 SO 210, 1870 SO 141 and 1895 SO 210. The standing order also provides that bills are to be presented to the Governor for 'Her Majesty's Assent', reflecting the terms of section 8A of the *Constitution Act 1902*. This provision is no longer required since the passing of the *Australia Acts* in 1986 and, in practice, the Clerks arrange for bills passed by both Houses to be forwarded to the Governor for assent.[353]

1895 SO 211, 1870 SO 142 and 1856 SO 211 all provided for bills to be authenticated by the Clerk before presentation for assent.

In November 1895, the House repealed SO 210 which had conceded a power to the Assembly to lay aside a bill amended by the Council, providing that, where an Assembly

350 *Minutes,* NSW Legislative Council, 11 December 1930, p 38; 17 December 1930, p 42; 20 December 1931, p 51.

351 *Minutes,* NSW Legislative Council, 22 March 1979, p 257. Since the passing of the *Australia Acts* in 1986, bills are no longer reserved for assent by the Sovereign.

352 *Constitution Act 1855* and section 8A of the *Constitution Act 1902*.

353 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004), p 219.

bill amended by the Council was laid aside by the Assembly on the basis that, in the Assembly's view, the Council did not have the power to make those amendments, the Council could not consider or introduce a similar bill in the same session, notwithstanding that the President or, by vote on motion, the Council was of the view that the Council did have the power to make the amendments. The matter was referred to the Standing Orders Committee, which recommended that the standing order be rescinded. Members of the committee were not all in favour of the rescission[354] nor were members in the House, however, following extensive debate and an unsuccessful attempt to propose further amendment, the motion to rescind SO 210 was agreed to. Standing orders 211 to 281, as originally numbered, were then consequentially renumbered 210 to 280.

Unproclaimed legislation

The requirement for the government to provide to the House the details of legislation duly passed by the Parliament and assented to by the Governor, but not proclaimed to commence, was first raised in the House in 1990, when Mrs Kirkby (Australian Democrats) proposed a provision similar to that recently adopted in the Australian Senate for a report of unproclaimed legislation to be provided to the House every six months. Members speaking in support of the motion stated that it would lead to greater accountability of government and maintain the authority of Parliament, while those objecting believed it was unnecessary, as an examination of unproclaimed provisions was at that time already underway.[355] Although the motion was agreed to, no list was provided to the House as Parliament was prorogued two months later.

On 22 October 1996, the Leader of the Opposition moved a censure motion against the Attorney General and Minister for Industrial Relations for his failure to proclaim the commencement of certain provisions of the *Industrial Relations Act 1996*. The House amended the motion and resolved instead that the House express its concern over the failure of the Attorney General to proclaim the provisions, and for the Attorney General and Minister for Industrial Relations to table every second sitting day of each month a list of all legislation that had not been proclaimed 90 calendar days after assent.[356]

The first list of unproclaimed legislation was tabled by the Attorney General and Minister for Industrial Relations on 13 November 1996, and then every second sitting day of each subsequent month.[357]

On 17 September 1997, the provision was adopted, in the same terms, as a sessional order,[358] which was then adopted each subsequent session until 30 August 2000, when it was amended slightly. Between 1996 and 2000, the Hon Jeff Shaw had held

354 *Hansard*, NSW Legislative Council, 19 November 1895, p 2675.
355 *Minutes,* NSW Legislative Council, 11 October 1990, pp 461-462; *Hansard,* NSW Legislative Council, 11 October 1990, pp 8223-8229.
356 *Minutes,* NSW Legislative Council, 22 October 1996, pp 379-380.
357 *Minutes,* NSW Legislative Council, 13 November 1996, p 442; 4 December 1996, p 546; 9 April 1997, p 587;17 June 1997, p 801.
358 *Minutes,* NSW Legislative Council, 17 September 1997, p 42.

the portfolios of Attorney General and Industrial Relations simultaneously and was therefore responsible for tabling the list of unproclaimed legislation. On 28 June 2000, Mr Shaw resigned from Parliament and his portfolios were assigned to two different members. As a result, the new sessional order adopted on 30 August 2000 substituted 'Minister' in place of 'Attorney General and Minister for Industrial Relations'.

The provision was adopted as a sessional order in 2002 and 2003 and in 2004 was adopted as standing order 160(2). The list of unproclaimed legislation has since been tabled every month according to the standing order.

161. PROTEST AGAINST THE PASSING OF A BILL

Any member objecting to the passing of a bill may have a protest entered in the Minutes, copies of which will be forwarded to the Governor by the President.

Development summary		
1860	Sessional order	Protests against the passing of any bill
1870	Standing order 143	Copies of protest to be forwarded to Governor
1895	Standing order 212	Copies of protest to be forwarded to Governor
2003	Sessional order 161	Protest against the passing of a bill
2004	Standing order 161	Protest against the passing of a bill

Standing order 161 provides for any member to have a protest against the passing of any bill entered in the minutes and presented to the Governor.

Operation

Any member who objects to the passing of a bill may enter a protest in the Minutes of Proceedings. A protest will usually take the form of first stating the long title of the bill to which the member or members wish to protest, then a statement of reasons from the dissentients,[359] with the name of each member listed underneath. A copy of the protest is sent to the Governor by the Clerk, on behalf of the President, as soon as possible after its receipt. The President then informs the House of the receipt of the protest on the next sitting day.[360]

Each protest received is inscribed in the Clerk's Protest Book, by hand. The book maintained by the Clerk in the present day is the same that has been used since the receipt of the first protest in 1857 (see below for further commentary). In all, 55 protests

359 *Erskine May* states that Lords may add their names to a protest either without remark, or with further reasons (*Erskine May*, 24th ed, p 524). The practice does not appear to have been questioned in the Legislative Bouncil, where each protest recorded in the Clerk's book has included a (sometimes lengthy) statement of reasons.

360 See, for example, *Minutes,* NSW Legislative Council, 4 June 2015, p 194; 30 May 2013, p 1796; 22 May 2013, p 1734; 14 June 2011, p 197; 25 March 2009, p 1058; 1 December 2005, p 1809.

have been received, though in some cases multiple protests have been received to the same bill. On two occasions, the President of the Legislative Council has been moved to lodge a protest against a bill.[361]

The Governor, or the Official Secretary on behalf of the Governor, will ordinarily write to the Clerk to acknowledge receipt of the protest, and such notification is reported to the House on the next sitting day.[362]

Under the terms of the current standing order, a protest may be lodged once the bill has passed the Legislative Council – that is, there is no requirement for the bill to have passed the Legislative Assembly before a protest may be lodged. Since 2004, only one protest has been lodged prior to the bill having been considered by the Legislative Assembly.[363] The remaining nine protests received by the President since 2004 all related to Assembly bills that had subsequently been agreed to by the Council,[364] however, in three cases the protest was received prior to the Assembly agreeing to amendments made by the Council to the bill.[365]

The standing orders in place prior to 2004 provided that a protest could only be lodged once a bill had been passed by both Houses. While most protests lodged complied with this requirement, on several occasions protests were nevertheless lodged following the Council agreeing to an Assembly bill with amendments, and prior to the Assembly having agreed to those amendments.[366] In one case, the bill subsequently lapsed during its consideration in the Assembly.[367]

In 1887, President Hay ruled that a protest against a bill could have no effect unless it was entered in the Clerk's book before the next day of sitting, and was signed on that day.[368] This reflects the practice of the House of Lords.[369] While most protests received

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361 Sir Terence Aubrey Murray lodged protests, with others, against the Road Act Amendment Bill in 1869 on the basis that the amending bill was essentially a private bill acting for the interests of only one parish; and against the Loder's Estate Bill in 1873 on the basis that the bill would see land transfer to a deceased's executors rather than to his wife and children, who had been the named beneficiaries in the deceased's will (*Minutes*, NSW Legislative Council, 11 March 1869, p 56; 27 February 1873, p 81).

362 See, for example, *Minutes,* NSW Legislative Council, 23 June 2015, p 201; 18 June 2013 p 1804; 28 May 2013, p 1751; 2 August 2011, p 283.

363 Protest against the passing of the Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011, *Minutes*, NSW Legislative Council, 14 June 2011, p 197. The bill had been agreed to by the Council on 14 June 2011, but was not passed by the Assembly until 16 June 2011. The protest was received from the Hon Luke Foley, Leader of the Opposition, on 14 June 2011.

364 *Minutes,* NSW Legislative Council, 1 December 2005, p 1809; 18 June 2008, p 675; 25 March 2009, p 1058; 14 June 2011, p 197; 22 May 2013, p 1734; 30 May 2013, p 1796; 4 June 2015, p 194; 15 October 2015, p 456; 17 March 2016, p 766**.**

365 *Minutes,* NSW Legislative Council, 25 March 2009, p 1058; 14 June 2011, p 197; 6 April 2017, p 1538.

366 *Minutes,* NSW Legislative Council, 7 March 1883, p 49; 3 April 1884, p 116; 12 November 1896, p 234; 33 November 1899, p 110.

367 *Minutes,* NSW Legislative Council, 7 March 1883, p 49.

368 *Minutes,* NSW Legislative Council, 16 June 1887, p 2117.

369 *Erskine May*, 24th ed, p 524.

by the President since that time have been received, entered into the Clerk's book and signed either on or before the next sitting day, there have been exceptions. In 1869, a protest was received after an interval of one sitting day;[370] in 1892, a protest was received after an interval of two sitting days, after the House granted leave for the member to sign the protest;[371] and in 1880 and 1881, protests were received after an interval of a number of sitting days.[372]

Only three additional rulings have been made by Presidents of the Legislative Council in regard to the practice of lodging a protest, all made by President Hay following the lodgement of a protest in regard to the Divorce Amendment Extension Bill 1890, a particularly controversial protest that was later expunged (see 'Background'). Firstly, a motion to expunge a protest from the Minutes of Proceedings, being a matter of privilege, requires no notice. However, the motion should first be precluded by a motion for the reading of the protest. Secondly, while it is not for the Chair to say whether a member's right to protest has been exercised properly, if a protest contains a statement which is known to be inconsistent with fact, it is the duty of the Chair to point out to the member, through the Clerk, that it is necessary to correct the statement. Finally, a protest should lie on the table of the House during the hours when it is open for members to sign the protest.[373]

Erskine May observes that in the House of Lords, the right to enter a protest is restricted to Lords who were present and (in the case of a division) voted on the matter at issue. However, leave has been given to Lords to sign the protest of another Lord, although they were not present when the question was put.[374] The question has not arisen in the Council to date on proceedings on a bill, however, in 1858 the President ruled that it would not be in order for him to receive a protest from a member regarding the adoption of an additional standing order because the member was not present at the time the vote was taken.[375]

Background

The first protest lodged by a member of the Council was received prior to the provision of a formal procedure for such protests in the standing orders. On 11 February 1857, immediately following the third reading of the 'Loan Bill, £150,000', Mr Lutwyche handed a protest to the Clerk, just as the Clerk rose to call on the next order of the day.[376] The *Sydney Morning Herald*'s record of proceedings for that day notes that Mr Deas Thomson, the Representative of the Government in the Legislative Council, observed that as this was the first time such a course had been pursued in the Council, and as

370 *Minutes,* NSW Legislative Council, 17 February 1869, p 56.
371 *Minutes,* NSW Legislative Council, 17 March 1892, pp 283, 284 and 285.
372 *Minutes,* NSW Legislative Council, 8 June 1880, p 195; 20 December 1881, p 197.
373 *Minutes,* NSW Legislative Council, 10 July 1890, pp 1987-1988.
374 *Erskine May,* 24th ed, p 524.
375 *Minutes,* NSW Legislative Council, 30 July 1858, p 59.
376 *Minutes,* NSW Legislative Council, 11 February 1857, p 63; *Sydney Morning Herald,* 12 February 1857, p 4.

the Clerk was in a difficult position as to how he should respond, Mr Lutwyche could perhaps move that the protest be entered in the journal of the House. Mr Lutwyche refused to move any such motion, as to do so would, in his view, concede a right to the House which it was the privilege of any single member to exercise. Mr Lutwyche observed that the practice of the House of Lords was that any member desiring to record in the journals a protest must do so before six o'clock on the day on which the motion protested against was carried, and to forward it to the Clerk for insertion in the journals before two o'clock the following day.[377] The *Herald* does not discuss the outcome of the interchange, however the Minutes of Proceedings for that day do record the lodgement of Mr Lutwyche's protest.[378]

Protests became fairly commonplace in the ensuing years. In 1860, the House adopted a new standing order that provided formal authority for a member to lodge a protest against the passing of a bill:

> Whenever any bill shall have finally passed both Houses, against the passing of which any member shall have entered a protest upon the Minutes, the President shall forthwith forward copies of such protest to His Excellency the Governor General.[379]

The standing order was adopted on the recommendation of the Standing Orders Committee following an inquiry into the propriety of adopting a standing order to require that all protests against the passing of a bill entered into the minutes be forwarded to the Governor for his consideration when the bill was presented for Royal Assent.[380] The inquiry was prompted by an incident that had occurred in 1858, when the Governor, in a message assenting to the Pastoral Lands Assessment and Rent Bill, observed that a protest made by certain members against the bill had not been brought to his attention. He stated:

> It appears that when this Act, having been passed by the Legislative Assembly, was submitted to the Legislative Council, it received the assent of the majority, but certain members were permitted to enter a protest against it. It was then brought up to me in the usual manner, no reference being made to the Protest.[381]

In its report, the committee observed that the House of Lords standing orders allowed for a protest against any decision of the House to be entered into the 'Clerk's Book'. The committee noted that members of the Legislative Council had 'occasionally availed themselves of this right, and entered their protests or dissents to certain votes in the Minutes' under the authority of 1856 SO 1, which provided that 'in all cases not provided for, resort shall be had to the rules of the Imperial Parliament'. The committee went on to acknowledge the remarks made by the Governor in 1858, and recommend that a

377 *Sydney Morning Herald,* 12 February 1857, p 4.

378 *Minutes,* NSW Legislative Council, 11 February 1857, p 63.

379 *Minutes,* NSW Legislative Council, 12 April 1860, pp 71-72; *Legislative Council Journal of the Minutes of Proceedings,* 1859-60, pp 169-172 (for report of Standing Orders Committee).

380 *Minutes,* NSW Legislative Council, 7 March 1860, p 65.

381 *Legislative Council Journal of the Minutes of Proceedings,* 1859-60, pp 171-172.

new standing order be adopted to provide that protests received and entered into the minutes also be forwarded to the Governor.[382]

The new standing order had a dual effect: it provided a new mechanism for the Governor to be informed of protests received but also, indirectly, formalised what was by then becoming a commonplace practice of lodging protests to bills.

While the new provision was inspired by the practice of the House of Lords, it varied in one key respect. House of Lords SO 59 provides that a Lord has the right to protest against *any* decision of the House.[383] The provision adopted by the Legislative Council on the other hand restricted the subject matter of protests to bills, and only those passed by both Houses.

The new standing order continued under the adoption of SO 212 in 1895 in almost identical terms.[384] During that time, protests remained commonplace, but the practice fell away from 1899. The practice was revived in 1986 when three protests were lodged against the passage of the Judicial Officers Bill, but then fell into disuse once again for some years.

In 2004, the requirement for a bill to have been passed by both Houses was omitted from the new standing orders. Under the current terms of SO 161, a member of the Council can lodge a protest to any bill passed by the Council, regardless of its passage through the Assembly. The 2004 rewrite also redrafted the terms to incorporate plain, gender neutral language.

The practice of lodging a protest was revived in 2005, when a protest was lodged against the passage of the Terrorism (Police Powers) Amendment (Preventative Detention) Bill, and the practice has continued periodically since that time.

Protest expunged from the minutes

On 9 July 1890, two protests were lodged against the passing of the Divorce Amendment and Extension Bill. The bill had been incredibly controversial, introduced to the House on five separate occasions.[385] The first protest received, signed by 10 members, cited various reasons for protesting the bill, including the contrast between the provisions of the bill and the law of the Christian Church, and the likelihood that husbands who had mistreated their wives would, if allowed to divorce, go on to mistreat other new wives, thereby multiplying the harm caused by their behaviour.[386]

The contents of the second protest, signed only by Mr Heydon, a fierce opponent of the bill, were subsequently expunged from the minutes on 10 July 1890 in response to a question of privilege raised by Sir Alfred Stephen, the member with carriage of the bill.

382 *Journal of the Legislative Council,* 1859-60, pp 179-180.

383 *Erskine May*, 24th ed, p 524.

384 Only one amendment was made to the terms, an omission of reference to the 'Governor General' in favour of the 'Governor'.

385 See discussion in *Hansard,* NSW Legislative Council, 8 May 1890, pp 215-216.

386 *Minutes,* NSW Legislative Council, 9 July 1890, p 88.

Sir Alfred objected to statements made in the protest which suggested that, while he had been acting as Lieutenant-Governor in the absence of the Governor, he had sent a message of thanks for those who had supported him in passing the bill prior to the bill being read a third time, which in turn unduly influenced members to vote in support of the bill.[387] The member who had moved the third reading of the bill in Sir Alfred's absence moved that the protest be expunged from the minutes and, following extensive debate, the motion was agreed to.[388] As a result, the record of the protest published in the bound Minutes of Proceedings lists four dot points with only a series of asterisks in place of the text.[389] However, as noted above, an official Protest Book is kept by the Clerk, in which the terms of each protest received are inscribed by hand. As the protest was written within the bound pages of the volume, the manner in which this entry was expunged was to rule two lines across the page, in between which was written the words 'Expunged by order of the Legislative Council'.

162. PROCEDURES AFTER PRESENTATION OF BILLS

(1) All public Acts assented to and public bills reserved for the signification of Her Majesty's pleasure, will be numbered by the Clerk immediately before the title, in the order of assent or reservation, with the date of assent or reservation added after the title, and commencing with a new series of numbers from the January of each year.

(2) After numbering, the Act will be enrolled and recorded in the manner required by law.

Development summary		
1856	Standing order 130 Standing order 131	Proceedings after presentation Enrolment
1870	Standing order 144 Standing order 145	Proceedings after presentation Enrolment
1895	Standing order 213 Standing order 214	Proceedings after presentation Enrolment
2003	Sessional order 162	Procedures after presentation of bills
2004	Standing order 162	Procedures after presentation of bills

SO 162 describes the administrative and procedural steps to be followed after the Governor has assented to a bill.

Operation

Once the Governor has assented to a bill, the Governor sends a signed message to that effect to the Council (and similarly to the Assembly). The message is then reported to the

387 *Hansard,* NSW Legislative Council, 10 July 1890, pp 1985-1986.
388 *Minutes,* NSW Legislative Council, 10 July1890, p 92.
389 *Minutes,* NSW Legislative Council, 9 July 1890, p 88.

House on the next sitting day or, if the House is sitting, either on receipt or at the earliest possible break in proceedings.

An Act number is allocated to each bill in order of assent by the Governor, by the Clerk of the Parliaments for bills introduced in the Council, and by the Clerk of the Legislative Assembly for bills introduced in that House. Advice of the allocation of the Act number is forwarded to the Parliamentary Counsel's Office and the Department of Premier and Cabinet by letter, and the Act number is also recorded in a register kept by the Clerks of both Houses.

A new numerical series commences with each calendar year. When a bill is agreed to one year and assented to the next, the year of assent is included with the number allocated to the Act, for example the *Standard Time (Amendment) Act 1988 (1989 No. 1)*.

Until 2016, the assented 'vellum', or official copy of the assent, was forwarded to the Registrar-General for enrolment within 10 days of the assent, in keeping with the provisions of section 50 of the *Constitution Act 1902*. However, following the repeal of section 50 and adoption of new provisions under section 8A which require that the Act be transmitted to a 'public repository of State records', the Parliament enrols then transmits Acts to the State Records Authority on a periodic basis. Notification is then published in the *Government Gazette*, under the authority of the Clerk.

The standing order provides that bills reserved for the pleasure of Her Majesty are to be numbered with the assent or reservation date. The reservation of bills for Her Majesty's assent is no longer required since the passing of the *Australia Acts,* in 1986 and, in practice, the Clerks arrange for bills passed by both Houses to be forwarded to the Governor for assent. However, the terms of the standing order, and standing order 160 reflect the terms of section 8A of the *Constitution Act 1902*.[390]

Background

The provisions of SO 162 have applied consistently since 1856, with two small variations, the first relating to the enrolment of Acts, and the second relating to the system for numbering Acts.

1856 SO 130 required an Act to be enrolled 'or otherwise dealt with according to law'. The 1870 rewrite (SO 145) saw the terms amended to require the Act to instead be enrolled 'and recorded in the manner required by' law. The impetus for the amendment was not canvassed in the report of the Standing Orders Committee or the related debate in the House, however, the terms were subsequently carried over for the purposes of both the 1895 (SO 214) and 2004 (SO 162) standing orders.

1856 SO 130 required the Clerk to commence a new series of numbering 'with each year of Her Majesty's reign'. This provision continued until adopted as SO 214 in 1895 and was then amended in 1897 to provide for the numbering of Acts by reference to

390 Twomey, *The Constitution of New South Wales*, p 219.

the secular year, bringing the standing order into alignment with the provisions of the *Interpretation Act* . The amendment had been prompted by a request from the Statute Law Consolidation Commission, which was referred to the Standing Orders Committee for consideration. After consideration of the request, the committee recommended that the change in procedure be adopted.[391] The committee's report was considered in committee of the whole forthwith and the amendment to the standing order adopted. During debate, the committee was advised that a number of new bills had not been enrolled under the provisions of the new *Interpretation Act*, adopted earlier that year, until consequential amendments were made to the standing order.[392]

The committee was informed that the previous citation system whereby Acts had been numbered (for example, 24 Victoria 1), had been an awkward and inconvenient method which did not provide a correct indication of the year of the legislation because the Queen came to the throne in the middle of the year and her reign had cut years. A commission which had included Supreme Court and District Court judges 'and other distinguished persons' had recommended that the method of citation be altered to reflect the order in which Acts were agreed to each calendar year – for example No. 1 1897. The change was brought into effect under the new *Interpretation Act 1897*, however, a consequential amendment was required to the standing orders to put the amendment into practical application.[393]

Members speaking to the motion argued that while the change proposed was commonsense, the reference to a 'secular year' was not clear, as it was more commonplace to refer to 'the year of our Lord' or simply 'the year'. Following prolonged debate, the committee agreed to instead adopt a reference to 'the year of our Lord', and the amended standing order was subsequently agreed to by the House.[394]

163. EXPLANATION, UNDER THE CONSTITUTION ACT, OF A DEPARTMENTAL BILL

(1) Any Minister of the Crown who is a member of the Legislative Assembly may, at any time, on motion agreed to by the Legislative Council, according to section 38(A) of the Constitution Act 1902, sit in the Legislative Council for the purpose of explaining the provisions of any bill relating to or connected with any department administered by that Minister.

(2) Such motions may be moved without notice at any time after the bill has been read a first time.

(3) The question will be decided without debate or amendment, except for a statement, not exceeding 10 minutes, by the mover in support of the motion.

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391 *Legislative Council Journal of the Minutes of Proceedings*, 1897, pp 289-291.

392 *Minutes,* NSW Legislative Council, 7 July 1897, p 70; *Hansard,* NSW Legislative Council, 7 July 1897, p 1705.

393 *Hansard,* NSW Legislative Council, 7 July 1897, p 1705.

394 *Hansard*, NSW Legislative Council, 7 July 1897, pp 1705-1709; *Minutes*, NSW Legislative Council, 7 July 1897, p 70.

(4) Under this standing order a Minister who is a member of the Legislative Assembly may take part in any debate or discussion in the Legislative Council, but may not vote.

(5) Unless otherwise decided, the consent will extend only to the second reading of a bill and the proceedings in committee following the second reading.

(6) Only one Minister of the Crown who is a member of the Legislative Assembly may sit in the Legislative Council at any one time under this standing order.

Development summary		
1934	Standing order 214A	Explanation under the Constitution Act of a departmental bill
2003	Sessional order 163	Explanation, under the Constitution Act, of a departmental bill
2004	Standing order 163	Explanation, under the Constitution Act, of a departmental bill

SO 163 provides the practical procedure to be followed when the House chooses to utilise its powers under section 38A of the *Constitution Act 1902* to request an Assembly minister to sit in the Council for the purpose of explaining the provisions of a bill that falls under the portfolio of a department administered by that minister.

Operation

Section 38A of the *Constitution Act 1902* provides:

(1) Notwithstanding anything contained in this Act, any Minister of the Crown who is a member of the Legislative Assembly may at any time, with the consent of the Legislative Council, sit in the Legislative Council for the purpose only of explaining the provisions of any Bill relating to or connected with any department administered by him, and may take part in any debate or discussion in the Legislative Council on such Bill, but he shall not vote in the Legislative Council.

(2) It shall not be lawful at any one time for more than one Minister of the Crown under the authority of this section to sit in the Legislative Council.

SO 163 in turn outlines the procedure by which the Council may initiate such an invitation and the rules and procedures that will apply during the time that a minister is subsequently present in the Council.

A motion to request the attendance of an Assembly minister for the purpose of explaining a bill may be moved without notice, at any time after the first reading of the bill (SO 163(2)). While the mover of the motion may make a statement of no more than 10 minutes in support of the motion, the question must otherwise be decided without

amendment or debate (SO 163(3)). After the motion has been dealt with, proceedings on the bill continue from the point at which they were interrupted.

Most resolutions requesting the presence of a minister from the other House require the concurrence of that House to 'release' their minister for that purpose.[395] Although the Council has not advised the Assembly of requests made under SO 163 to date, [396] any such resolution should nevertheless be communicated to the Assembly by message in keeping with the provisions of the standing orders (SOs 123-125).

At the nominated time, the minister is invited to enter the House for the purpose nominated in the resolution previously agreed to. The minister is then conducted by the Usher of the Black Rod to the Table of the House.[397]

While in the chamber, the minister may take part in debate, though only on the matter the subject of the resolution of the House. The minister may not vote (SO 163(4)). This provision echoes the provisions of section 38A(1) of the *Constitution Act 1902*. Though it is not expressly stated in the terms of the standing order, the minister would not be recognised for the purposes of a quorum.

The terms of SO 163(5) provide authority for the minister to be present for the duration of the second reading of a bill and the related proceedings in committee of the whole, however the House may either extend this authority or restrict the authority.

Only one minister of the Crown who is a member of the Legislative Assembly may sit in the Council at any one time under the authority of the standing order (SO 163(6)).

The House has utilised the provisions of SO 163 on one occasion only, during the consideration of a series of particularly controversial bills relating to industrial relations. In 1990, when the order of the day for resumption of debate on the second reading of the bills was called on, Ms Kirkby (Australian Democrats) moved a motion by contingent notice that standing orders be suspended to allow her to move:

> (1) That, pursuant to section 38A of the Constitution Act 1902, this House consents to the Honourable J.J. Fahey, M.P., Minister for Industrial Relations and Employment and Minister Assisting the Premier to sit in the Legislative Council for the purpose only of explaining the provisions of the Industrial Relations Bill, the Industrial Court Bill, and the Industrial Legislation (Repeals, Amendments and Savings) Bill.
>
> (2) That the Minister may take part in any debate or discussion in the Legislative Council on the Bills in Committee of the Whole.

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395 For example, a message requesting the attendance of the Treasurer in the other House for the purpose of giving a speech in relation to the budget (*Minutes*, NSW Legislative Council, 21 September 1995, p 180; 25 May 2006, p 52).

396 *Minutes*, NSW Legislative Council, 4 June 1990, p 275.

397 See *Minutes*, NSW Legislative Council, 23 August 1990, p 378.

The motion was agreed to, and the House continued its consideration of the second reading of the bills.[398] When the House resolved into committee of the whole some weeks later, the Chair observed that the Council was about to 'make constitutional history' when he invited the Usher of the Black Rod to conduct the minister to the table.[399] On the minister being seated, a number of procedural points were clarified by the Chair following questions by members. The Chair advised that for the purposes of the minister's attendance in the chamber:

- members could address any questions to the visiting minister and the minister could participate in the debate as he saw fit
- consideration of the provisions of the bill would proceed in the usual order, subject to any direction the Chair may receive from the committee
- when an amendment was moved by a member, the Chair would next give the call to the visiting minister to provide his response, and
- while the visiting minister would speak to the amendment, the minister in the chair (i.e. the Council minister representing the Government) would retain the right of a final reply.[400]

The subsequent debate in committee of the whole took place over 11 sitting days. The Assembly minister took a seat at the table on each of those days during the period devoted to the consideration of the bills. When the motion to adopt the report of the committee was moved some weeks later and amended to cause the bills to be recommitted for further consideration, the Assembly minister did not attend the Council, the House having not requested his attendance during the recommittal.[401]

Background

The provisions of SO 163 were first adopted in 1934, shortly after section 38A was inserted into the *Constitution Act 1902*.[402]

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398 *Minutes*, NSW Legislative Council, 4 June 1990, p 275. While consideration of the second reading resumed, the proceedings on the question were not straightforward. Immediately after the House had considered Mrs Kirkby's motion, the House resumed consideration of an amendment to the question that debate be adjourned for three months. The amendment was subsequently withdrawn, but shortly thereafter the President left the chair for several hours to facilitate the attendance of members at a special briefing on the bills in the Parliamentary Theatrette.

399 *Hansard*, NSW Legislative Council, 23 August 1990, p 6245. By the date on which the minister took his seat at the table, his portfolio responsibilities had changed. Nevertheless, the Chair advised the committee that while he 'may not be the same character … he sits here as the Minister who had the carriage of these bills in the Legislative Assembly and that, of course, qualifies him under the terms of the standing order' (p 6246).

400 *Hansard*, NSW Legislative Council, 23 August 1990, pp 6246-6247.

401 *Minutes*, NSW Legislative Council, 23 October 1990, pp 485-486.

402 Section 38A was later amended in 1987 (*Constitution (Amendment) Act 1987*), however, the amendments made were minor, having the effect of omitting reference to 'an Executive Councillor' and inserting instead reference to 'a minister of the Crown'.

In 1933, the *Constitution Act 1902* was amended to insert section 5B, which provided for the resolution of deadlocks between the two Houses, and section 38A, which authorised the Council to resolve that an Assembly minister sit in the Council 'for the purposes of explaining the provisions of a bill relating to or connected with a department administered by him'.

On 12 December 1934, the House, on motion of Mr Manning, resolved that the standing orders be amended to omit SO 152, relating to free conferences, and adopt two new standing orders which made reference to a free conference held under the new provisions of the *Constitution Act 1902*, and to insert a new SO 214A, which made provision for an Assembly minister to sit in the Council for the purposes of explaining a bill, under the provisions of section 38A. The motion was agreed to as formal business, without debate.[403]

The terms of the standing order adopted in 1934 differed from those of the current standing order in several key respects:

- Council ministers were permitted to move a motion to invite an Assembly minister to attend the Council without prior notice, however, other members could only move such a motion pursuant to notice having been previously given (1934 SO 214A(1) and (2)).
- The original standing order did not include the provisions of paragraph (4) of the 2004 standing order, those provisions already being reflected in the terms of the Act. The motivation for inclusion of this provision in the current standing order is not a matter of record, however, it is anecdotally understood that the addition was made in 2004 for the completeness of the procedure.
- The original standing order did not place a restriction on the number of Assembly ministers that may be present in the Council under the authority of the standing order. The restriction that now applies (SO 163(6)) was first adopted in the 2004 rewrite.

403 *Minutes,* NSW Legislative Council, 12 December 1934, p 210.

CHAPTER 26

PRIVATE BILLS

164. NOTICE OF INTENTION

(1) Notice of the intention to apply for a private bill must, within three months prior to the presentation of the petition (for the private bill), be published once a week, for four consecutive weeks:

(a) in the Government Gazette,

(b) in at least one daily newspaper published in Sydney, and

(c) in one newspaper published in or nearest to the district affected by the bill.

(2) The published notice must contain a true statement of the general objectives of the bill, and state what private interests, so far as they can be conveniently set forth, will probably be affected by the bill.

(3) The production of the numbers of the Government Gazette and newspapers containing the notice will be required at the time of presenting the petition, and will be sufficient proof of such notice.

Development summary		
1856	Standing order 134 Standing order 135 Standing order 136	Certain Notices required Contents of Notice Publication of Notice
1870	Standing order 147 Standing order 148 Standing order 149	Certain Notices required Contents of Notice Publication of Notice
1895	Standing order 265	Notice of intention to apply for
2003	Sessional order 164	Notice of intention
2004	Standing order 164	Notice of intention

A private bill confers particular powers or benefits on a private person or persons, public company or corporation, or some particular locality, and are promoted by parties outside of the legislature. Private legislation is in addition to or even in conflict with the general law.

The last private bill passed by the Legislative Council was the Tamworth Tourist Information Centre Bill in 1992.[1] There have been no private bills introduced under the current standing orders.

SOs 164-171 provide the special procedures for initiating a private bill and for its progress through the House. The procedures and requirements for handling a private bill are designed not only to consider the interests of the promoters of the bill, but also to protect the welfare of other members of the public.

Operation

In seeking to have a private bill considered by the Council, the promoters of the bill must prepare:

- the bill,
- a notice to be published in newspapers and the *Government Gazette*, and
- a petition for leave to introduce the bill into the House.

The promoters must also secure members to sponsor and conduct the bill through the Houses although it has been practice for the Clerk to facilitate finding a member of the Legislative Assembly to sponsor and take carriage of a private bill in the Assembly.[2]

Private bills commence with the publication of a notice in newspapers and the *Government Gazette* which must contain a true statement of the general objectives of the bill, and the private interests to be affected by the bill. The publication of the notice is intended to ensure that any person whose interests may be affected by the requested private legislation is sufficiently notified so that they may oppose or support the bill, in whole or in part by petition to the select committee appointed to consider the bill (SO168).

Failure to comply with the notice requirements could result in the notice being void and further proceedings being postponed until the petition is withdrawn and the requirements for notice have been complied with.

Notices must be published once a week for four consecutive weeks within three months prior to the presentation of the petition required under the standing orders.

Background

Since 1843, the standing orders have provided for substantially the same rules for private bills: the introduction of private bills required the publication of a notice and commenced with a petition, the bill required a preamble and would be referred to a select committee after the first reading, and that all expenses and costs are paid by the

1 Enactment of the *Local Government Act 1993* removed the need for an Act of Parliament to sell or exchange public lands

2 Correspondence from Parliamentary Officer (Table), Doug Carpenter, to the Hon J Maddison (Member for Ku-ring-gai), dated 27 November 1978.

parties proposing the bill. These rules are similar to the rules for private bills which apply in the House of Commons and House of Lords. Private bills are not provided for in the Commonwealth Parliament.

The last private bill passed by the Legislative Council was the Tamworth Tourist Information Centre Bill in 1992, received from the Assembly and dealt with as government business in the Council. The last private bill introduced in the Council was the Hornsby War Memorial Committee (Land Sale) Bill in September 1980, being passed by the House and forwarded to the Assembly the following month.[3] There have been no private bills introduced under the current standing orders.

Since 1856, the standing orders have required that the notice of a private bill be published once a week for four consecutive weeks within three months prior to the presentation of the petition required under the standing orders.

The rule that the notice must be published in the *Government Gazette*, in at least one daily newspaper published in Sydney, and in one newspaper published in or nearest to the district affected by the bill, has also applied consistently since 1856. However, this rule has been varied in some cases where a private bill was sought by an institution whose interests were state-wide and the expense of advertising the stipulated notice in a newspaper in every country town was avoided by advertising in the *Government Gazette* and in two newspapers with a state-wide circulation.

Since 1856, the standing orders have required that the petition from the parties requesting leave to bring in the bill must state that the required notice has been given, contain a copy of the notice and include the numbers of the *Gazette* and newspapers.

However, in practice, members were requested to provide complete copies of each newspaper and *Government Gazette* for each consecutive week to the Clerk for verification one week prior to presentation of the petition.[4]

165. INITIATION

(1) A private bill may only be initiated in the Council by petition first presented and received, together with a printed copy of the proposed bill. The petition must be signed by one or more of the parties applying for the bill.

(2) Every petition for a private bill will:

(a) commence by stating that the public notice required has been duly given,

(b) contain a copy of the public notice, and

(c) conclude with a request for leave to bring in the bill.

(3) When the petition has been received, notice of motion for leave to bring in the bill may be given, as in the case of public bills.

3 *Minutes,* NSW Legislative Council, 10 September, p 46; 30 October 1980, p 167.

4 Manual of procedures for private bills, undated.

(4) When leave to bring in a private bill has been given, and before it is read a first time, it will be printed, at the expense of the parties applying for it, in the same form as public bills, and a sufficient number of copies of it will be delivered to the Clerk, for the use of the House.

Development summary		
1856	Standing order 132 Standing order 133 Standing order 136 Standing order 137 Standing order 138	Initiation of Private Bills Petition for Publication of Notice Bill: when brought in Printing Bill
1870	Standing order 146 Standing order 149 Standing order 150 Standing order 151	Initiation of Private Bills Publication of Notice Bill: when brought in Printing Bill
1895	Standing order 266 Standing order 267 Standing order 268 Standing order 269	Initiated on Petition Form of Petition Introduction of Bill Printing of
2003	Sessional order 165	Initiation
2004	Standing order 165	Initiation

Standing order 165 provides that a private bill is initiated in the Council with a petition from the parties applying for the bill. The standing order sets out the requirements for the petition and the procedures on receipt of the petition.

After receipt of petition, notice of motion can be given for leave to bring in the bill. Once leave has been granted, the bill is read a first time and printed, as for public bills.

Operation

Following the publication of a notice for the required period, the process in the House commences with the presentation of a petition to which a copy of the bill must be attached. The petition must commence by stating that the public notice required has been duly given, must contain a copy of the public notice, and conclude with a request for leave to bring in the bill. The petition must be signed by one or more of the parties applying for the bill.

It is the responsibility of the promoter to have the bill drafted, traditionally by their solicitor. In the past there have been concerns raised about the quality of draft bills prepared by private solicitors.[5] In 1859, a motion was moved that it be referred to the Standing Orders Committee whether a standing order should be adopted to provide that a private bill not be read a first time unless it had been submitted to the Parliamentary Draftsman for a report to the House on the bill.[6]

5 Correspondence from Acting Director of Land Titles, Registrar-General's Office, to Clerk of Parliaments, dated 20 August 1979 regarding the Hornsby War Memorial Committee (Land Sale) Bill.

6 *Minutes*, NSW Legislative Council, 21 September 1859, p 15.

The promoters of a private bill must seek a member, known as a 'sponsor', willing to present the petition, introduce the bill and conduct it through its various stages in the House. The sponsoring member should be conversant with the contents of the bill. A member of the Legislative Assembly must also be found to take charge of the bill when it is ready for presentation to that House. It has been practice for the Clerk to facilitate finding a member of the Legislative Assembly to sponsor and assume responsibility for the private bill in the Assembly.[7]

Prior to the petition being presented to the House, the promoter delivers to the Clerk the petition with the bill and required documents along with a receipt from the Treasury demonstrating payment of $50 (the sum currently required by SO 166).[8] The Clerk examines the material to determine whether the proper notice has been given and that the documents are in order.

When the petition has been presented to the House, the member produces copies of the *Government Gazette* and the requisite public notices, and, having done so, the petition is received.[9] Under SO 165(3) the member may then give notice for leave to be given to bring in the bill. According to practice, the petition and the notice of motion for a private bill is given during the routine of business at the commencement of the sitting.[10]

However, there have been occasions on which notice was not given and, instead, following the petition being received, standing orders were suspended as a matter of necessity and without previous notice[11] to allow the bill to be introduced, and then on the certificate of payment being produced, the bill was read a first time, printed and referred to a select committee for inquiry and report.[12] The motions for leave, first reading and printing have also been moved as formal business.[13]

When leave to bring in the bill has been granted, a motion is moved that the bill be printed. The costs for printing are borne by the promoters of the bill. Sufficient copies must be made available for use by the House. The first reading is moved immediately and, if agreed to, the member sponsoring the bill gives a notice of motion under SO 168.

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7 Correspondence from Parliamentary Officer (Table), Doug Carpenter, to the Hon J Maddison, Member for Ku-ring-gai, dated 27 November 1978.

8 See, for example, correspondence to the Clerk of the Parliaments dated 23 August 1979 from solicitors for the petitioners on the Baulkham Hills Shire Council (Norfolk Place Public Reserve Land Sale) Bill.

9 See, for example, *Minutes,* NSW Legislative Council, 17 March 1936, p 77 (The Presbyterian Church (New South Wales) Property Trust Bill).

10 See, for example, *Minutes,* NSW Legislative Council, 18 September 1979, p 54 (Baulkham Hills Shire Council (Norfolk Place Public Reserve Land Sale) Bill).

11 Under SO 264 as it operated between 1931 and 1991, when seeking to suspend standing orders as a matter of necessity and without previous notice, a member would move a motion for the suspension of standing orders and, if no member objected, the question would be put. If objection was taken, the motion would lapse.

12 *Minutes,* NSW Legislative Council, 4 November 1975, pp 160-161; 23 August 1978, p 65.

13 See, for example, *Minutes,* NSW Legislative Council, 19 September 1906, pp 71-72 (Churches of Christ Property Management Bill)

If members wish to question whether the bill should be introduced as a public or private bill, it is practice that a point of order not be taken until the second reading debate,[14] which is then determined by the President's ruling.[15] However, in 1869, on a public bill being reported from committee of the whole, the President stated that in his view the bill was a private bill, referring to *Erskine May* and the few relevant precedents. A motion was then moved by the member proposing the bill that, in the opinion of the House, the bill was a public bill. On a division being called it was apparent that there was a lack of a quorum and the House adjourned. Proceedings were later restored and the motion that the bill was a public bill was agreed to.[16] Bills have also been ruled to be hybrid bills.[17]

In 1901, a private member presented a petition for the introduction of a private bill entitled the Presbyterian Church Property Management Amendment Bill. Following the petition being received, the member gave a notice of motion for leave to bring in the bill, as did a representative of the Government in the Legislative Council. Both notices were published on 20 November 1901, one as general business and one as government business.[18] On 21 November 1901, the private member moved his motion for leave to bring in the bill, following which the Government member withdrew his motion.[19] Proceedings on the bill lapsed on prorogation but in the following session the bill was again introduced (see SO 171 for proceedings on a lapsed bill) and passed all stages in the Council.[20] On transmittal to the Assembly, the bill was read a first time on the motion of the Premier, the Hon John See MP. Had the bill continued, it would have been considered as a Government bill, but the bill again lapsed on prorogation.[21] There are also precedents of private bills originating in the Assembly being sponsored by the government in the Legislative Council.[22]

Background and development

Standing order 165 is an amalgamation of 1895 standing orders 266, 267, 268 and 269, which were in substantially the same terms.

Earlier standing orders included provisions which have since been omitted:

- The requirement under 1856 SO 133 for petitions to be presented within 30 days after commencement of the session. There was practice for circumventing that requirement by suspending standing orders to allow the presentation of a petition for a private bill after 30 days.[23] That requirement was rescinded in 1870.

14 *Minutes,* NSW Legislative Council, 19 February 1918, p 108 (The Glebe Loan Bill).
15 *Minutes,* NSW Legislative Council, 16 April 1858, p 15 (Dioceses of Sydney and Newcastle Lands Investment Bill).
16 *Minutes,* NSW Legislative Council, 21 January 1869, p 36 (Road Act Amendment Bill).
17 *Minutes,* NSW Legislative Council, 2 December 1920, p 126 (East Maitland Racecourse Enabling Bill).
18 *Minutes,* NSW Legislative Council, 20 November 1901, p 163.
19 *Minutes,* NSW Legislative Council, 21 November 1901, p 167.
20 *Minutes,* NSW Legislative Council, 25 June 1902, p 37.
21 *Hansard,* NSW Legislative Assembly, 25 June 1902, p 722.
22 See, for example, the Tamworth Tourist Information Centre Bill 1992.
23 *Minutes*, NSW Legislative Council, 17 February 1859, p 17; 14 March 1944, p 89.

- The requirement under standing orders adopted in 1856, which continued in 1870, that the petition must state that the bill does not involve the creation of any new rate, tax, or impost, was omitted from standing orders in 1895 and a new provision adopted that the petition conclude with a prayer for leave to bring in the bill, which provision has been again adopted in the 2004 standing orders.

166. PAYMENT FOR PRIVATE BILLS

(1) Before a private bill may be read a first time, the sum of $50 towards meeting incurred expenses, must be paid to the credit of the Legislature, and a certificate of such payment must be produced by the member moving the first reading of the bill.

(2) Whenever the expenses incurred exceed the amount paid, as determined by the Clerk, a further sum of $50 must be paid to the credit of the Legislature by the parties applying for the bill, and further certificates produced before the bill is further proceeded with.

(3) Whether the bill is passed, rejected or withdrawn, the promoters must pay any additional sum which may be required to fully pay any expenses incurred. In the event of a balance remaining in favour of the promoters the Clerk will issue a certificate of the actual expenses incurred and arrange for the refund of any unexpended amounts.

Development summary		
1856	Standing order 139	Deposit, before first Reading
1870	Standing order 152	Deposit, before first reading
1884	Standing order 152	Deposit, before first reading
1895	Standing order 267	Deposit in Treasury
2003	Sessional order 166	Payment for private bills
2004	Standing order 166	Payment for private bills

It is a principle underlying the procedures for private bills that the financial burden of considering a bill for the benefit of private interests should not be borne by the Treasury. It is in recognition of this principle that standing orders since 1856 have set out fees and charges which are imposed on the promoter and which must be paid before the bill can proceed and, if necessary, from time to time throughout the consideration of the bill.

Operation

Under SO 166, before a private bill can be read a first time, the sum of $50, towards meeting incurred expenses, must be paid to the credit of the Legislature. On the motion for leave to bring in the bill being agreed to, the member produces a certificate of the payment to the House and may then move the first reading of the bill.[24]

24 See, for example, *Minutes,* NSW Legislative Council, 23 August 1978, p 65.

Under SO 166(3), whether the bill is passed, rejected or withdrawn, the promoters must pay any additional sum which may be required to fully pay any expenses incurred. According to correspondence on the Baulkham Hills Shire Council (Norfolk Place Public Reserve Land Sale) Bill, the Clerk writes a letter to the promoter of the bill, or their solicitor, advising of the total costs incurred, the amount owing and the requirement to provide a receipt on payment of the costs. In the event of a balance remaining in favour of the promoters, the Clerk will issue a certificate of the actual expenses incurred and arrange for the refund of any unexpended amounts. Other records of the Council suggest that in meeting all expenses incurred, the promoter would be required to meet the costs of advertising, preparation of the petition, drafting of the bill, printing of the bill and costs arising from the inquiry and report by the select committee appointed to consider the bill. These would include witness expenses, transcription of evidence and printing of the committee's report.

In 1977, the Clerk provided advice that bills involving land titles should also be referred to the Registrar-General, but only when a written assurance has been received from the promoters that any fee charged for this service would be paid by them.[25] The service by the Registrar-General's Department establishes the authenticity of title and description of the land. It has been the practice that the Clerk facilitates this process on behalf of the promoter.[26]

Development

The 1856 standing order had required the sum of £25 to be paid to the Colonial Treasurer. In March 1884, the Standing Orders Committee tabled a report on expenses for private bills. The report recommended the following changes to the standing orders:

- reference to the Colonial Treasurer be omitted and 'the Consolidated Revenue Fund' inserted instead
- that when the expenses of a private bill exceed £25, a further £25 may from time to time be demanded by the Clerk and paid by the parties to the Consolidated Revenue Fund
- on the bill passing, the promoters may obtain from the Clerk a certificate of the actual expenses incurred, with a view to the refund of any amount found to be overpaid.[27]

The House considered the report in committee of the whole on 19 March 1884, during which it was noted that, unlike in the Legislative Assembly, there was no refund available to the

25 Correspondence from Clerk, Leslie Jeckeln, to promoter of Moss Vale Club Services Bill, dated 9 December 1977.

26 Correspondence from Clerk, Leslie Jeckeln, to the Registrar-General on behalf of the promoters for Ku-ring-gai Municipal Council (Warrawee Avenue Public Reserve) Bill, dated 23 August 1977.

27 *Journal of the Legislative Council,* 1883-84, vol 36, Part 1, pp 451-453.

promoter should the costs of consideration of the bill be less than the £25 deposited. An amendment to bring the Council into line with the Assembly was subsequently agreed to.[28]

In 1985, standing order 270 was amended following a recommendation of the Standing Orders Committee, to change 'Consolidated Revenue Fund' to 'Consolidated Fund', to omit reference to the fund being 'of the Colony', and to change the sum payable for expenses incurred by a private bill from £25 to $50.[29]

SO 166 now provides that the payment be made to the Legislature.

167. FORM OF THE BILL

Every private bill must contain a preamble, reciting the circumstances on which the bill is founded, and the matters in reference to, or by reason of which the legislation is required.

Development summary		
1856	Standing order 140	Preamble to Bill
1870	Standing order 153	Preamble to Bill
1895	Standing order 271	Preamble to Bill
2003	Sessional order 167	Form of the bill
2004	Standing order 167	Form of the bill

Standing order 167 provides a distinguishing feature from the rules applying to public bills – a private bill must contain a preamble stating the basis for the bill. The preamble must satisfy the select committee appointed to consider the private bill that the bill is necessary because it would be impossible to address the assertions in the bill in any other way, such as by applying to a court, or by amending the general law.

Operation

Standing order 168 requires that the select committee consider every petition for or against the bill, may hear counsel, and may take the evidence necessary to determine whether the allegations made in the preamble of the bill are satisfied.

The select committee turns its attention to the preamble after taking evidence from those promoting and opposing the bill. The committee can agree to the preambles,[30] in which case it then considers the various clauses and the title of the bill, or it can determine that

28 *Hansard,* NSW Legislative Council, 19 March 1884, pp 2359-2360; *Minutes,* NSW Legislative Council, 19 March 1884, pp 98-99.

29 *Minutes,* NSW Legislative Council, 21 November 1985, p 933; *Hansard,* NSW Legislative Council, 21 November 1985, p 10229.

30 See, for example, *Bills Register No. 2, Journal of the Legislative Council,* 1969-70-71, vol 157, p 619 (The Union Trustee Company of Australia, Limited (Amendment) Bill).

the preamble has not proven the necessity of the bill, thereby causing the bill to fail,[31] or it can amend the preamble.[32]

The select committee may require proof of the 'allegations'[33] made in the preamble. For example, for a private bill seeking to establish a body, documentary evidence such as agreements or minutes of general meetings and other related matters which may give rise to the assertions in the bill may be requested.[34]

If a bill does not contain a preamble, the committee cannot proceed with its inquiry. Where no preamble exists, a second bill with a preamble may be introduced in lieu of the original bill. In 1953, the select committee appointed to consider the Great Synagogue, Sydney (Amendment) Bill 1953 suggested that as the bill did not contain a preamble it could be withdrawn and re-drafted with the required preamble. The sponsor withdrew the bill, by leave, and immediately moved by consent and without notice that leave be given to bring in another bill. The bill was read a first time and referred again to the committee.[35] The bill subsequently passed through all stages and was amended in the Legislative Assembly, which amendments were agreed to by the Council.[36]

Background and development

The requirements under the standing orders for a preamble to a private bill have been consistent since 1856.

168. Reference to Select Committee

(1) When a private bill has been read a first time, it will be referred to a select committee, to be appointed upon notice of motion, and such committee will require proof of the allegation contained in the preamble.

(2) Every petition for or against a private bill will, if received, be referred without motion to the select committee on the bill, and any petition against a bill must distinctly specify the grounds of opposition.

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31 *Bills Register No. 2, Journal of the Legislative Council,* 1969-70-71, vol 157, p 619 (Fairfield Municipal Council (Rosemont Avenue Public Garden Recreation Space) Bill).

32 Report of the Select Committee on Churches of Christ Property Management Bill, *Journal of the Legislative Council,* 1906, vol 69, p 282; Report of the Select Committee on Burns Philp Trust Company Limited Bill, *Minutes,* NSW Legislative Council, 13 March 1940, p 325.

33 See SO 168(1).

34 Correspondence from the Clerk of the Parliaments, Major-General John Stevenson, to promoter for Reformed Churches in New South Wales Property Trust Incorporation Bill, dated 19 September 1969; Correspondence from Clerk of the Parliaments, A W Saxon, to promoter for Reformed Churches in New South Wales Property Trust Incorporation Bill, dated 29 July 1975.

35 *Minutes,* NSW Legislative Council, 29 September 1953, p 53; *Hansard,* NSW Legislative Council, 29 September 1953, p 842.

36 *Minutes,* NSW Legislative Council, 2 December 1953, p 113; 3 December 1953, p 117.

(3) The select committee may hear counsel if it is desired, take evidence as required, and decide on matters in issue between the persons conducting and opposing the bill.

(4) The select committee will determine whether the preamble, with or without amendment, will stand part of the bill. If decided in the affirmative, the several clauses of the bill, together with any amendments, will be considered. If determined in the negative it will be fatal to the bill.

Development summary		
1856	Standing order 141 Standing order 143 standing order 144 Standing order 145	Reference to a Committee Petitions against Bill Evidence before Committee Amendments before Committee
1870	Standing order 154 Standing order 156 Standing order 157 Standing order 158	Reference to a Committee Petitions against Bill Evidence before Committee Amendments before Committee
1895	Standing order 272 Standing order 273 Standing order 274	Reference to Select Committee – Proof of Preamble Petitions respecting Select Committee may hear Counsel – how Bill to be dealt with
2003	Sessional order 168	Reference to select committee
2004	Standing order 168	Reference to select committee

All private bills are referred to a select committee after the first reading. This is a significant difference to the procedures for public bills, under which there is no requirement for a public bill to be referred to a select committee but when so referred it is usually by way of an amendment to the motion for the second reading.

SO 168 provides that the select committee is to consider every petition for or against the bill, may hear counsel, and may take the evidence necessary in order to determine whether the allegations made in the preamble of the bill are satisfied.

The referral of a private bill to a select committee for examination and report is designed not only to ensure due consideration is given to the interests of the promoter but also to protect the welfare of other members of the public.[37] Section 73 of the *Interpretation Act 1987* prevents a Private Act 1987, from affecting the rights of the Crown or of any person (other than a person at whose instance or for whose benefit the Private Act was enacted) or from imposing liabilities on the Crown or the person.[38] Once the select committee has heard from all parties involved it must decide whether or not the interests of the private parties justify additional rights or exemptions from the general law.

37 Correspondence from Clerk of the Parliaments, Leslie Jeckeln, to promoter of Moss Vale Club Services Bill, dated 14 December 1977.

38 See Explanatory Notes to the *Interpretation Act 1987*.

Operation

The promoters of a private bill make 'allegations'[39] or assertions in support of the request for legislation which must be proven before Parliament agrees to enact the legislation.

On the bill being read a first time, the sponsor moves that the bill be printed. On the question being carried, the sponsor gives notice that on the next sitting day the bill will be referred to a select committee for consideration and report. On occasion, members have given a contingent notice that on the bill being read a first time a motion would be moved to refer the bill to a select committee.[40] There is also precedent for the motion to be moved forthwith by leave,[41] and for standing orders to be suspended to allow the introduction, first reading and reference to a select committee to be dealt with during one sitting.[42] However, most commonly notice has been given to refer a private bill to a select committee in the normal way and the motion moved as formal business.[43]

When the question that the bill be referred to a select committee is carried, the Clerk will consult with the sponsor to arrange for the calling of the first meeting of the committee. Where a sponsor has a possible conflict of interest, it may not be appropriate for that member to be the Chair of the select committee. For example, in 1975, the member who presented the petition and moved the motions for the first reading and referral to a select committee of the Taree Municipal Council (Bourke Street Public Reserve Land Sale) Bill did not chair the committee due to a possible conflict of interest, and did not take the bill through the second and third readings.[44]

Under earlier standing orders, members of the select committee were appointed by motion on notice, usually including the mover.[45] Under current standing orders, unless otherwise ordered, the members of the select committee would be appointed according to SO 210, that is, by government members being nominated by the Leader of the Government, opposition members being nominated by the Leader of the Opposition and crossbench members being nominated by agreement between crossbench members.

Petitions against a private bill, when received, are referred to the select committee on the bill, without motion, in accordance with the standing orders.[46] Petitions against a private bill may seek leave for the petitioner to appear before the select committee or

39 See SO 168(1).
40 See, for example, *Minutes,* NSW Legislative Council, 15 September 1971, p 95; 16 September 1971, p 102.
41 *Minutes,* NSW Legislative Council, 19 September 1979, p 66.
42 *Minutes,* NSW Legislative Council, 4 March 1969, pp 346-347.
43 See, for example, *Minutes,* NSW Legislative Council, 15 July 1897, p 83; 4 September 1901, p 60; 7 June, 1951 p 103.
44 *Minutes,* NSW Legislative Council, 4 November 1975, pp 160-161; 11 November 1975, p 174; 13 November 1975 p 183.
45 See, for example, *Minutes,* NSW Legislative Council, 7 June 1951, p 103; 19 August 1953, p 24; 30 August 1966, p 67.
46 See, for example, *Minutes,* NSW Legislative Council, 4 September 1918, p 46; 31 October 1939, p 286; 12 June 1951, p 108.

for the committee to hear counsel for the petitioner.[47] There are precedents for witnesses being questioned by counsel for the bill[48] and by solicitors for petitioners against bill.[49]

When all the evidence has been taken, the select committee then considers the bill clause by clause, following the procedures of committee of the whole, with the exception that the first matter determined by the committee is whether the preamble, with or without amendments, should stand part of the bill. If, in the committee's view the preamble fails to prove the 'allegations' made, the private bill fails and further consideration of the various clauses and the title of the bill cannot proceed.[50]

At the conclusion of the committee's deliberations, the committee's report, signed by the Chair, is adopted and reported to the House.

There is precedent for a private bill to be referred back to the select committee for further consideration. In March 1976, the third reading of the City of Goulburn Gas and Coke Company's (Amendment) Bill was amended to refer the bill 'back to the Select Committee appointed on the Bill for further consideration and report'.[51] The House was prorogued soon after and the proceedings on the bill lapsed.

Background and development

Standing order 168 amalgamates the rules previously set out in separate standing orders and makes minor revisions to the rules.

SO 168(1) replicates the provisions of 1856 SO 141 and 1895 SO 272, requiring that every private bill be referred to a select committee, to be appointed by motion on notice, and such committee will require proof of the allegation contained in the preamble.

SO 168(2) is the same in substance as 1895 SO 273. 1856 SO 143 had only referred to petitions in opposition to the bill being referred to the select committee. The provision adopted in 1895, and readopted in 2004, requires that every petition, either for or against the private bill, is to be referred to the select committee on the bill without motion.

SO 168(3) provides that the committee shall take evidence on the matters at issue between the parties in support of and in opposition to the bill and may hear from counsel if desired. SO 168(3) modernises and simplifies the requirements under 1856 SO 144 and 1895 SO 274 for taking evidence and for allowing the committee to hear from counsel.

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47 See, for example, *Minutes,* NSW Legislative Council, 6 August 1902, p 88 (Australian Mutual Provident Society's Acts Amendment Bill). See also Municipality of North Sydney (Waverton Park) Bill 1952, The Great Synagogue, Sydney, Bill 1930.

48 Minutes of Evidence, Select Committee on the Underwood Estate Acts Amendment Bill, *Journal of the Legislative Council,* 1876-77, vol 27, Part 2, p 231.

49 Minutes of Evidence, Select Committee on the Underwood Estate Distribution Bill, *Journal of the Legislative Council,* 1878-79, vol 29, Part 2, p 905.

50 See, for examples, *Bills Register No. 2, Journal of the Legislative Council,* 1894, vol 52, Part 1, p 207 (Castle Hill Tramway Bill); *Bills Register No. 2, Journal of the Legislative Council,* 1969-70-71, vol 157, p 619 (Fairfield Municipal Council (Rosemont Avenue Public Garden and Recreation Space) Bill).

51 *Minutes,* NSW Legislative Council, 25 March 1976, p 335.

SO 168(4) replicates the provision in 1856 SO 145 and 1895 SO 274 for the progress of the bill to be determined on the question that 'the preamble stand a part of the bill', and, if determined in the negative, the bill fails.

SO 168 omits the specific requirement of 1856 SO 145 and 1895 SO 274 that amendments to the bill are to be 'carefully noted for report to the House, care being taken that no Clause be inserted or Amendment made in the Bill which shall be foreign to the import of the notice required to be given by the party or parties applying for it'.

A provision in 1856 SO 142 standing orders that the select committee could direct a further notice to be given if it considered that the original notice given by the promoters of the bill was insufficient was omitted from the 1895 standing orders.

169. Report of the Select Committee

When a select committee reports in favour of a private bill, a future day will be appointed for the second reading, and the bill will be proceeded with in the same manner as public bills.

Development summary		
1856	Standing order 146	Report from Committee
1870	Standing order 159	Report from Committee
1895	Standing order 275	Proceedings after report of Select Committee
2003	Sessional order 169	Report of the Select Committee
2004	Standing order 168	Report of the Select Committee

Standing order 169 provides that when a select committee on a private bill reports in favour of the bill, a future day must be set for the bill's second reading. From this stage, the bill proceeds in the same manner as a public bill.

Operation

After a select committee has considered all the evidence on a private bill, it must then determine whether the preamble in the bill, with or without amendments, should stand part of the bill (see SO 168).

If, in the committee's view, the preamble fails to prove the allegations made by the promoter, the committee will report to that effect to the House and the bill will proceed no further.[52]

If, in the committee's view, the preamble satisfies the need for the private bill, the select committee reports to the House with a schedule of any amendments made by the

52 See, for example, *Bills Register No. 2, Journal of the Legislative Council,* 1969-70-71, vol 157, p 619 (Fairfield Municipal Council (Rosemont Avenue Public Garden and Recreation Space) Bill); *Bills Register No. 2, Journal of the Legislative Council,* 1894, vol 52, Part 1, p 207 (Castle Hill Tramway Bill); *Journal of the Legislative Council,* 1876-77, vol 27, Part 2, pp 223-255 (Report from the Select Committee on the Underwood Estate Acts Amendment Bill, dated 13 June 1877).

committee, a list of witnesses, transcripts of evidence and Minutes of Proceedings. On the committee's report being tabled and ordered to be printed, a future day is set for the second reading. However, there are precedents for standing orders to be suspended as a matter of necessity and without previous notice[53] and on contingent notice[54] on the tabling of the select committee's report to allow the bill to proceed through all remaining stages during the present or any one sitting.

A bill amended in select committee is reprinted with words to be omitted ruled through and those to be inserted printed in bold.[55] The cost of the reprinted bill is payable by the promoter. It is this marked-up reprinted bill, rather than the bill as introduced, which then proceeds through its remaining stages and, along with a copy of the report of the select committee, is forwarded to the Assembly for consideration.

Select committees on private bills have reported the bill to the House:

- without amendment[56]
- with an amendment or amendments[57]
- with amendments to the preamble[58]
- with an amendment in the title[59]
- without amendment but with a suggestion that a clause be inserted.[60]

Committees have also reported that the bill could not proceed as it did not contain a preamble.[61]

Any amendments made by the select committee may be agreed to or not in committee of the whole which may also make further amendments to the bill.

There is precedent for a private bill to be referred back to the select committee for further consideration (see SO 168 for further detail).

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53 *Minutes*, NSW Legislative Council, 24 October 1979, p 148. Under SO 264 as it operated between 1931 and 1991, when seeking to suspend standing orders as a matter of necessity and without previous notice, a member would move a motion for the suspension of standing orders and, if no member objected, the question would be put. If objection was taken, the motion would lapse.

54 *Minutes*, NSW Legislative Council, 2 April 1957, pp 243-244; 26 October 1949, pp 200-201.

55 See copy of Port Stephens Shire (Soldiers Point Public Reserve Land Sale) Bill of 1969.

56 *Minutes,* NSW Legislative Council, 28 April 1971, p 30 (J. F. Wilson Will Trusts Variation Bill).

57 *Minutes*, NSW Legislative Council, 4 June 1930, p 296 (The Great Synagogue, Sydney, Bill); 13 November 1952, p 131 (Municipality of North Sydney (Waverton Park) Bill).

58 Report from the Select Committee on the Port Kembla Sailors, Soldiers Memorial Hall Bill, 1957, ordered to be printed, *Minutes,* NSW Legislative Council, 2 April 1957 p 243.

59 *Minutes,* NSW Legislative Council, 13 November 1952, p 131 (Municipality of North Sydney (Waverton Park) Bill – short title changed from Local Government Amendment (Waverton Park) Bill).

60 *Minutes,* NSW Legislative Council, 9 August 1900, p 72; *Journal of the Legislative Council,* 1900, vol 62, p 347 (Report of Select Committee on the Holt-Sutherland Estate Bill).

61 *Minutes,* NSW Legislative Council, 29 September 1953, p 53 (The Great Synagogue, Sydney, (Amendment) Bill).

On the bill having passed all stages in the Legislative Council, a message is forwarded to the Assembly along with a copy of the report of the select committee.[62] For example:

MR. SPEAKER,—

The Legislative Council having this day passed a Bill, intituled "*An Act to amend the Sydney Meat-preserving Company (Limited) Incorporation Act, 1871; and for other purposes,*"—presents the same to the Legislative Assembly for its concurrence, accompanied by a copy of the Report from and Minutes of Evidence taken before the Select Committee thereon.

Legislative Council Chamber,
Sydney, 26th March, 1925.

Background and development

Standing order 169 is the same in substance as former standing order 275. Standing order 275 varied the provisions in 1856 SO 146 for the report from the select committee to make it clear that it is only when the select committee reports in favour of a private bill that a future day is to be appointed for the second reading.

170. PRIVATE BILLS ORIGINATING IN THE ASSEMBLY

Private bills originating in the Assembly, if accompanied by printed copies of the reports and proceedings of the select committee to which they were referred, will be proceeded with in all respects as public bills, unless the House determines otherwise.

Development summary		
1856	Standing order 147	Private bills from Assembly
1870	Standing order 160	Private bills from Assembly
1895	Standing order 276	Originated in Assembly
2003	Sessional order 170	Private bills originating in the Assembly
2004	Standing order 170	Private bills originating in the Assembly

SO 170, and its equivalent standing order in the Assembly (SO 361), allow private bills which have been properly introduced and approved by a select committee and passed by the originating House, to be dealt with in the other House in all respects as a public bill. This provision allows the Council to consider all the evidence received by the Assembly on the bill.

Operation

A private bill introduced in the Assembly is proceeded with in the Council according to the provisions for a public bill, while remaining a private bill.

SO 170 provides that rather than requiring a private bill received from the Assembly to be introduced in the Council according to the rules for a private bill, that the Council can instead rely on the evidence received from the Assembly. The message from the Assembly transmitting the private bill to the Council for concurrence includes a copy of the report

62 See also, *Minutes,* NSW Legislative Council, 24 March 1931, p 110.

of the select committee on the bill and the minutes of evidence taken before the select committee.[63] Once the message has been received, the rules for public bills are followed.[64]

However, under SO 170, it is open to the Council to take its own evidence on a bill if it deems necessary. For example, on 30 October 1912, the motion that the City Tattersall's Club Bill be read a second time was amended to refer the bill to a select committee, notwithstanding that the private bill had originated in the Assembly and had been received from the Assembly along with a copy of the select committee's report. In speaking on the motion for the second reading, members expressed concern that there was insufficient information before the House on which to decide whether the bill should be passed into law. [65]

A private bill originating in the Legislative Assembly which lapses by reason of prorogation, may be proceeded with on receipt of a petition for leave to introduce the bill again. Notice is then given of a motion to allow the private bill to pass through all its remaining stages through which it had passed in the previous session and the usual message is forwarded to the Assembly. See SO 171 for further detail.

Background and development

The standing orders for considering a private bill initiated in the Assembly have been consistent since 1856. A private bill initiated in the Assembly forwarded to the Council and accompanied by the report and proceedings of the select committee on the bill can proceed as a public bill unless the House otherwise decides.

The language of the provisions has been modernised over time. For example, SO 147 adopted in 1856 referred to every private bill 'sent up from the Assembly', which was amended to bills 'coming to this House the first time from the Assembly' in 1895 and again amended in 2003 to refers to bills 'originating in the Assembly'.

171. LAPSED PRIVATE BILLS

(1) A private bill, originated in the Council and having been reported by a select committee, which lapses in either house by reason of a prorogation before it has reached its final stage may, upon receipt of a petition by the promoters for leave to proceed, be introduced again, including any amendments already agreed to in the Council, and read a first time without notice or debate.

63 See, for example, *Minutes,* NSW Legislative Council, 27 June 1900, p 21; 5 July 1900, pp 29 and 30; 12 July 1900, p 38; 18 July 1900, p 42 (Stanford Coal-Mine Railway Bill).

64 *Minutes,* NSW Legislative Council, 27 November 1992, p 497 (Tamworth Tourist Information Centre Bill).

65 *Minutes,* NSW Legislative Council, 31 October 1912, p 83; *Hansard,* NSW Legislative Council, 31 October 1912, pp 2555-2556.

(2) Such private bill may also, on motion agreed to, be passed through all subsequent stages through which it had passed in a previous session without further notice or debate.

(3) If a motion for such proceedings is negatived then the bill may be proceeded with in the ordinary way.

(4) If a private bill having been read a first time and referred to a select committee, lapses by reason of a prorogation before the committee has reported, it may, upon receipt of a petition from the promoters, and by order of the House, be read a first time and referred to a select committee together with the minutes or evidence taken before, together with all papers, petitions and instructions previously referred or given. When the committee reports on the bill, it may be proceeded with in the ordinary way.

(5) In the case of every private bill the standing orders will be held to be satisfied in all respects, where they have been complied with in a previous session.

Development summary		
1860	Standing order 162	Proceedings on private bills interrupted in one session may be renewed, upon petition in the next, upon motion, without notice or debate
	Standing order 163	Proceedings where any such bill shall be unreported by a Select Committee in a previous session
	Standing order 164	Where standing orders shall have been complied with in a previous session
1870	Standing order 162	Proceedings on private bills interrupted in one session may be renewed, upon petition in the next, upon motion, without notice or debate
	Standing order 163	Proceedings where any such bill shall be unreported by a Select Committee in a previous session
	Standing order 164	Where standing orders shall have been complied with in a previous session
1888	Standing order 162	Proceedings on private bills interrupted in one session may be renewed, upon petition in the next, upon motion, without notice or debate
1895	Standing order 277	Interruption and Renewal of Proceedings on Private Bills
	Standing order 278	Proceedings where any such Bill shall not have been reported by Select Committee in a previous Session
	Standing order 279	Where Standing Orders shall have been complied with in a previous session
2003	Sessional order 171	Lapsed private bills
2004	Standing order 170	Lapsed private bills

Standing order 171 sets out the procedures for the restoration of a private bill which lapsed on prorogation. However, a bill can only be reintroduced under the standing orders if a periodic election for the Council has not taken place between the two sessions (see SO 159).

Operation

A private bill which originated in the Council and lapses in either House by reason of prorogation, may be proceeded with upon receipt of a petition presented by the promoters of the bill for leave to proceed, but can include any amendments already agreed to in the Council, and be read a first time without notice or debate. (SO 171(1)). On the petition being received, a motion may be moved forthwith for the bill to pass through all its remaining stages through which it had passed in the previous session without further notice or debate.[66] If the motion for such proceedings is negatived then the bill may be proceeded with in the ordinary way for private bills.

In 1924, the Sydney Meat-Preserving Company (Limited) Amendment Bill was read a third time and forwarded to the Assembly with the report of the select committee on the bill.[67] In the next session, a petition was presented requesting that the bill be proceeded with. On the petition being received, the bill was presented and read a first time.[68] The following day, a motion was agreed to that 'the bill be passed through all its remaining stages through which it had passed during a previous session, and forwarded to the Legislative Assembly with the usual message'. As the bill had been considered by a select committee in the previous session, the bill proceeded directly to the second and third readings which were agreed to without debate, and the bill was forwarded to the Assembly along with the report of the select committee of the previous session.[69]

There are a number of examples of the proceedings on a private bill being recommenced after prorogation.[70] However, the progress of the bills has varied. On some occasions, on the day following the petition being received and the bill presented and read a first time, the motion for the bill to pass through all stages was moved as formal business and the second reading proceeded forthwith.[71] On other occasions the motion for the reintroduced bill to pass through all remaining stages was moved after the second reading and without notice.[72]

If a private bill which has been read a first time and referred to a select committee lapses by reason of prorogation before the committee has reported, it may, on receipt of a petition from the promoters, and by order of the House, be read a first time and referred to a select committee together with the minutes or evidence taken before, together with

66 See, for example, *Minutes,* NSW Legislative Council, 26 March 1925, p 18.

67 *Minutes,* NSW Legislative Council, 23 October 1924, p 121.

68 *Minutes,* NSW Legislative Council, 25 March 1925, p 14.

69 *Minutes,* NSW Legislative Council, 26 March 1925, p 18.

70 See, for example, *Minutes,* NSW Legislative Council, 20 May 1896, p 11 (Cooperative Colliery Tramway Bill), (Council bill); 18 June 1902, p 24 (Presbyterian Church Property Management Amendment Bill).

71 See, for example, *Minutes,* NSW Legislative Council, 26 October 1887, p 30 (Perpetual Trustee Company Bill); 27 May 1896, p 14 (Emu Gravel and Road-Metal Company's Tramway Bill).

72 *Minutes,* NSW Legislative Council, 27 July 1899, p 16 (Capertee Tramway Bill).

all papers, petitions and instructions previously referred or given. When the committee reports on the bill, it may be proceeded with in the ordinary way.[73]

If the select committee had reported in the previous session, the evidence taken by the select committee on the bill in the previous session would also be referred.

Background and development

The standing order adopted in 1856 did not provide for proceedings to recommence on a private bill which lapsed on prorogation. In 1860, the House referred to the Standing Orders Committee a reference to consider proposed procedures for a lapsed private bill.[74]

The committee tabled its report on 10 May 1860,[75] recommending the adoption of an amended, and simplified, procedure to that originally proposed by the House:

- proceedings interrupted by the close of the session before their completion, could at any time within 10 days from the commencement of the next session, upon petition from the promoters and on motion without notice, be ordered to be resumed at the stage at which they were interrupted,
- on motion moved forthwith a lapsed private bill could pass through the several stages it passed in the preceding session without further notice or debate and then proceed in subsequent stages in the ordinary manner for private bills
- any private bill referred to a select committee which did not report by the close of the session, could, after the receipt of a petition and order on motion without notice, be referred again to a select committee comprising as nearly as possible the same members as the original committee, together with the minutes of evidence taken previously and all papers and petitions referred, and all instructions previously given to the committee. On the committee reporting, the bill would be proceeded with in the usual manner.

The new procedure was adopted as SOs 162, 163 and 164.[76]

In 1887, on a petition being presented for the Perpetual Trustee Company Bill which had lapsed on prorogation in the other House, objection was taken that SO 162 only provided for bills interrupted in the Council and not bills interrupted by prorogation in the Assembly. The President advised members that the provision was unclear and referred to the Assembly, which had adopted the same rule as the Council in 1860, but which had permitted a bill in a similar case to proceed. The matter was referred to the Standing Orders Committee for inquiry and report preventing further proceedings on

73 See, for example, *Minutes,* NSW Legislative Council, 3 October 1918, p 69; 22 October 1919, p 76; 13 November 1919, p 113 (The Baptist Union Incorporation Bill).
74 *Minutes,* NSW Legislative Council, 3 May 1860, p 83.
75 *Minutes,* NSW Legislative Council, 10 May 1860, p 86.
76 *Minutes,* NSW Legislative Council, 23 May 1860, pp 93-94.

the bill until the committee had reported.[77] In its report, the committee noted that the purpose of SOs 162 to 164 was to enable private bills to be carried through the Houses with less interruption than was previously the case and noted that the Assembly had repeatedly allowed Assembly bills interrupted in the Council by prorogation to be resumed by the Assembly and sent to the Council to be proceeded with in the usual way.[78] The committee recommended the adoption of a new standing order which omitted the time frame from the commencement of the next session in which proceedings could be ordered to be resumed and clarified that a Council bill which lapsed in either House could proceed under the standing orders.

During consideration in committee of the whole, the proposed new standing order was amended to omit a provision which could have had the unintended consequence of preventing a private bill that had been read a first time but not yet referred to a select committee from being proceeded with in the new session and to omit a reference to 'its passage through' the Council, as this inferred that the bill had passed through all stages.[79]

The House agreed to new SO 162, in lieu of the former SO 162, in the following terms:[80]

> If the promoters of any private bill introduced into the Council, with respect to which bill proceedings have been interrupted in either House by the close of the session before their completion, shall petition the Council during the next session for leave to proceed with the same bill, and the petition be received, then such bill shall be introduced again, but with such alterations as may have been made in the Council, and read a first time without notice or debate; and it may also, on a motion then put and carried to that effect, be, without further notice or debate, passed through all the subsequent stages through which it had passed in the previous session; but should such motion be negatived, then the bill shall be proceeded with in the ordinary way.

In 1895, SO 277 was adopted in the same terms as former SO 162. SO 171 was adopted in 2003 in similar but modernised terms. 1895 SO 278 and SO 279 have been incorporated in SO 171(4) and (5).

77 *Minutes,* NSW Legislative Council, 28 September 1887, p 13; *Hansard,* NSW Legislative Council, 28 September 1887, pp 129-133.

78 *Journal of the Legislative Council*, 1887-88, vol 43, Part 1, pp 341-343.

79 *Hansard,* NSW Legislative Council, 13 October 1887, pp 494-496.

80 *Minutes,* NSW Legislative Council, 13 October 1887, p 24.

CHAPTER 27

COMMITTEE OF THE WHOLE HOUSE

172. APPOINTMENT OF COMMITTEE

(1) A committee of the whole House will be appointed by a resolution that the House resolve itself into a committee of the whole immediately or at a future time.

(2) When an order of the day is read for the House to resolve itself into a committee of the whole the President will leave the Chair without putting any question, and the House then resolve itself into committee, unless a notice for an instruction to the committee is proposed.

Development summary		
2003	Sessional order 172	Appointment of committee
2004	Standing order 172	Appointment of committee

The committee of the whole consists of all members of the House, presided over by the Chair of Committees rather than the President. The committee of the whole is appointed where the standing orders require, such as for consideration of amendments to bills (SO 144(6)), or where the House determines that it is necessary for a matter to be considered in detail. Debate in committee of the whole is subject to few time limits and members may speak more than once, making the committee mechanism well suited to matters where detailed consideration is required. SO 172 provides for the appointment of the committee, however, the procedures governing the operation of proceedings in committee of the whole are outlined in greater detail in SOs 173 to 178.

Operation

The most common use of the committee of the whole is for the consideration of bills, however, committee of the whole has been used to consider a wide variety of matters, such as reports of the Standing Orders Committee;[1] resolutions outlining matters to be resolved with the other colonies before New South Wales would agree to a system for an

1 For example, *Minutes,* NSW Legislative Council, 19 August 1863, pp 37-38; 16 March 1881, p 43; 7 July 1897, p 70; 3 November 1909, p 103; 22 November 1927, p 41.

Australian Federation;[2] the terms of certain petitions to be sent to the Queen to give effect to the recommendations of a committee regarding the separation of New South Wales from Queensland;[3] establishment of the Parliamentary Management Board;[4] and resolutions establishing the Library Committee.[5]

SO 172(1) provides that a committee of the whole House will be appointed by a resolution that the House resolve itself into a committee of the whole immediately or at a future time. The motion to resolve into committee immediately takes the form: 'Mr/Madam President, I move that you do now leave the Chair and the House resolve into committee of the whole for the consideration of [the matter]'. This motion can be debated or amended[6] (though not for bills – see SO 141) in the same manner as other motions, however, this is rare. According to longstanding practice, the motion to consider a matter in committee at a future time takes the form: 'That consideration in committee of the whole be set down as an order of the day for a later hour/next sitting day'.

Although SO 141(b) provides that after the second reading of a bill, 'the House will *immediately* resolve into committee of the whole for consideration of the bill' [emphasis added], in practice, members only resolve into committee following a resolution of the House, in keeping with the provisions of SO 172(1). If the question on that motion is agreed to, the President leaves the chair and the House resolves into committee. However, in the few past cases where the question has not been agreed to, proceedings on the bill have lapsed.[7]

Under SO 172 (2), when the House has agreed that the matter be considered in committee of the whole at a future time, when the order of the day is read, the President leaves the chair without any question being put.

After the President leaves the chair, the Chair of Committees or a Temporary Chair takes the chair at the table between the two clerks to signify that the Council is now 'in committee'.

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2 On 24 November 1898, the Hon John Henry Want moved, according to notice, the House resolve into committee of the whole to consider a series of resolutions that would lay out the numerous matters that New South Wales asserted must be resolved in consultation with the other states before New South Wales would agree to Federation. The detailed motion notes that the results of the recent general election had demonstrated 'that the bill is not acceptable to the electors of this colony in its present shape, although the electors have made it clear that they are strongly in favour of union with the sister colonies, upon lines which can be mutually accepted as fair and just to all', the details of which would be considered by the committee of the whole. *Minutes*, NSW Legislative Council, 24 November 1898, p 65.

3 *Minutes*, NSW Legislative Council, 11 December 1856, p 31.

4 *Minutes*, NSW Legislative Council, 2 December 1994, pp 467-470; 5 December 1994, pp 483-486.

5 *Minutes*, NSW Legislative Council, 19 December 1856, pp 37-38; 30 December 1856, p 39.

6 *Minutes*, NSW Legislative Council, 11 December 1856, p 31. For an amendment to this motion to refer a bill to a select committee, see *Minutes*, NSW Legislative Council, 6 February 1879, p 104; 28 March 1892, p 308.

7 See, for example, *Minutes*, NSW Legislative Council, 27 July 1875, p 139; 17 April 1879, p 174.

Background

The provisions of SO 172 were first formalised in the standing orders in 2004, taking the terms of Senate SO 143, however, the standing order reflects the practice well-established since the inception of the Council in 1856. Prior to 2004, 1895 SOs 171 and 172 provided for the motion to be moved that the President leave the chair and the House to resolve into committee for consideration of a bill, but no equivalent provision was made in the standing orders for the consideration in committee of matters other than bills.

The committee of the whole mechanism finds its origin in the reign of James I in England, where the absence of the Speaker (a representative of the monarch) and the freedom afforded to members to speak more than once was found to provide an opportunity for fuller and freer debate on bills. The practice of the House 'resolving into committee of the whole' is taken from the Commons, rather than the Lords, where the House orders that 'the House be put into committee', which is followed by an adjournment of the house during pleasure.[8] The origins of the committee mechanism are discussed further in *New South Wales Legislative Council Practice*,[9] *Erskine May*[10] and Bourinot.[11]

173. Proceedings in committee

(1) A committee may consider only the matters referred to it by the House.

(2) A question in committee will be decided in the same manner as in the House.

(3) A motion contradictory to the previous decision of a committee may not be entertained in the same committee.

(4) A motion for the previous question may not be made in committee.

(5) In committee members may speak more than once on the same question, and, when a question has been proposed from the Chair, must confine themselves to that question.

(6) Motions "That the question be now put" and "That the Chair report progress and ask leave to sit again" must be moved without debate and immediately put and determined, but neither of those motions may be repeated within 15 minutes after either of them has been moved, unless debate on the matter has concluded.

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8 Sir Reginald F D Palgrave (ed), *Erskine May's Parliamentary Practice* (William Clowes & Sons Ltd, 10th ed, 1893), pp 360.

9 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), pp 442-443.

10 *Erskine May*, 10th ed, pp 360-363.

11 Sir John George Bourinot, *Parliamentary procedure and practice in the Dominion of Canada,* 3rd ed, 1903, pp 515-516.

(7) Except as otherwise provided by the standing orders, the same rules of the conduct of members and of debate, procedures, and the conduct of business will be observed in committee as in the House, the Chair of Committees having the same authority as the President for the preservation of order, but disorder in a committee may be censured only by the House, on receiving a report.

Development summary		
1856	Standing order 43 Standing order 44	Rules in committee Authority of Chairman
1870	Standing order 53 Standing order 54	Rules in committee Authority of Chairman
1895	Standing order 96 Standing order 215 Standing order 218 Standing order 219 Standing order 220 Standing order 221	Rules of debate in committee Proceedings guided by Rules of the House Considers only matters referred Decision of questions – Chairman's Casting Vote Previous Question shall not be moved in Committee Members may speak more than once
2003	Sessional order 173	Proceedings in committee
2004	Standing order 173	Proceedings in committee

SO 173 lays out the key rules for the consideration of matters in committee of the whole, principle among which are the freedom afforded to members to speak more than once; the restriction on a committee from reversing a decision previously made; the procedure for the Chair to deal with disorderly conduct by members; and restrictions that apply to the moving of certain procedural motions, including the previous question (SO 107), the 'gag' (SO 99), and motions for the Chair to report progress (SO 177).

Operation

A committee of the whole may only consider matters that have been referred to it by the House (SO 173(1)). Most commonly these matters are bills, however, other matters were routinely referred to committee in the early years of the Council (see SO 172).

Under SO 173(2), questions in committee of the whole must be decided in the same manner as those in the House – that is, on a majority of members voting 'aye' or 'no', with the capacity for members to call for a division (see SOs 112-119) and for the Chair to give a casting vote in the event of an equality of votes (SO 116).

A motion contradictory to the previous decision of a committee may not be entertained in the same committee (SO 173(3)). In the case of bills, this standing order can be read in conjunction with SO 144(2), which provides that:

> No new clause or amendment may be proposed which is substantially the same as one already negatived by the committee, or which is inconsistent with one that has been agreed to by the committee, unless a recommittal of the bill has intervened.

If a committee wishes to revisit a decision previously made, or consider an amendment or other matter that would be contrary to a decision previously made, the House must

authorise the recommittal of the matter in accordance with the procedure set out under SO 177(3) (or SOs 146(2), 147 or 149 in the case of bills).

A motion for the previous question may not be made in committee of the whole (SO 173(4)). The 'previous question' (see SO 107) is a dilatory motion used to supersede a question – that is, to guillotine debate by either forcing the question on the motion under consideration to be put immediately, or forcing the motion under consideration to lapse, depending on the outcome of the motion when put. The procedure for the previous question is, therefore, fundamentally at variance with the purpose and intent of the committee of the whole, which is to facilitate full, free and detailed consideration of the matters referred. There is no correlating prohibition on the closure of debate under SO 99 being moved (see SO 173(6) below), likely because the previous question is seen to be a more drastic procedure, posing a risk that all proceedings in committee would lapse if the question was agreed to. In contrast, the impact of SO 99 would be limited and lead only to either the question on the amendment under consideration being put immediately if agreed to or, if negatived, debate on the amendment continuing.

SO 173(5) provides that members may speak more than once in committee. This feature of debate in committee finds its genesis in the practice of the House of Commons, where the committee of the whole was first established to provide members with a forum to freely debate petitions for bills without restriction on debate and without the interference of the Speaker, the representative of the monarch.[12] However, members must nevertheless ensure that their contributions to debate are relevant to the question then before the Chair. Chairs of Committees have routinely called members to order for making remarks that go beyond the amendment then under consideration.[13]

Since 2011, the House has agreed to a sessional order to applying time limits to debate in committee on government bills, prompted by a particularly lengthy committee debate on a controversial bill.[14] Members may speak for 15 minutes at a time, though may seek leave to speak for a further 15 minutes. In practice, as members typically make multiple contributions to debate in a consultative or questioning style during committee, the effect of the sessional order has not been particularly noticeable during debate. There is no time limit for debate in committee on private members' bills or other matters referred.

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12 The origins of the committee of the whole process are discussed further in Lovelock and Evans, *New South Wales Legislative Council Practice,* 2008, pp 442-443.

13 For example, Ruling: Chair Gay, *Hansard,* NSW Legislative Council, 11 November 1998, p 9664; Ruling: Chair Fazio, *Hansard,* NSW Legislative Council, 29 October 2003, p 4291, 30 November 2005, p 20302, 3 December 2008, p 12428; Ruling: Chair Griffin, *Hansard,* NSW Legislative Council, 29 June 2004, p 10380; Ruling: Chair Gardiner, *Hansard,* NSW Legislative Council, 2 June 2011, p 2099, 2 May 2012, p 10892; Ruling: Chair Khan, *Hansard,* NSW Legislative Council, 14 October 2015, p 4233; 21 October 2015, p 4724.

14 *Minutes*, NSW Legislative Council, 3 August 2011, pp 296-298; 9 September 2014, p 11; 6 May 2015, p 59.

SO 173(6) provides that two specified procedural motions, if moved, must be put without debate or amendment, and restricts members from moving these motions within 15 minutes after either has previously been moved, unless debate on the matter has concluded. These procedural motions are:

- *Motion 'That the question be now put'*: The closure motion is colloquially referred to as the gag. If agreed to, the motion, provided for under SO 99, forces the debate on the motion to conclude immediately, except for a statement of no more than 30 minutes by the mover of the original motion. Unlike the motion 'That the question be not now put' (SO 107), a motion under SO 99 does not cause a motion or a series of motions to lapse. However, the use of the procedure is nevertheless at odds with the full and detailed consideration that is characteristic of committee of the whole. In 2011, a minister moved the gag during a particularly lengthy committee debate on a contentious bill, the first instance of the motion being moved in 99 years.[15]
- *Motion 'That the Chair report progress and ask leave to sit again'*: This motion is the means by which members may adjourn or postpone consideration in committee until a later hour or a future day (SO 177). The motion is moved in the form: 'That you do now leave the Chair, report progress, and seek leave to sit again at a later hour/next sitting day'. In certain cases provided for under the standing orders, the motion can also be used to prompt a motion for the reconsideration or recommittal of certain matters (see SOs 177(3), 146(2), 147 and 149). If the motion 'That you do now leave the Chair' is agreed to without providing for progress to be reported or leave sought to sit again, the motion will terminate the proceedings of the committee (see SO 177(4) and (5)).

The same rules regarding the conduct of members and the rules of debate apply in committee as those that apply in the House, and the Chair of Committees has the same authority as the President for the preservation of order. On the Chair calling a member to order three times, the member may be removed (SO 192). However, if a member acts in a manner deemed disorderly under the definition of SOs 190-191, the Chair must interrupt proceedings and report the matter to the President for the determination of the House (SO 173 (7)). The procedure for addressing disorderly conduct in committee of the whole is discussed further under SO 175.

Interruption of proceedings in committee by an order of the House

Under SO 46(1), when an order of the House specifies a time for consideration of a matter at a particular time and the House is in committee of the whole, the Chair is to interrupt proceedings and report progress to the House. A motion is then moved that the House adopt the report and further consideration of the matter in committee is set down on the Notice Paper for a later hour of the sitting, or the next sitting day if the House is to be adjourned.

15 *Hansard*, NSW Legislative Council, 4 June 2011, p 32.

SO 32(2) provides a similar yet slightly contradictory procedure – where committee of the whole is interrupted to move the adjournment, the Chair must seek leave for the committee to sit again, instead of the matter being set down on the Notice Paper automatically as is the case under SO 46. Under SO 32(2), at the time appointed for the minister to move the adjournment, the committee must resolve out of committee. However, the sessional order for the motion for the adjournment adopted over subsequent sessions varies this requirement,[16] and instead provides that at the time nominated for the adjournment the Chair will inquire whether the minister wishes to move the adjournment. If the minister declines, the committee will simply continue its deliberation until concluded.

Under SO 46, if the committee is interrupted for Questions, the Chair will interrupt proceedings and report progress, and resumption of debate in committee will be automatically set down on the Notice Paper for resumption as an order of the day. However, as noted under SO 46, when a lunch break precedes Questions, the committee will generally go through the process of reporting progress and seeking leave to sit again prior to the lunch break to obviate the need for the Chair to resume committee of the whole after lunch, only to then leave the chair immediately owing to the sessional order for Questions taking effect.

A member speaking when proceedings in committee are interrupted may continue speaking when proceedings are resumed. This typically occurs if the House is in committee of the whole before Question Time, or proceedings are interrupted to allow for the adjournment of the House.

Background

While the terms of SO 173 reflect those of Australian Senate SO 144, the provisions of SO 173 have applied in the Council either as a matter of practice or under the standing orders since 1856, except for the restrictions on procedural motions under SO 173(6), which were first adopted in 2004. Prior to that, no restriction was placed on the frequency with which members could move for the gag, or move that the Chair report progress.

174. Appointment of acting Chair

If the Chair wishes to leave the chair any Temporary Chair may take the chair, and if no Temporary Chairs are present, then the Chair may appoint any other member to take the chair, such member having the same powers as the Chair.

Development summary		
1895	Standing order 217	Chairman may appoint Acting Chairman
1909	Standing order 217	Chairman may appoint Acting Chairman
2003	Sessional order 174	Appointment of acting Chair
2004	Standing order 174	Appointment of acting Chair

16 *Minutes*, NSW Legislative Council, 23 November 2011, p 611; 9 September 2014 p 7; 6 May 2015, p 55.

The purpose of this standing order is to authorise the Chair to nominate a Temporary Chair, or another member if there are no Temporary Chairs present, to take the chair in committee of the whole.

Operation

Committee of the whole is presided over by the Chair of Committees, who has the same authority as the President for the preservation of order (SO 173(7)). Under SO 18, at the beginning of each session of Parliament, the President may nominate not less than three members to act as Temporary Chairs of Committees when requested, or in the absence of the Chair of Committees. The practical application of this arrangement is provided for under SO 174, which makes clear that the Chair may call on either a Temporary Chair or, if no Temporary Chair is present, any other member to take the chair during committee of the whole. That member has the same powers as the Chair.

Consistent with SO 22 in regard to the House, the Chair is not required to advise the House or committee that the appointment has been made – the member simply takes the chair.

In practice, in recent years it has been commonplace for up to seven Temporary Chairs to be appointed by the President, so there has rarely been a need to appoint another member to take the chair.[17] On one earlier occasion, in the absence of both the Chair of Committees through illness and the three Temporary Chairs, the President retained the chair and presided during consideration in committee.[18]

Under SO 86, the President and the Chair of Committees may take part in debate. While the President regularly takes part in debate and votes in committee of the whole, the Chair of Committee rarely seeks to speak during debate. The last recorded occasion was on 30 March 1966, when a Temporary Chairman took the chair to enable the Chairman to vote in committee of the whole on the Long Service Leave (Amendment) Bill.[19]

Background

Prior to 1895, where the Chair of Committees expressed a desire not to take the chair during consideration in committee, or was absent on account of illness, the House nominated a member to act in place of the Chair, usually as an addendum to the motion

17 For an example where a member other than a Temporary Chair has been appointed, see *Minutes* NSW Legislative Council, 5 December 1990 am, p 744; *Hansard,* NSW Legislative Council, 5 December 1990, p 11851. Prior to 1927, two members were commonly appointed as Temporary Chairs. Three Temporary Chairs were appointed between 1928 and 1984, after which the number varied until 1995. From 1995, seven Temporary Chairs were generally appointed, however, only three Temporary Chairs were appointed for the 56th Parliament (from 2015).

18 *Minutes*, NSW Legislative Council, 4 August 1948, p 178.

19 *Minutes*, NSW Legislative Council, 30 March 1966 am, p 288. This is a highly unusual occurrence, as s 22I of the *Constitution Act 1902* specifically provides that the Chair may only have a casting vote, rather than a deliberative vote.

that the House resolve into committee of the whole.[20] This procedure operated as a matter of practice only, inspired by the practice of the House of Commons.[21]

In 1895, the Council adopted SO 217[22] to enable the Chair to appoint another member to take their place in committee proceedings, with such member having the same powers as the Chairman. The terms of the standing order were informed by a similar provision adopted by the Legislative Assembly.[23]

In 1909, in response to a recommendation made by the Standing Orders Committee,[24] the standing order was amended to provide for the Chair to appoint a Temporary Chairman to act in their place. If no Temporary Chairman was present, the Chair could then appoint any other member present to act in their place.[25] During consideration of the Standing Orders Committee's report in committee of the whole, it was observed that the Chairman of Committees had been ill for some time. Under the original terms of 1895 SO 217, the House could only appoint another member to take the chair from day to day and it had frequently been the case that notification of the absence of the Chairman came just before the House was due to meet, prevailing on members to take the chair at only a moment's notice. It was further observed that the Legislative Assembly's equivalent standing order had been amended to enable the Speaker to nominate certain members to act as Temporary Chairs at the commencement of each session, who could act in place of the Chair even in cases where the Chair was present. With the support of the current Chairman of Committees, the committee had recommended that the Council's provisions be brought into line with those in the Assembly.[26]

The standing order remained in these terms until the 2004 rewrite.

175. DISORDER IN COMMITTEE

(1) The Chair may name a member for being guilty of a wilful or vexatious breach of any of the standing orders or for interrupting the orderly conduct of the business of the committee.

(2) When the Chair names a member, the Chair will leave the Chair and report such action to the President.

(3) After the House has dealt with the named member the Committee will resume.

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20 See, for example, *Minutes*, NSW Legislative Council, 21 December 1859, p 48; 4 April 1860 p 69; 15 January 1873, p 36; 24 April 1873 p 145.

21 *Erskine May,* 10th ed, p 570.

22 Originally adopted as 1895 SO 218, but renumbered to SO 217 following the recision of SO 210.

23 Assembly 1894 SO 309.

24 *Minutes*, NSW Legislative Council, 3 November 1909, pp 102-103.

25 *Minutes*, NSW Legislative Council, 3 November 1909, p 103.

26 *Hansard*, NSW Legislative Council, 3 November 1909, p 3197

(4) If disorder arises in Committee, the President may resume the Chair without any question being put, and may leave the Chair in the same manner, after which the committee will resume its proceedings.

Development summary		
1895	Standing order 222 Standing order 223	A Member may be named by the Chairman President may resume Chair when disorder arises
2003	Sessional order 175	Disorder in committee
2004	Standing order 175	Disorder in committee

SO 175 lays out the practical course of action to be taken where a member acts in a manner that falls within the definition of 'disorderly conduct' under SO 190 during proceedings in committee of the whole.

It is rare for disorderly conduct requiring action under SOs 190 and 191 to occur, either in the House or committee. The more common procedure is for a member to be removed from the chamber by order of the Chair of Committees under SO 192, which provides for immediate removal up until the end of the sitting.

Operation

It is the responsibility of the Chair to maintain order in committee of the whole. While it is commonplace for members to be called to order or for the Chair to make a ruling regarding a member's general remarks or behaviour, it is rare for conduct to be deemed to be 'disorderly' within the definition of SO 190. However, where a member, after warning by the Chair:

(a) continues to obstruct the business of the committee, or

(b) continues to abuse the rules of the committee, or

(c) refuses to comply with an order of the Chair, or

(d) refuses to comply with the standing orders, or

(e) continues to disregard the authority of the Chair, or

(f) otherwise obstructs the orderly conduct of business of the committee,

that behaviour will fall within the definition of disorderly conduct under SO 190. Disorder in committee may be censured only by the House, on receiving a report (SO 190(2)) – SOs 173(7) and 175 lay out the practical procedures to follow in that event.

When a member is guilty of a wilful or vexatious breach of any of the standing orders, or of interrupting the orderly conduct of the business of the committee, the Chair may name the member. To do so, the Chair states: 'I name [followed by the member's title (the Hon/Mr/Ms Dr/etc) and name]'.

SO 175(2) and SO 190(2) concurrently provide that when the Chair has named a member, the Chair will leave the chair and report the offence to the President. The President may

resume the chair without any question being put (SO 175(4)), and the matter is then dealt with by the House under the provisions for disorderly conduct (see SOs 190 and 191). After proceedings in the House have concluded, the President leaves the chair and the committee resumes at the point in proceedings at which it was interrupted (SO 175(4)).

There has been only one instance of disorderly conduct in committee of the whole in the Legislative Council. On 15 December 1915, following continuous disorder in committee of the whole and a warning, a member was named by the Chair. Under former SOs 222 and 259, on the President resuming the chair, the Chair reported disorder in committee and obtained leave to sit again as soon as the disorder had been dealt with by the House. The Chair then reported the disorder – that the member had been continuously disorderly, in spite of repeated warnings from the Chair. The President named the member as having been guilty of wilfully interrupting the orderly conduct of business, following which a motion was moved that the member be adjudged guilty of contempt of this House, as required by the standing orders at the time. The member was heard in explanation and suspended by the House for 24 hours.[27] Later in the sitting,[28] the President informed the House that the Usher of the Black Rod had intimated that the member desired to apologise for his conduct the previous evening and the House agreed to a motion that the member again be heard in explanation. The member was conducted to his place in the chamber by the Usher of the Black Rod and having given a 'satisfactory explanation', a motion was agreed to that the suspension resolution be rescinded.[29]

Background

SO 175 replicates the provisions of 1895 standing orders 222 and 223, which operated without revision until 2004.

Prior to 1895, the standing orders did not make specific reference to disorder in committee of the whole. Under the standing orders adopted in 1856 and 1870, a member who wilfully disobeyed any order of the Council or vexatiously interrupted the orderly conduct of its business was to be held guilty of contempt (1856 SO 152; 1870 SO 168), however, the records of the House suggest that no such incidences occurred in committee of the whole during the operation of those standing orders.

176. QUORUM

(1) The quorum in committee of the whole will be the same as for the House.

(2) If notice is taken of the absence of a quorum in committee, the Chair will count the committee, and if after the bells have been rung for five minutes

27 *Minutes,* NSW Legislative Council, 15 December 1915, p 226; *Hansard,* NSW Legislative Council, 15 December 1915, pp 4749-4750.

28 The President having left the chair at 12.25 am until 2.30 pm.

29 *Minutes,* NSW Legislative Council, 15 December 1915, p 228; *Hansard,* NSW Legislative Council, 15 December 1915, p 4771.

a quorum is not formed, or if it appears on a division (by which division no decision will be taken to have been arrived at) that a quorum is not present, the Chair will leave the Chair and report to the House.

(3) When the Chair reports an absence of a quorum in committee to the President, the President will count the House, and if a quorum of members is then present, the House will again resolve itself into a committee of the whole without any question being put.

(4) If the proceedings of a committee are interrupted by lack of a quorum and consequent adjournment of the House, the resumption of the committee will be an order of the day for the next day of sitting, and when the order is called on the proceedings will be resumed at the point where they were interrupted.

Development summary		
1856	Standing order 39 Standing order 40 Standing order 41	Quorum in committee Want of a quorum Reporting same to House
1870	Standing order 49 Standing order 50 Standing order 51	Quorum in committee Want of a quorum Reporting same to House
1895	Standing order 11 Standing order 224 Standing order 225	Absence of Quorum Absence of Quorum (in committee of the whole House) House counted by President
1985	Standing order 11 Standing order 224	Absence of Quorum Absence of Quorum (in committee of the whole House)
2003	Sessional order 176	Quorum
2004	Standing order 176	Quorum

SO 176 provides the procedure to be followed in the event that the Chair's attention is drawn to the absence of a quorum in committee of the whole. Ultimately, if a quorum is formed, proceedings continue, however, if a quorum is not formed the House must adjourn for the day and the resumption of proceedings in committee of the whole is set down as an order of the day for the next sitting day on the Notice Paper.

Operation

The quorum in the committee of the whole is the same as that for the House, being eight members in addition to the member presiding.[30] A member may draw attention to the absence of a quorum by taking a point of order and calling attention 'to the state of the committee'. The Chair will count the members present in the chamber and, if there are less than eight, will direct the Usher of the Black Rod to ring the bells[31] for five minutes (SO 176(2)). If a quorum is formed within that time, the Chair will order that the bells be stopped and the committee will continue its consideration of the matters referred.

30 Section 22H *Constitution Act 1902.*

31 Being the division bells.

If after five minutes a quorum has not been formed, the Chair must leave the chair and report the absence of a quorum to the President (SO 176 (2)).

If the absence of a quorum is noted as the result of a division, the Chair will proceed immediately to report the matter to the President in the House without the need to first ring the bells.

The President will then count the number of members present in the House. If a quorum has been formed, the President will leave the chair and the House will again resolve into committee of the whole, without any question being put, and proceedings in committee will resume at the point at which they were interrupted (SO 176 (3); SO 30 (2)).[32]

Under SO 176(4) and SO 30(2), where proceedings in committee of the whole have been interrupted by the lack of a quorum and consequent adjournment of the House, the resumption of the committee is made an order of the day for the next sitting day, however, the terms of a sessional order agreed to since 2007 have amended this provision to allow the resumption of proceedings to be made an order of the day either for a later hour, or for the next sitting day.[33] Adjournment of the House for want of a quorum in committee was fairly commonplace in the early years of the Council, but then fell away. The last occurrence was in 1916.[34]

Background

Many of the provisions of SO 176 have applied consistently since 1856 – the quorum in committee has been the same as that for the House either under the standing orders or under the *Constitution Act 1902*;[35] the Chair was required to report the absence of a quorum in committee to the President; and, if a quorum was not present on the President taking the chair, the House was adjourned to the next sitting day. Nevertheless, new procedures have gradually been introduced since 1895.

Provision for the bells to be rung for one minute before the Chair was obliged to report the absence of a quorum to the President was first introduced in 1895 (SO 224), taking the form of the equivalent standing order adopted by the Assembly;[36] this was extended to five minutes in 1985, following a recommendation made by Standing Orders Committee

32 *Minutes*, NSW Legislative Council, 5 August 1909, p 38; 4 November 1915, p 142.

33 *Minutes*, NSW Legislative Council, 18 October 2007, pp 281-282; 9 May 2011, pp 73-74; 6 May 2015, pp 56-57. For the purposes of clarity, this sessional order could also have amended SO 176(4) to provide for proceedings to be set down for a later hour, however, the House has chosen to apply the provision of amended SO 30 for the purposes of SO 176(4).

34 *Minutes*, NSW Legislative Council, 23 March 1916, p 279 (no quorum in division on a bill).

35 While this was specified under standing order in 1856 and 1870 (SOs 39 and 49 respectively), no such provision was made in the 1895 standing orders. The requirement nevertheless stood under s 22H of the *Constitution Act 1902*. A small point of difference can also be observed in the reference made to the President – in 1856, the quorum was to be the same as House, 'exclusive of the President', however, the 2004 standing orders simply make the quorum in committee the same as that in the House.

36 Assembly 1894 SO 322.

(similar amendments were made to the standing orders governing the ringing of a quorum bell in the House (1895 SO 11) and the ringing of division bells (1895 SO 128).[37] Provision for the House to return to proceedings in committee if a quorum had been formed on the President taking the chair was also first introduced in 1895 (SO 1895 225),[38] although this applied as a matter of practice for many years previously.[39]

SO 176(4) stipulates that where proceedings in committee are interrupted by the lack of a quorum and the subsequent adjournment of the House, the resumption of proceedings will be made an order of the day for the next sitting day. This provision was first adopted in 2004. Prior to 2004, if proceedings in committee of the whole were interrupted by the lack of a quorum, the order of the day lapsed.[40] Proceedings could only be resumed by motion on notice on a subsequent day.[41]

177. REPORT OF THE COMMITTEE

(1) When all matters referred to a committee have been considered, the Chair will be directed to report to the House, and when the consideration of those matters has not been concluded, the Chair may be directed to report progress and ask leave to sit again.

(2) A motion may be made at any time during the proceedings of a committee that the Chair report progress and ask leave to sit again.

(3) Resolutions reported from a committee may be agreed to or disagreed to by the House, or agreed to with amendments, recommitted to the committee, or the further consideration of them postponed.

(4) A motion may be made "That the Chair do now leave the Chair", which if carried will terminate the proceedings of the committee.

(5) Any committee whose proceedings have been so terminated may be revived by order on motion.

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37 *Minutes*, NSW Legislative Council, 20 November 1985, pp 910-914; 21 November 1985, p 933; *Hansard*, NSW Legislative Council, 21 November 1985, p 10229.

38 Legislative Council records note that a former Clerk had observed that the provisions of 1895 SOs 11 and 225 conflicted. Under SO 225, the President was to count the House and if a quorum was present committee proceedings would resume, however, under SO 11, if the Chairman of Committees reports the absence of a quorum to the President, *the bells were first to be rung* before the President proceeded to count out the House. In any event, the anomaly was not called into question as use of the provision fell away and the terms were rectified in the 2004 revision of the standing orders.

39 On some occasions the committee resumed on motion (for example, *Minutes*, NSW Legislative Council, 30 July 1858, p 59. On others the House immediately resolved into committee (for example, *Minutes*, NSW Legislative Council, 11-12 November 1858, p 101.

40 For example, *Minutes*, NSW Legislative Council, 20 September 1905, p 89; 29 August 1906, p 50.

41 See, for example, *Minutes*, NSW Legislative Council, 18 April 1860, p 73 (committee interrupted, House counted out); 25 April 1860, p 75 (item resumed); 23 March 1916, p 279 (committee interrupted, House counted out); 27 March 1916, p 283 (item restored and consideration resumed).

Development summary		
1856	Standing order 42	Adjournment of committee
1870	Standing order 52	Adjournment of committee
1895	Standing order 227 Standing order 228 Standing order 229	Report – Report of progress Motion to report progress Motion that the Chairman leave the Chair
2003	Sessional order 177	Report of the Committee
2004	Standing order 177	Report of the Committee

SO 177 outlines the mechanism for the committee of the whole to report to the House on the progress of its consideration of matters referred and any decisions made, and the options available to the House in responding to that report. The standing order also outlines the procedural motions that may be moved to terminate proceedings on a matter referred to a committee, and to revive those proceedings at a later date.

Operation

While the House vests the committee of the whole with the authority to consider bills and other matters and make amendments where necessary, the House retains the ultimate authority to determine the final outcome of any matters referred. For this reason, the committee must report the outcome of its proceedings to the House, whether or not those proceedings have been concluded, to provide the House with the opportunity to accept or reject its report – the House alone has the power to prevent the passage of a matter, or to facilitate its withdrawal.[42]

When the committee has concluded its consideration of the matters referred, a motion is then moved that the bill, resolution or other conclusion be reported to the House (SO 177(1)). If the committee wishes to interrupt or postpone its consideration of matters for a length of time, a motion can alternatively be moved that the committee report progress and request the leave of the House to sit again either on a future day[43] or a later hour,[44] so that the item is set down for future consideration on the Notice Paper (SOs 177(1) and (2)).[45] The Chair has ruled that there can be no debate on a motion that progress be reported,[46] and members are bound by the provisions of SO 173(6) which states that the motion may not be moved within 15 minutes of having been moved previously. A motion that the committee report its outcome or its progress may be

42 Sir John George Bourinot, *Parliamentary procedure and practice in the Dominion of Canada* (Canada Law Book Co, 3rd ed, 1903), p 660.

43 For example, *Minutes*, NSW Legislative Council, 22 March 1977, p 334; 6 October 1977, p 539 (the next day); 27 September 1889, p 258; 25 January 1893, p 117; 12 April 1893, p 238 (specified date); 18 August 1915, p 49 (this day three weeks); 2 December 1931, p 398 (this day six weeks).

44 For example, *Minutes*, NSW Legislative Council, 16 March 1978, p 944; 28 October 1987, p 205.

45 The *Consolidated Indexes to the Minutes of the Proceedings and Printed Papers* cite numerous examples where the committee in fact reported *no* progress, and sought leave to sit again. The report was adopted and the committee resumed consideration at a later date.

46 *Hansard*, NSW Legislative Council, 28 July 1910, p 1207.

moved by any member,[47] but is usually moved by a minister or by the member with carriage of the matter referred to the committee.

If the question is negatived, consideration in committee of the whole continues.[48]

If the question is agreed to, the President resumes the chair and the Chair of Committees reports the outcome of the committee's consideration to the President; the President then repeats that report to the House. The report of a committee is an oral report.

While not specifically provided for under this standing order, a motion is then moved: 'That the report of the committee be adopted', as this provides the trigger for the House to respond to the report according to one of the options provided for under SO 177(3). (This practice is taken from the procedure set out for the adoption of reports of committee of the whole on bills under SO 146(3). It also reflects the practice of the Australian Senate, from which the terms of SO 177(3) were taken.)[49] This motion can be debated, however, it would not be in order for debate to revisit the discussion which has taken place in committee or during the first or second reading debate.[50]

The options available to the House in responding to the report of the committee under SO 177(3) first appeared in the 2004 standing orders, and are taken from the Australian Senate,[51] however, many of the options were also available under the precursors to the current standing order. Although the terms in which the standing order is drafted suggest that the options available relate to the House's power to agree to or alter the resolutions reported from the committee, *Odgers' Australian Senate Practice* makes clear that the options instead relate to the House's power to amend the motion 'that the report be adopted'.[52] The options include:

- *Agreeing or disagreeing with the committee's actions or resolutions*: Agreeing to the report is a straightforward process with a clear outcome, and the option most often favoured by the House. Disagreeing to the committee's report has the effect of the bill (or other matter) 'dropping' from the Notice Paper.[53] A bill that drops from the Notice Paper in this manner can be restored at a later date.[54]

47 Ruling of the Chair, *Hansard*, NSW Legislative Council, 8 August 1989, pp 9519-9525.

48 For example, *Hansard*, NSW Legislative Council, 17 June 2009, p 16151; 12 September 2012, p 15003.

49 Rosemary Laing, *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009), p 448. Laing notes that the Senate's response to the report of the committee is initiated by a motion 'That the report of the committee be adopted'.

50 This principle is reflected in Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 319.

51 Australian Senate SO 148.

52 *Odgers' Australian Senate Practice,* 13th ed, p 319.

53 For example, *Minutes*, NSW Legislative Council, 10 April 1873, p 125, and the list of notices of motions and orders of the day for the following day listed at the bottom of that page. Also, *Minutes*, NSW Legislative Council, 28 June 1877, pp 117-118, where there was a division on the motion to adopt the report this day six months. There being an equality of votes, the President cast his votes with the 'noes' and the item dropped from the paper.

54 For example, *Minutes*, NSW Legislative Council, 22 April 1873, p 132.

- *Moving a relevant amendment to the motion*: This provision was first adopted in the standing orders in 2004, however, the House has amended the motion 'that the report be adopted' as a matter of practice since the early years of the Council. *Odgers' Australian Senate Practice* states that an amendment may: express the House's opinion concerning a matter associated with the bill; declare the Senate's intention in making requests; seek to defer the bill; refer it to a standing or select committee; refer to a committee matters raised by amendments; make a standing order for documents;[55] make an order for a report by a statutory authority; or provide for the urgent despatch of a message.[56] Of these options available, the Council has only amended the motion to refer the matter to a select committee.[57]

  The President has ruled that an amendment to the motion may not be moved by the same member who moved for the adoption of the report.[58] This would also apply to an amendment to the motion to recommit the matter for further consideration (below).

- *Recommitting the matter to the committee*: To recommit the matter for further consideration, a member may move that the question on the adoption of the report from the committee of the whole be amended by omitting all words after 'That' and inserting instead a motion that the matter be recommitted for further consideration. There is no provision to set recommittal down for a future time – if it is intended to postpone further consideration of the bill until a later time, the proper course is to set down the order of the day for adoption of the report for a later hour or future day (see below) and amend the motion when it is called on. There is no limit on the number of times a matter can be recommitted.[59]

- *Postponing further consideration of the matter*: In practice, this means ordering that the report be adopted at a later hour[60] or on a future day.[61] There are also examples of the Council seeking to amend the motion to set down the adoption of the report for 'this day six months' (see explanation below).[62]

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55 That is, the equivalent to the Legislative Council's order for papers process under SO 52.

56 *Odgers' Australian Senate Practice,* 13th ed, p 319.

57 For example, *Minutes*, NSW Legislative Council, 14 March 1861, p 77; 26 November 1929, p 101. For a bill referred to a committee when progress was being reported (that is, prior to consideration having concluded), see *Minutes*, NSW Legislative Council, 10 April 1997, p 595. See also an example where such an amended was negatived, *Minutes*, NSW Legislative Council, 27 April 1865, p 63; 8 November 1923, p 84.

58 *Minutes*, NSW Legislative Council, 6 June 1865, p 107.

59 See, for example, the recommittal of a bill on the motion for adoption of both the second and third reports from committee of the whole, *Minutes*, NSW Legislative Council, 5 February 1857, p 60; 11 February 1857, p 63.

60 *Minutes*, NSW Legislative Council, 13 March 1879, p 142.

61 For example, *Minutes*, NSW Legislative Council, 28 January 1857, p 51 (consideration of a bill – other examples can be found under the commentary on SO 147); 25 June 1858, p 43 (consideration of a report of the Standing Orders Committee).

62 *Minutes*, NSW Legislative Council, 9 December 1862, p 162.

Reconsideration and recommittal

While the procedures under SOs 172 to 178 apply to committee of the whole for the consideration of any matter, including bills, not all of the procedures that apply to the consideration of bills under SOs 141 to 147 apply to the consideration of other matters in committee of the whole. The most notable of these anomalies is the absence of a provision for the committee to move that a matter other than a bill be reconsidered which, under SO 146, can be moved as an amendment to the motion 'that the Chair report the bill to the House'. This new provision, first adopted in the 2004 rewrite, provides the committee with a valuable last opportunity to revisit any provisions of a bill or amend the outcome of its consideration. However, in the absence of this provision under SO 177, clerks and members must be aware that a committee established to consider a matter other than a bill does not have the same option available. If the committee wishes to revisit a matter it may only do so by arranging for a member in the House to move that the matter be recommitted for further reconsideration (SO 177(3)), or move an instruction to the committee of the whole that it have the power to consider a matter previously considered (SO 179).

Terminating proceedings in committee of the whole

As noted above, the House can set aside the outcome of the committee's consideration of a matter by disagreeing to the motion that the report of the committee be adopted. Proceedings on a matter can also be terminated while the matter is still under the consideration of the committee. However, while the procedural motions to initiate the termination are moved in committee of the whole, in each case the matter is ultimately determined by the House.

Motion that the Chair do now leave the Chair

Under SO 177(4), a motion may be moved in committee of the whole 'That the Chair do now leave the Chair', which if carried will terminate the proceedings of the committee.[63] In this case, no report is made to the House and the bill will drop from the Notice Paper.[64] However, because the committee itself does not have the power to terminate the bill, the bill may consequently be revived by the House.[65] Under SO 177(5), a member may move a motion to restore the order of the day,[66] and the proceedings will be resumed at the point where they were previously interrupted.

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63 For example, during consideration of the Ombudsman (Amendment) Bill and Police Regulation (Allegations of Misconduct) (Ombudsman) Amendment Bill, the Leader of the Opposition moved 'That the Chair do now leave the Chair'. The motion was agreed to and the House resolved immediately out of committee and proceeded to the dinner break. When the House resumed later that evening, business continued in the usual manner. The bills were not restored to the paper that session. (*Hansard*, NSW Legislative Council, 2 May 1989, p 7045).

64 For example, *Minutes*, NSW Legislative Council, 8 June 1894, p 177; 20 December 1894, p 122; 13 November 1895, p 106; 24 September 1896, p 137.

65 Sir John George Bourinot, *Parliamentary procedure and practice in the Dominion of Canada,* 3rd ed, 1903, p 667.

66 For example, *Minutes*, NSW Legislative Council, 21 December 1894, p 124.

In a variation on this procedure, there is also at least one example of a Chair reporting progress but not seeking leave to sit again. The bill subsequently dropped from the Notice Paper.[67]

Seeking leave to sit again this day six months

Deferral of an item until 'this day six months' has the effect of disposing of an item and it may not be considered again in the same form that session.[68] On several occasions, the committee of the whole reported progress and obtained leave to sit again this day six months.[69]

Background

Most of the procedures that apply under SO 177 have applied consistently during the life of the Council, either formally under the standing orders[70] or informally as matters of practice. Provision for proceedings to be terminated by the committee moving a motion 'That the Chair do now leave the Chair' was first made in 1895 (1895 SOs 228 and 229); prior to this the more common mechanism by which proceedings were terminated was by the Chair reporting progress and seeking leave to sit again 'this day six months',[71] or by the Chair reporting progress and not seeking leave to sit again.[72]

Paragraph (3) of SO 177 provides the options available to the House in responding to a report from the committee. While some of the options, such as agreeing/disagreeing to the report or amending the motion for adopting to recommit the matter, have been matters of practice for many years, the terms of paragraph (3) are new to the Council and were first adopted in 2004, taken from Senate standing order 148.

178. Objection to Chair's ruling

If objection is taken to a decision of the Chair of Committees, such objection must be stated at once in writing. If the committee decides, the Chair will then leave the Chair, and the House resume. When the matter has been laid before the President and disposed of, the committee will resume proceedings where they were interrupted.

Development summary		
1895	Standing order 90	Objections to decisions of the Chairman of Committees
2003	Sessional order 178	Objection to Chair's ruling
2004	Standing order 178	Objection to Chair's ruling

67 *Minutes*, NSW Legislative Council, 27 April 1871, p 162.
68 For other uses of this procedure and the background to its operation, see SO 140.
69 *Minutes*, NSW Legislative Council, 27 January 1859, p 11; 6 June 1877, pp 100-101; 6 May 1886, p 98.
70 1856 SO 42; 1870 SO 52, 1895 SO 227.
71 *Minutes*, NSW Legislative Council, 27 January 1859, p 11; 6 June 1877, pp 100-101; 6 May 1886, p 98.
72 *Minutes*, NSW Legislative Council, 27 April 1871, p 162.

The Chair of Committees has the same authority as the President to maintain order in committee of the whole. However, if a member is of the view that the Chair has made a ruling in error, SO 178 outlines the procedure by which a member may object to the Chair's ruling and put the matter to the President, in the House, for final arbitration. When the matter has been resolved, the committee resumes proceedings at the point where they were previously interrupted.

Operation

While SO 178 makes provision for a member to object to a ruling made by the Chair of Committees, the process by which such objection is made has largely developed as a matter of practice.

If a member wishes to object to a ruling made by the Chair of Committees in committee of the whole, they must do so immediately, in writing. A pro forma script is provided by the Clerk for this purpose, which provides the form of words the member should use when stating their objection: 'Mr/Madam Chair, I take objection, under standing order 178, to your decision. I seek the indulgence of the committee to permit me to state my objection in writing'.

The script then lists four categories of rulings, to which the member may base their objection. These categories are provided for convenience to provide ready forms of words for the most common causes for objection, and are:

- ruling that the proposed amendment was not relevant to the subject matter of the bill,
- ruling that the proposed amendment reversed the principle of the bill as read a second time,
- ruling that the remarks of a member were not relevant to the bill, amendment or matter under discussion, and
- upholding a point of order made by another member.

The member completes and signs the script and then reads their objection to the committee of the whole. The member then says: 'Mr/Madam Chair, I move: That you do now leave the Chair and report such objection to the House so that the matter may be laid before the President'.

The Chair responds:

> The Honourable [name of member] has taken objection to my ruling and stated the objection in writing. He/she has moved: That I do now leave the Chair and report the objection to the House so that the matter may be laid before the President.

Debate on the motion may then ensue. The motion is not subject to a time limit and, in keeping with the provisions of SO 173(5), members may speak more than once to the motion. However, other mechanisms for limiting debate available under the standing

orders continue to apply in committee of the whole. For example, during debate on the motion that the Chair report an objection to the House in 2011, a minister moved for the closure of debate by moving 'that the question be now put' (SO 99).[73]

When debate has concluded, the question is put. If negatived, proceedings in committee will resume at the point at which they were interrupted.[74] If the question is agreed to, members will resolve out of committee and the President will take the chair in the House. The Chair will report to the President:

> Mr/Madam President: I have to report that in committee, objection has been taken by the Honourable [name of member] under standing order 178 to my decision that [the Chair then reads the member's objection lodged in writing]. The committee has decided that the matter should be laid before the President.

The President then repeats the Chair's report to the House and offers members the opportunity to address him or her on the matter. Debate may then ensue, and is not subject to time limit.[75]

Following members' contributions, the President will rule on the matter. When the matter has been resolved, the President leaves the chair without any question being put and the House resolves back into committee of the whole to resume proceedings at the point at which they were interrupted. If, prior to the resumption of consideration in committee, another matter of business interrupts or pre-empts the resumption of those proceedings, such as the adjournment of the House, or the interruption of business for Questions according to sessional order, the resumption of consideration in committee is set down as an order of the day on the Notice Paper.[76]

Prior to the adoption of the current standing orders it was not uncommon for members to object to rulings of the Chair of Committees.[77] Only two such objections have been made since the adoption of the current standing order in 2004, both of which were defeated.[78]

The *Annotated Standing Orders of the Australian Senate* notes that debate on an objection to a decision of the Chairman of Committees cannot be adjourned, in keeping with the rationale that the committee of whole must be able to resume its work with as much expedition as possible while any difficulties are dealt with by the House.[79] The question has not arisen in the Council, however, a similar logic is likely to apply.

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73 *Hansard,* NSW Legislative Council, 2 June 2011, pp 2049-2053.

74 For example, *Hansard,* NSW Legislative Council, 14 May 1987, pp 12021-12022; 30 April 2003, pp 80-82.

75 For an example under the current standing orders, see *Hansard,* NSW Legislative Council, 2 June 2011, pp 2047-2054.

76 See, for example, *Hansard,* NSW Legislative Council, 30 April 2003 p 68.

77 *Minutes*, NSW Legislative Council, 22 March 1916, p 272; 23 March 1916, p 279; 21 September 1931, p 308; 27 September 1932, p 44; 25 July 1934, p 86; 14 November 1934, p 188; 8 December 1937, p 98; 30 September 1941, p 67; 15 March 1978, p 78.

78 *Hansard,* NSW Legislative Council, 30 April 2003, pp 80-82; 4 June 2011, pp 2047-2054. A further dissent moved in 2008 was subsequently withdrawn, *Hansard*, NSW Legislative Council, 19 June 2008, p 8866.

79 Laing, *Annotated Standing Orders of the Australian Senate*, p 444.

Background

SO 178 replicates the procedure that previously applied under the 1895 standing orders (1895 SO 90). The standing order adopted by the Council in 1895 was based on the general form adopted by the Assembly, with several variations – the Assembly limited debate on the motion that the Chair report the objection to the House to a statement by the member objecting of no more than 10 minutes, and limited debate on contributions to the Speaker's consideration of the matter to 10 minutes per member, for a total of 30 minutes.[80]

Prior to 1895, the procedure for objecting to a decision of the Chair of Committees was not provided for under the standing orders, however the House followed the same practice.[81]

80 1894 Assembly SO 162.

81 For example, *Minutes,* NSW Legislative Council, 6 October 1881, p 92.

CHAPTER 28

INSTRUCTIONS BY THE HOUSE TO COMMITTEES

179. EFFECT OF INSTRUCTIONS

(1) An instruction may give a committee of the whole House authority to consider matters not otherwise referred to it, or extend or restrict its authority.

(2) An instruction may be given to a committee on a bill to divide a bill into two or more bills or to consolidate several bills into one.

(3) An instruction may be given to a committee on a bill to amend an existing Act or consider amendments which are not relevant to the subject matter of the bill but are relevant to the subject matter of the Act it is proposed to amend.

Development summary		
1895	Standing order 230	Objects of an instruction
2003	Sessional order 179	Effect of instructions
2004	Standing order 179	Effect of instructions

A committee of the whole can be charged with the detailed consideration of a variety of matters, but most often bills. Nevertheless, the House remains the ultimate authority of any matter referred to the committee and equally the authority of any restrictions or special liberties that are placed upon the committee's consideration of the matter referred (see SO 27). SO 179 is the formal expression of this principle under the standing orders.

The power to provide an instruction to committee of the whole was first formalised in the standing orders in 2004 (taken from the terms of Senate SO 150), however, the practice has been a matter of convention since the early years of the Council.[1]

1 For example, *Minutes*, NSW Legislative Council, 18 November 1857, p 24; 10 March 1864, p 149; 24 March 1864, p 161; 14 June 1865, pp 126-127; 30 November 1988, pp 296-297. See also an instruction to a select committee, *Minutes*, NSW Legislative Council, 10 November 1870, p 66; 1 December 1936, p 55; 21 October 1982, p 202.

Operation

The House may give the committee of the whole authority to consider matters not otherwise referred to it, or to extend the committee's authority (SO 179(1)). While this authority can extend to any matter, the power is most often used in accordance with the procedure under SO 179(3), which provides that an instruction may be given to a committee on a bill to amend an existing Act or consider amendments which are not relevant to the subject matter of the bill but are relevant to the subject matter of the Act it is proposed to amend.[2] This allows the committee to consider an amendment that would otherwise contravene SO 144(1), which provides that an amendment must be relevant to the subject matter of the bill, or SO 136(3), which provides that no clause may be inserted in a bill which is irrelevant to its title.

While an instruction may empower a committee of the whole House to consider matters not otherwise referred to it, former President Johnson ruled in 1988 that an instruction authorising the introduction of amendments which are outside the subject matter of the bill should be cognate with the general purposes of the bill.[3] This is in keeping with House of Commons practice.[4] The President further ruled that while it is for the House to decide whether an instruction should be carried, it is for the committee to decide whether it is prepared to accept any amendment it is so instructed to consider.[5]

In 2011, the House agreed to an instruction to enable the committee to reconsider amendments previously considered, notwithstanding that the Council had finalised its original consideration of the bill. On that occasion, the Assembly wrote to the Council to advise that it disagreed to amendments made by the Council in the Graffiti Legislation Amendment Bill 2011.[6] The Council responded by requesting a free conference on the bill,[7] however, this too was rejected by the Assembly. To enable the Council to reconsider the amendments previously agreed to but rejected by the Assembly, a minister moved an instruction to the committee of the whole that it have the power to consider both the message rejecting the free conference, and the original message disagreeing to the Council's amendments. The motion was moved according to contingent notice as a conduct of business motion, following the suspension of standing orders. The motion

2 For example, *Minutes*, NSW Legislative Council, 1 June 2010, p 1858; 9 November 2010, p 2183; 28 March 2012, p 857; 19 June 2014, p 2616; 24 June 2015, p 233.

3 Ruling: President Johnson, *Hansard*, NSW Legislative Council, 30 November 1988, pp 3917-3918.

4 Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011), pp 558, 561-562, which notes that an instruction cannot authorise the consideration of an amendment that is *not* cognate to the purposes of the bill; or that is inconsistent with the second reading; or attempts to introduce into a bill a subject which should properly constitute a distinct measure; or attempts to confer powers on a committee which it already has, or are otherwise superfluous; or proposes an impracticable division of the bill into two or more bills; or is generally not clear and specific.

5 Ruling: President Johnson, *Hansard*, NSW Legislative Council, 30 November 1988, pp 3917-3918.

6 *Minutes*, NSW Legislative Council, 26 August 2011, pp 387-388.

7 *Minutes*, NSW Legislative Council, 13 September 2011, pp 426-427.

was agreed to and the committee of the whole went on to make further amendments to the bill, which were ultimately agreed to by the Assembly.[8]

Dividing a bill

Under SO 179(2), the House may also instruct the committee of the whole to divide a bill into two or more bills. The procedure has been used twice[9] since the power was first formalised in the standing orders in 2004, the terms of which reflect those of Senate SO 150. The House had previously considered such instructions on at least three occasions prior to the adoption of the standing order, one of which was agreed to[10] and two of which were not.[11] To divide a bill, or to instruct the committee to consolidate several bills, the following practice should be followed:

- Following the second reading, or otherwise in accordance with the provisions of the standing and sessional order, a member moves: 'That it be an instruction to the committee of the whole: that the committee have the power to divide the bill into a certain number of bills'. The motion will include the purpose for dividing the bills. In the examples moved to date, the motion has also included a motion 'that the committee report the bills separately'.[12]
- In committee, the Chair will announce that the committee has received an instruction from the House that the committee has power to divide the bill into two bills.
- At the appropriate point in the bill, a member will move an amendment, drafted by Parliamentary Counsel, to divide the bill into two bills. The committee will then deal with the new bill containing the long title, clauses containing preliminary provisions, and those portions of the bill divided into the new bill according to the instruction agreed to in committee.
- At the conclusion of proceedings in committee, the minister will move that the Chair leave the chair and report to the House that the committee has considered the bill and, according to the instruction given by the House, divided the bill into two [or more] bills, naming the new bills. The motion will also report the bill/s with or without amendments.

The procedure for dividing a bill can result in the bills being considered separately and open the bills to any of the procedures provided for in the standing orders: for example, one bill may proceed while another does not; one bill may proceed through all stages

8 *Minutes*, NSW Legislative Council, 21 August 2012, p 1148.

9 Statute Law (Miscellaneous Provisions) Bill (No 2) 2014, *Minutes*, NSW Legislative Council, 18-19 November 2014, p 313; 19 November 2014, p 342; Statute Law (Miscellaneous Provisions) Bill 2017, *Minutes*, NSW Legislative Council, 10 May 2017, pp 1596-1602.

10 *Minutes*, NSW Legislative Council, 28 June 2000, p 567.

11 *Minutes*, NSW Legislative Council, 20 November 1990, pp 632-633; 28 June 2000, p 567; 27 May 2003, p 123.

12 For example, *Minutes*, NSW Legislative Council, 20 November 1990, pp 632-633 (this proposal sought to have a separate Appropriation Bill for 'The Legislature'); 27 May 2003, p 123.

while the other is considered further in committee of the whole; or one bill may be negatived while the other is referred to a committee for inquiry.

While the Council's standing orders make provision for a bill to be divided, the Council's power to do so is contested by the Legislative Assembly. In 1990, following the Assembly's decision to accept a resolution of the Council to divide a bill, the Assembly advised the Council:

> The Assembly considers that the established rules and practices of the Houses provide 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. Further, the Legislative Assembly's action in this particular case is not to be taken as a precedent.[13]

This response from the Assembly was somewhat surprising given that the instruction to divide the bill was moved by a Government minister.[14] When the procedure was used more recently in 2014, no such objection was made, but in 2017 the objection was reiterated.[15]

Consolidating several bills into one

Under SO 179(2), the House also has the power to instruct a committee to consolidate several bills into one. The power has not been used to date in the Council.

Instructions to consider amendments imposing a tax or impost – 'money bills'

From time to time, issues arise in relation to the powers of the Council to amend 'money bills', meaning appropriation bills appropriating public revenue and taxation bills imposing any new tax, rate or impost.

The Council does not admit any limitation on its powers in respect of money bills other than that such bills must originate in the Assembly, that the Council may only suggest amendments (by way of a message to the Legislative Assembly) to a 'bill appropriating revenue or moneys for the ordinary annual services of the Government', and that a 'bill appropriating revenue or moneys for the ordinary annual services of the Government' may be presented to the Governor for assent under section 5A of the *Constitution Act 1902*, notwithstanding that the Legislative Council has not consented to the bill. Deadlocks between the Houses on all other appropriation bills and all taxation bills may be dealt with by the Council in the normal way under section 5B of the *Constitution Act 1902*. In June 2015, the Chair of Committees gave a comprehensive ruling on the Council's ability to amend 'money bills',[16] which is reproduced in *A Practical Guide to Procedure in Committee of the Whole*.[17]

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13 *Minutes*, NSW Legislative Council, 29 June 2000, p 579.

14 *Minutes*, NSW Legislative Council, 28 June 2000, p 567.

15 *Minutes*, NSW Legislative Council, 20 November 2014, p 374; 24 May 2017, p 1643.

16 *Hansard*, NSW Legislative Council, 24 June 2015, pp 1727-1728.

17 Appendix Four, *A Practical Guide to Procedure in Committee of the Whole*, NSW Legislative Council, 2015, pp 32-34.

Instructions on matters other than bills

The House can make instructions that relate to matters other than the provisions of bills. For example, in 2011 the House agreed to an instruction relating to the procedures that would be followed during the committee of the whole on a particularly contentious bill on which it was expected that there would be extensive debate and multiple divisions. The instruction imposed time limits on debate, required that amendments be submitted to the Chair before the House resolved into committee, required that amendments that occurred at the same place be considered together and that the question be put on the amendments together, and required that where divisions were requested to be put sequentially the doors would be locked and remain locked until the remaining questions had been disposed of.[18]

Instructions relating to the consideration of a private bill

On two occasions, the House agreed to an instruction to committee of the whole to call the solicitor promoting a private bill before it, to produce certain documents and to be examined respecting the bill.[19] This practice has not reoccurred in recent years, as the Council has not considered a private bill since 1992 (see SO 164).

Background

Provision for instructions to be given to committee of the whole was first made in the standing orders in 1895 (SO 230), however, the practice of instructing the committee is well established and has been in use since the 1800s, when instructions were moved as amendments;[20] according to notice, following the second reading of a bill being agreed to;[21] according to contingent notice; following the second reading being agree to;[22] or without previous notice.[23] Most of these instructions sought to authorise the committee to consider amendments that would otherwise be outside the leave of a bill then under consideration.

As noted above, a number of the provisions of SO 179 were first adopted in 2004, specifically:

- In SO 179(1), the specific reference to the House having the power to issue an instruction that would 'extend or restrict' the committee's authority.
- SO 179(2) and (3). Although both provisions were matters of practice prior to 2004 (discussed above), the terms in which those practices were formalised in the standing order were taken from the terms of Senate SO 150.

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18 *Minutes*, NSW Legislative Council, 2-4 June 2011, pp 182-185.

19 *Minutes*, NSW Legislative Council, 10 March 1864, p 149 (Bank of New South Wales Incorporation Act Amendment Bill); 24 March 1864, pp 161 and 166 (Moruya Silver Mining Company's Incorporation Bill).

20 For example, *Minutes*, NSW Legislative Council, 10 March 1864, p 149.

21 For example, *Minutes*, NSW Legislative Council, 22 August 1900, p 86.

22 For example, *Minutes*, NSW Legislative Council, 30 November 1988, pp 296-297.

23 For example, *Minutes*, NSW Legislative Council, 18 November 1857, p 24.

180. NOTICE REQUIRED; WHEN MOVED

(1) Except as provided in paragraph (2), an instruction may only be moved by motion on notice. A motion for an instruction is to be moved before the House resolves itself into a committee of the whole House or when the order of the day is read for the resumption of a committee.

(2) An instruction may be moved as an amendment on the question for the adoption of the report of the committee.

Development summary		
1895	Standing order 231	When instructions should be moved
2003	Sessional order 180	Notice required; when moved
2004	Standing order 180	Notice required; when moved
2015	Sessional order	Instruction to committee of the whole – variation to SO 180

SO 180 names the various points in proceedings at which an instruction to committee may be moved. While the standing order is quite restrictive in this regard and requires that notice be given on a previous sitting day, practice over time has developed to enable members to move instructions of which notice has not been given either by way of contingent notice or, more recently, in accordance with a sessional order that provides for an instruction to be moved after the second reading is agreed to or when the order of the day is read for resumption of consideration in committee of the whole.

Operation

Under SO 180, an instruction may only be moved:

- by motion, on notice, or
- as an amendment to the question for the adoption of the report of the committee.

The restrictive nature of the standing order, which replicates its 1895 precursor,[24] is intended to ensure that members have requisite notice of an instruction that is to be moved to allow for due consideration and reflection before agreeing to extending or restricting the committee's powers in some way. However, practice over time has developed to move away from the requirement for the contents of an instruction to first appear on the Notice Paper. From the late 1980s until 2014, this was achieved by a member giving a 'contingent notice' that, contingent on the second reading of any bill being agreed to, standing orders would be suspended to allow the member to move a motion forthwith for an instruction to the committee of the whole in relation to any bill. While the background to this procedure is discussed below, the effect of the procedure can be summarised as fulfilling the requirements of both SOs 180 and 198:

24 1895 SO 231.

- under SO 180, the member had complied with the requirement to give notice of their intention to move an instruction,
- under SO 198, the member had complied with the requirement to give notice of their intention to move for the suspension of standing orders.

This practice operated over such a lengthy period that, in 2015, the House formalised the practice by way of the adoption of a sessional order. The sessional order has the effect of omitting the requirement for an instruction to be moved on notice, and instead provides:

(1) A motion for an instruction is to be moved before the House resolves itself into committee of the whole House or when the order of the day is read for the resumption of a committee.

(2) An instruction to committee of the whole in relation to a bill must be moved after the second reading and before the House resolves itself into committee of the whole, or when the order of the day is read for the resumption of committee.

(3) An instruction may be moved as an amendment on the question for the adoption of the report of the committee.[25]

Under the terms of the sessional order, and consistent with practice, members are not required to provide the terms of an instruction prior to moving it. However, in practice, members generally consult their colleagues across the various parties prior to moving an instruction to ensure that they have the requisite support for the motion to be agreed to by the House.

Moving an instruction, in practice

Most often, an instruction is moved immediately on the House agreeing to the second reading of a bill. This is in keeping with the provisions of both the original terms of SO 180, the terms of the 2015 sessional order and the provisions of SO 141(2)(b), which provide for the motions that may be moved immediately following the second reading being agreed to.

Under paragraph (2) of the sessional order, an instruction to committee must be moved *after* the second reading, but *before* the House resolves into committee. This provision was tested in 2015. A member had circulated an instruction that they intended to move to authorise the committee to consider certain amendments that would otherwise be outside the leave of the bill. On the second reading of the bill being agreed to, a minister immediately moved that consideration in committee of the whole stand an order of the day for a later hour of the sitting, before the member was called on to move their intended instruction, preventing the member from doing so.[26] At the time at which the bill was next due to be considered, some days later, on the Deputy President calling on the Clerk to read the order of the day for the bill (but prior to the Clerk actually doing so), the member sought the call and moved, according to sessional order, his

25 *Minutes*, NSW Legislative Council, 6 May 2015, p 61.
26 *Minutes*, NSW Legislative Council, 27 May 2015, p 134.

motion for the instruction to the committee of the whole. The motion was agreed to. The Deputy President then once again called on the Clerk to read the order of the day and the House resolved itself into committee of the whole.[27] In point of fact, it would have been most appropriate for the member to move the motion for the instruction *after* the Clerk had read the order of the day – while the sessional order makes clear that the instruction must be moved before the House resolves into committee, the sessional order does not require that the motion be moved before the order of the day is read. Under this practice, the President would simply leave the chair once the motion had been disposed of, or would announce 'I will now leave the Chair and the House will resolve into committee of the whole'. The application of this alternative practice would ensure consistency with the practice that had applied prior to the adoption of the sessional order in 2015.[28]

Paragraph (2) of the 2015 sessional order provides that an instruction may be also moved when the order of the day is read for the resumption of committee. This provision would be of most benefit in the event that, during committee, it is noted that the committee would be benefit from the power to consider amendments otherwise outside the scope of the bill or be charged with additional powers of some kind. This being the case, the committee could resolve out of committee and at some future time or date, a member move the requisite instruction when the order of the day for further consideration in committee is next read. This procedure could also be used if, during committee of the whole, the Chair rules that amendments circulated by a member are outside the leave of the bill and could only be considered on the specific instruction of the House.

Paragraph (3) of the 2015 sessional order, in the same terms as SO 180(2), provides that an instruction may be moved as an amendment on the question for the adoption of the report of the committee. This provision does not appear to have been used to date, however, could be used if a situation arises similar to that outlined above, where it comes to the attention of the committee during its consideration of a matter that requires certain authority that it would not otherwise have.

An instruction, once agreed to, may later be rescinded.[29]

Background

Provision for the time at which an instruction should be moved was first made in the standing orders in 1895 (SO 231), however, the principle had been articulated by former President Lackey in 1893, who advised that in order to ensure that members who were absent had requisite notice of a member's intention to move an amendment that would otherwise be outside the scope of the bill, the member should seek the

27 *Minutes*, NSW Legislative Council, 24 June 2015, pp 233-234.

28 See, for example, *Minutes*, NSW Legislative Council, 28 June 2000, pp 567-569; 23 October 2002, p 416; 31 March 2004, p 645.

29 See, for example, *Minutes*, NSW Legislative Council, 30 November 1988, pp 296 and 299.

concurrence of the House or give notice that he would move the amendment on a subsequent occasion.[30]

Under SO 231, the motion for an instruction could be moved:

- after the order of the day for going into committee had been read and before the question 'That the President do now leave the Chair, etc',
- before the order of the day was read for resumption of a committee, or
- when the committal of a bill is moved after the second reading.

As noted above, from the late 1980s until 2014, members had developed the practice of moving instructions according to contingent notice. A contingent notice takes the form of a member giving notice that, contingent on a certain event occurring, in this case the bill being read a second time, the member will move that something else happen. In this case, the contingent notice provides that the member will move that an instruction be given to committee of the whole. The most common form of contingent notices given prior to the 1980s had concerned the passing of bills through all stages – such notices had been given since 1859. However, there are early examples of contingent notices given for the purpose of moving an instruction to committee of the whole, though the practice was infrequent and in some cases related to an instruction moved at other stages of consideration such as on the adoption of the report from committee or on recommittal.[31]

Many years later, on 15 November 1988, the Hon Richard Jones (Australian Democrats) gave a contingent notice that contingent on the House agreeing to the second reading of the Statute Law (Miscellaneous Provisions) Bill (No 2), he would move that it be an instruction to the committee of the whole that they have the power to consider an amendment to provide for the desexing of cats.[32] Mr Jones gave another contingent notice for a single bill several weeks later,[33] then in 1989 gave the first example of a contingent notice to apply to all bills, in the following terms:

> Contingent upon a motion being agreed to for the second reading of any bill, [I will move]: That so much of the standing orders be suspended as would preclude the moving of a motion forthwith for an instruction to the committee of the whole in relation to the bill.[34]

This contingent notice was given with the intention of fulfilling the requirements under the standing orders that notice be given both for an instruction (1895 SO 230) and for the suspension of standing orders (1895 SO 264).

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30 *Hansard*, NSW Legislative Council, 31 May 1893, p 7710.

31 *Minutes*, NSW Legislative Council, 1 March 1893, p 168; 7 June 1893, p 334 (motion for instruction on recommittal); *Notices of Motions and Orders of the Day*, NSW Legislative Council, 8 June 1893, p 342 (motion for instruction on adoption of report from committee); 16 August 1900, p 81; 27 November 1895, p 135 (instruction on motion for further consideration in committee).

32 *Notices of Motions and Orders of the Day*, NSW Legislative Council, 16 November 1988, p 244.

33 *Notices of Motions and Orders of the Day*, NSW Legislative Council, 30 November 1988, p 287.

34 *Notices of Motions and Orders of the Day*, NSW Legislative Council, 20 September 1989, p 891.

Mr Jones gave a similar notice in the first days of the following session,[35] and then gave an additional contingent notice several months later for an instruction to a committee that a bill be divided into two or more bills.[36] Mr Jones gave notice for a general instruction again in the following session,[37] after which from the 50th to 55th Parliaments (1991 to 2014) a number of members gave the same notice.[38] As noted above, from the 56th Parliament (2015) a sessional order was adopted which obviated the continued use of contingent notices, providing a permanent provision for members to move an instruction without notice.[39]

181. Debate on instructions

Debate on a motion for an instruction:

(a) must be relevant to the instruction,

(b) may not refer to the objects of the bill to which the instruction relates, and

(c) may not anticipate discussion of a clause in the bill.

Development summary		
2003	Sessional order 181	Debate on instructions
2004	Standing order 181	Debate on instructions

This standing order outlines the restrictions that apply to debate on an instruction to a committee of the whole.

Operation

Debate on a motion for an instruction must be relevant to the instruction, may not refer to the objects of the bill to which the instruction relates, and may not anticipate discussion of a clause in the bill. These provisions are in keeping with the general rules for debate set out under the standing orders, which provide that a member may not digress from the subject matter of a question under discussion, or anticipate a matter yet to be discussed (SO 92). Similarly, rulings made by various Presidents have affirmed that debate on a preceding procedural motion (e.g. the suspension of standing orders to bring on consideration of an item) must not anticipate debate on the substantive matter,[40]

35 *Notices of Motions and Orders of the Day*, NSW Legislative Council, 28 March 1990, p 42.

36 *Notices of Motions and Orders of the Day*, NSW Legislative Council, 29 May 1990, p 224. The notice remained on the paper for the remainder of the session, however, Mr Jones did not give the notice again in subsequent sessions.

37 *Notices of Motions and Orders of the Day*, NSW Legislative Council, 21 February 1991, p 2.

38 Commencing from *Notices of Motions and Orders of the Day*, NSW Legislative Council, 3 July 1991, pp 2-4.

39 *Minutes*, NSW Legislative Council, 6 May 2015, p 61.

40 Ruling: President Burgmann, *Hansard*, NSW Legislative Council, 29 October 2003, p 4267; Ruling: President Primrose, *Hansard*, NSW Legislative Council, 28 November 2007, p 4471; Ruling: President Harwin, *Hansard*, NSW Legislative Council, 10 September 2014, p 121.

and that debate in committee of the whole or on the third reading may not canvass the debate that has taken place during a previous stage of the bill.[41]

The rule has been enforced by the Chair on one occasion since its adoption in 2004.[42]

Background

The provisions of SO 181 were first adopted in the standing orders in 2004. The standing order formalises the principles reflected in rulings of the numerous Presidents over successive years in the Council, as discussed above.

182. INSTRUCTION TO SELECT OR STANDING COMMITTEES

An instruction may be given to a select or standing committee to extend or restrict its terms of reference. Any instruction must be moved before the committee reports.

Development summary		
2003	Sessional order 182	Instruction to select or standing committees
2004	Standing order 182	Instruction to select or standing committees

SO 182 clarifies that the House may instruct a select or standing committee to extend or restrict its terms of reference – a power that has always been available to the House, but was not clearly articulated in the standing orders until 2004. The standing order further provides that any such instruction must be moved before the committee reports. While the power is an important one, it is rarely exercised as amendments to terms of reference and reporting dates are most commonly achieved by an ordinary resolution of the House.

Operation

The terms of reference provided to committees to inquire into certain matters may originate from a number of different sources: a reference from the House (or the joint Houses, in the case of joint select committees); a reference from a portfolio minister (standing committees only);[43] or a self reference from the committee itself (portfolio committees only). Nevertheless, under SO 182 the House may further instruct the committee to either extend or restrict any terms of reference. This is in keeping with the principle that the House determines the powers of its committees and the scope of any inquiries they undertake.

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41 Ruling: President Johnson, *Hansard*, NSW Legislative Council, 4 May 1989, p 7452; Ruling: President Burgmann, *Hansard*, NSW Legislative Council, 29 June 2001, p 15958; Ruling: Deputy President Nile, *Hansard*, NSW Legislative Council, 4 July 2001, p 16258; Ruling: President Harwin, *Hansard*, NSW Legislative Council, 16 October 2013, p 24081; 27 November 2013, p 26512.

42 Ruling: President Harwin, *Hansard*, NSW Legislative Council, 2 June 2011, p 2034.

43 Under the terms of the resolutions establishing the three standing committees: Law and Justice, Social Issues and State Development.

The purpose of such an instruction is to vest a committee with power it would not otherwise have or restrict its activities in some way. Of the few recent instances in which the House has considered such instructions, the instruction has sought to have the following effect:

- to require a committee to meet on a particular date for the purposes of hearing evidence from certain witnesses named in the resolution (the resolution was amended to omit reference to an 'instruction' and instead 'request' the committee to do so),[44]
- to postpone the commencement of its inquiry until the conclusion of certain reviews,[45]
- to prevent the committee from asking questions regarding the medical condition of a Director-General who was to appear before the committee for the purposes of a budget estimates hearing (subsequently negatived).[46]

The effect of an instruction is to bind the committee to undertake the action determined by the House.

An instruction to alter the terms of a reference of a joint committee must be agreed to by both Houses.

Background

Provision for the House to instruct a committee as to its terms of reference was first made in the standing orders in 2004,[47] however, the House exercised the power as a matter of practice in the years prior to 2004, adopting the power and practices of the House of Commons.[48]

In 1961, an amendment moved to the second reading of a bill to refer the bill to a select committee included 'an instruction' to the committee to consider certain matters.[49]

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44 *Minutes*, NSW Legislative Council, 22 September 2004, pp 1019-21 (Inquiry into Kariong Juvenile Justice Centre).

45 *Minutes*, NSW Legislative Council, 23 March 2005, pp 1297-8 (Inquiry into public disturbances in Macquarie Fields).

46 *Minutes*, NSW Legislative Council, 23 March 2005, p 1299.

47 The 1895 standing orders did however make some reference to the power. 1895 SO 278 laid out the various procedures that were apply when a select committee appointed to inquire into a private bill had not reported in a previous session. The standing order stated that the bill could be referred to a new select committee, together with the minutes of evidence taken, all papers and petitions referred, and 'all instructions which may have been given to the previous committee'. This implies that it was accepted that committees might ordinarily receive instructions from the House.

48 *Erskine May*, 24th ed, pp 806-807.

49 *Minutes*, NSW Legislative Council, 7 March 1961, pp 148-149.

In 1936, a select committee appointed to inquire into the truth or otherwise of certain charges made in the Legislative Council by a member in connection with the election of another member, advised the Council that it had agreed to the following resolutions:

- That the Chairman report to the House that a request has been received from a member that he be represented at the committee's inquiry by Counsel, and that the House be asked to give an instruction in the matter to the committee.
- That the Chair report to the House that an application had been made by the same member for an adjournment of the committee's inquiry until some weeks ahead, and that the House be asked to give an instruction in the matter to the committee.

Standing orders were suspended to allow the consideration of the report forthwith, and the House went on to resolve that it be an instruction to the committee that it grant the member's application to be represented by Counsel before the committee, refuse the member's application for an adjournment, and decide for itself what adjournment, if any, should be granted.[50]

50 *Minutes*, NSW Legislative Council, 1 December 1936, p 1936.

CHAPTER 29

PRIVATE MEMBERS' BUSINESS

183. NOTICE GIVEN

Any member may give notice of an item of private members' business for debate during the session.

Development summary		
1999	Sessional order	Private Members' Business
1999–2003	Sessional order	Private Members' Business
2003	Sessional order 183	Notice given
2004	Standing order 183	Notice given
2011–2015	Sessional order	Expiry of private members' business

The provisions for the conduct of private members' business are contained in standing orders 183 to 189. The origin and development of the rules for the conduct of private members' business under the standing orders are detailed under standing order 184.

Private members' business, also known as general business, refers to notices of motions and orders of the day standing in the name of non-government members, excluding matters of privilege, business of the House, motions under SOs 200 or 201 and motions to take note of committee reports. The purpose of such business is to allow private members to raise issues of concern to their constituents, propose legislation and promote alternatives to government policy for debate and decision by the House.

The term 'private member' is not defined in the standing orders but is generally understood to include any member of the House except the President and ministers. The President and ministers generally refrain from sponsoring or pursuing items of private members' business and withdraw or request a change of sponsorship of any items of private members' business standing in their name once appointed. The question of whether a minister may initiate items of private members' business acting in their private capacity has not arisen for determination in the Council. However, it is not uncommon for parliamentary secretaries to give notices of motions in their capacity as private members on issues unrelated to their official duties, and there

are precedents of members moving amendments to private members' bills in their capacity as a private member and not as a minister.[1]

Operation

SO 183 provides for any member to give notice of an item of private members' business. Although SO 183 appears to clarify that any member, including the President and ministers, may initiate private members' business, there have been no examples of the President or ministers doing so since the adoption of SO 183.

Notices of items of private members' business are set down on the Notice Paper under the category 'Private Members' Business' in the order given and are then subject to the rules for the consideration of private members' business set out in SOs 184 to 189.

In 2011, a sessional order was adopted to provide that any private members' business notice of motion outside the order of precedence (See SO 185) remaining on the Notice Paper for 20 sitting days without being moved is removed from the Notice Paper. The sessional order was adopted again in 2015.[2]

Background and development

The provision first appeared in 1999 when the House adopted a sessional order for the conduct of private members' business which substantially changed the way the House would consider such business. Originally the provision required at least five calendar days' notice to be given of an item of private members' business.[3] This requirement was omitted from the sessional order on private members' business in the following session[4] and has not since been revived. The terms of the first paragraph of the sessional order adopted in September 1999 were eventually adopted as standing order 183.

184. Consideration of

On days set apart for general business, the House is to consider items of private members' business in the sequence established by a draw conducted by the Clerk at the beginning of the session and from time to time.

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1 In September 2010, the Hon John Hatzistergos, Attorney General, circulated and moved an amendment to the Adoption Amendment (Same Sex Couples) Bill 2010 (No. 2), a private members' bill, in a private capacity and not as Attorney General. *Hansard*, NSW Legislative Council, 8 September 2010, p 25383.

2 *Minutes,* NSW Legislative Council, 21 June 2011, p 232; 6 May 2015, p 58.

3 *Minutes,* NSW Legislative Council, 12 May 1999, p 50.

4 *Minutes,* NSW Legislative Council, 8 September 1999, p 31.

Development summary		
1895	Standing order 66	Remanets
1999-2003	Sessional order	Private Members' Business
2003	Sessional order 184	Consideration of
2004	Standing order 184	Consideration of
2011-2015	Sessional order	Substituting an item in the order of precedence

Under SO 40, the House is to set the times for considering government and general business. SO 184 provides that on days set apart for general business, the House is to consider items of private members' business in the order established by a draw conducted by the Clerk at the beginning of the session and from time to time. The conduct of the draw is provided by SO 185.

Operation

Under SO 185, the Clerk is to conduct a draw of 12 members' names from the items of private members' business already on the Notice Paper, to establish the order of precedence of business to be conducted on private members' days.

While the requirement under SO 185 for an order of precedence to be established is the basis under which private members' business is considered, members regularly seek to change the established order by suspending standing orders to bring on items outside the order of precedence. In an effort to reduce the instances of members seeking to change the order of business on a private members' day, in 2015 the Government Whip initiated an informal process whereby government, opposition and crossbench members meet to discuss private members' business to be considered the following day. Members agree on the items in the order of precedence to proceed and on any additional items outside the order of precedence on the Notice Paper that are also to be given precedence.

To apply the agreed order of business, prior to the commencement of private members' business the following day, the Government Whip moves a motion without notice for the suspension of standing orders to allow a subsequent motion to be moved concerning the conduct of general business.[5] A motion is then moved proposing the order of business for the day.[6] It is open to any member to move an amendment to the motion to add or omit an item of private members' business.

While agreeing to the motion proposed by the Government Whip gives the House a degree of certainty as to the items to be considered, and in what order, it does not prevent the House from later agreeing to postpone items on the list or amending the order. In June 2015, an amendment to insert an additional item of private members' business in the list for the day was not agreed to.[7]

5 This procedure is provided under sessional order for the conduct of business adopted, *Minutes,* NSW Legislative Council, 6 May 2015, p 62.

6 See, for example, *Minutes,* NSW Legislative Council, 13 August 2015, pp 302-303.

7 *Minutes,* NSW Legislative Council, 25 June 2015, pp 247-248.

Background and development

Standing orders 183 to 189 provide for the consideration of private members' business. The provisions were first introduced in 1999[8] and were readopted each subsequent session in modified form until adopted as standing orders in 2004.[9] These modifications are outlined below.

The 1999 provisions replaced a system of remanets which had been adopted in 1895. Prior to 1895, there were no provisions for private members' business. However, under 1856 SO 20 and 1870 SO 23 the House was to fix the days on which government business would take precedence of all other business.[10] Any notices of motions given by private members were listed under 'General Business – Notices of Motions' and 'General Business – Orders of the Day' and considered when reached as the House proceeded to consider the items of business in the order listed for the day.

Under the 1895 standing orders, general business took precedence of government business on every private members' day, usually Thursdays, and notices of motions took precedence of orders of the day on alternative private members' days (SO 57). Notices of motions were moved in the order they appeared on the Notice Paper (SO 57) in the chronological order they had been given in the House (SO 51). Similarly, orders of the day were called on in the order they appeared in the Notice Paper, which reflected the order in which the items had previously been dealt with. Notices of motions or orders of the day not reached by the end of the day, known as 'remanets', were set down on the Notice Paper for the next sitting day at the end of the business already fixed for that day (SO 66).

Accordingly, for example, if on Tuesday, X gave notice of a motion for the next sitting day the notice would be set down on the Notice Paper at the top of general business for Wednesday but if not reached on Wednesday the notice would be placed at the end of general business for Thursday. Similarly, if on Wednesday, Y gave notice of a motion for the next sitting day Y's notice would be listed at the top of general business for Thursday, ahead of X's, but if the motion was not reached on Thursday the notice would drop to the bottom of the list of general business for the next Tuesday.

The aim of this system was to ensure that no individual item of general business would carry on indefinitely to the detriment of other members' motions and dominate the limited time available for general business each week. However, there were problems with the system in practice, which included:

- The scheme of alternating motions and orders of the day each private members' day was unduly complicated and members were often unaware what matters were due for consideration.

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

9 *Minutes,* NSW Legislative Council, 8 September 1999, pp 31-32; 5 April 2000, pp 356-359; 12 March 2002, pp 34-43; 30 April 2003, pp 39-48; 14 October 2003, p 324.

10 See for example *Minutes,* NSW Legislative Council, 12 August 1870, p 8.

- Few private members' motions were taken to conclusion as it was rare for the House to get to vote on an item.
- The order in which general business was placed on the Notice Paper was determined indirectly by the order in which the Chair gave the call when notices of motion were called for.
- Members with some knowledge of the system could 'jump the queue' by giving notice of motion for a specified date rather than for the 'next sitting day' or by giving notice on a Wednesday for the next sitting day when motions were called on under the system of alternate Thursdays for motions and orders, thereby gaining precedence for the motion.[11]

These problems became magnified after 1978 when, following reforms to the Council's electoral system, governments ceased to be able to gain control of a majority of seats in the Council, and were further exacerbated between 1991 and 1999 when there was a dramatic expansion in the size of the crossbench.

In May 1999, in the first session of the 52nd Parliament, the House agreed without debate to a Government motion establishing a new system for the consideration of private members' business proposed by the Clerk[12] and which was based on the system in the House of Commons in Canada. Items of private members' business were to be considered in an 'order of precedence' established by a draw conducted by the Clerk at the beginning of each session and from time to time. Notices of motions when first given would appear on the Notice Paper outside the order of precedence in the chronological order they had been given in the House while items selected in the draw would be listed in the order of precedence in the order determined by the draw. The sessional order also introduced time limits for debate on private members' items and procedures to expedite the initial stages of private members' bills.

In the second session of the 52nd Parliament, the House agreed to a Government motion adopting the same sessional order with the following modifications:

- A requirement in the original sessional order for at least five calendar days' notice to be given of an item of private members' business was omitted.
- A requirement for debate on a bill to be adjourned after the mover's second reading speech and placed at the end of the order of precedence was varied so that debate would be adjourned for at least five calendar days and retain its position in the order of precedence.[13]

Later in the session, the Leader of the Government moved a motion to readopt the sessional order with the following further changes:

11 John Evans, *Discussion Paper: Private members' business – Proposals for reform,* 27 May 1991, pp 3-5.
12 *Minutes,* NSW Legislative Council, 12 May 1999, pp 50-51.
13 *Minutes,* NSW Legislative Council, 8 September 1999, pp 31-32.

- The time for the Clerk to notify eligible members of the conduct of the draw was to be reduced from two days to one day.
- The time for members selected in the draw to notify the Clerk of the item to be included in the order of precedence was to be reduced from two sitting days to two working days.
- A provision allowing for the exchange of positions in the order of precedence where a member would not be present to move their motion was to be omitted. In its place a new procedure was proposed allowing items in the order of precedence to be postponed up to three times without losing their position in the order of precedence.
- Procedures for debate on motions were to be split from the procedures for debate on bills. The procedures for debate on bills included a time limit for debate on the motion for leave to bring in a bill, speaking times for debate on the second and third stages of a bill and provision for the questions on the first reading and printing of a bill to be taken together as one motion and put without amendment or debate.
- An earlier provision stating that when a bill had passed the second reading stage the subsequent stages were to be dealt with on days set aside for government business by agreement between the Leader of the Government and the member in charge of the bill was omitted. In its place, a new paragraph was adopted providing that when an item of private members' business was dealt with on days set aside for government business the sessional order was to apply.

The motion was agreed to with an amendment by a Crossbench member, which qualified the restriction on the number of times an item could be postponed by the addition of the words: 'unless the House otherwise orders, on motion moved without notice'.[14] The intention of the amendment was to give the House discretion to permit an item to be postponed more than three times and retain its position in the order of precedence in exceptional circumstances.[15]

In 2002, in the third session of the 52nd Parliament, the same sessional order was adopted,[16] but later in the session the following variations were introduced on the motion of The Greens:

- A member was ineligible for the draw if the member had previously been selected in a draw and had an item of business disposed of when there were other members in the same group (opposition, crossbench, government) with notices who had not previously been selected in the draw.
- A member who had been selected in the draw could transfer their turn to another member who did not have an item in the order of precedence, in

14 *Minutes,* NSW Legislative Council, 5 April 2000, pp 356-359.
15 See *Hansard,* NSW Legislative Council, 5 April 2000, pp 4093-4095
16 *Minutes,* NSW Legislative Council, 12 March 2002, pp 34-43.

which case both the member whose name had been drawn and the member who had received the transfer would be ineligible to be included in the draw until other members in the same group (opposition, crossbench, government) with notices had been selected.[17]

The sessional order as varied by The Greens was again adopted at the start of the 53rd Parliament in 2003.[18]

On 14 October 2003, the House adopted a draft set of standing orders as sessional orders, including SOs 183-189. Draft SOs 183-189 were in the same terms as the sessional order on private members' business with the following changes:

- The term 'Business Paper' was largely replaced by the term 'Notice Paper'.
- An earlier provision which had precluded a member from the draw if the member had already been selected (introduced on 12 May 1999) was omitted, as it conflicted with a later provision which precluded a member who had previously been selected if there were other members in the same group with notices who had also not been selected (introduced on 7 May 2002).
- Provisions which had specified that the order of precedence did not prevent members giving notices outside the order of precedence (introduced on 12 May 1999) and that there were no time limits on speeches on bills in committee of the whole (introduced on 5 April 2000) were omitted. Such provisions had clarified aspects of the procedures when introduced as sessional orders, but had since become superfluous.

Those sessional orders went on to be adopted as standing orders.

During the autumn sittings in 2005, following a review of the sitting pattern including measures to promote 'family-friendly' hours, temporary sessional orders were adopted for the sitting times and precedence of business which included provision for private members' business to take precedence for a period each sitting day.[19] It was anticipated that the new arrangements would result in fewer disruptions to government business by private members since there would be an opportunity each sitting day for such business to be called on. However, while there was a reduction in the number of suspensions to deal with unscheduled business, the changes did not prevent the practice of private members seeking to deal with private members' business in government business time. The sessional orders applied until the adjournment of the House for the winter recess, a total of nine sitting days, and were not readopted in the next spring sitting.

In 2006, on the second day of the new session, the Government gave notice of a motion to introduce an expiry provision for notices of motions after 30 days of

17 *Minutes,* NSW Legislative Council, 7 May 2002, pp 137-138; *Hansard,* NSW Legislative Council, 7 May 2002, pp 1514-1515.

18 *Minutes,* NSW Legislative Council, 30 April 2003, pp 39-48.

19 *Minutes*, NSW Legislative Council, 6 May 2005, pp 1372-1373.

being on the Notice Paper. The sessional order was debated the following day, the Opposition expressing its surprise at the proposal, and its opposition to it. Debate was adjourned and the order of the day for resumption of debate later discharged from the Notice Paper.[20]

In 2010, the Joint Select Committee on Parliamentary Procedure noted that there was a lack of flexibility in the system of private members' business under the standing orders, as members often had to wait significant periods for items to be brought on in the order determined by the draw which led to the House debating notices of motions given many months or even years previously. The committee also noted that, to get around the problem, members were routinely suspending standing and sessional orders to bring on items outside the order of precedence, thereby interrupting other items and repeatedly adjourning items in the order of precedence when more pressing issues arose with the result that relatively few private members' motions were being finally disposed of.[21]

In 2011 the Procedure Committee recommended the adoption of a number of new sessional orders to address the concerns identified by the Joint Committee.[22] The House subsequently adopted four sessional orders to the following effect, which were again adopted in 2015:[23]

- An item in the order of precedence may be substituted with a notice of motion on the Notice Paper standing in the member's name (amendment to SO 185).
- The time limits on debate and individual speeches on private members' motions other than those for bills were reduced (amendment to SO 186).
- The number of times a notice of motion not for a bill could be postponed was reduced and provision for the House to permit further postponements by motion without notice was removed (amendments to SO 188).
- Private members' notices remaining on the Notice Paper for 20 sitting days without being moved were to expire except for notices of motions for bills or the disallowance of statutory rules.

Some months after the introduction of these sessional orders they were reviewed by the Procedure Committee, which concluded that the provisions appeared to have had a positive effect.[24]

However, the amendments to the standing orders failed to significantly change practice and members continued to seek to suspend standing orders to give

20 *Minutes,* NSW Legislative Council, 24 May 2006, p 36; 6 September 2006, p 174.

21 Joint Select Committee on Parliamentary Procedure, *Reforms to parliamentary processes and procedures*, p 46.

22 Procedure Committee, NSW Legislative Council, *Report relating to private members' business and the sitting pattern*, Report No. 5 (June 2011), pp 7-9.

23 *Minutes,* NSW Legislative Council, 21 June 2011, pp 232-234; 6 May 2015, pp 55-62.

24 Procedure Committee, NSW Legislative Council, *Report relating to private members' business, the sitting pattern, Question Time and petitions*, Report No. 6 (November 2011), p 5.

precedence to items of business outside the order in which they appeared on the Notice Paper, often to the frustration of the majority of the House. Nevertheless, the sessional orders were again adopted in 2015.[25]

In 2015, the Government Whip initiated an informal process whereby government, opposition and crossbench members would meet on the evening prior to private members' business day to agree on the items of private members' business to be considered the following day. While the list has contained items of private members' business in the order of precedence, it has also included items outside the order of precedence for consideration the following day. This informal system operates in conjunction with the system for determining an order of precedence and the rules provided for under SOs 184, 185 and 189 as amended by sessional orders.

185. CONDUCT OF THE DRAW

(1) The Clerk is to conduct a random draw of 12 members' names from items of private members' business already placed on the Notice Paper, to establish the order of precedence.

(2) To the extent that there is a sufficient number of notices on the Notice Paper, the draw is to be conducted from the names of members with notices in the following order:

(a) Opposition members,
(b) Cross bench members,
(c) Government members.

(3) The names of members with notices will be drawn separately in the sequence shown in paragraph (2) to determine their relative position in the order of precedence for the first 12 items.

(4) A member is ineligible to be included in the random draw of names if that member has previously been selected in a draw and had an item of business disposed of, when there are other members in the same group in paragraph (2) with notices who have not previously been selected in the draw.

(5) A member whose name is drawn in the ballot may transfer their turn to another member who does not have an item of private members' business inside the order of precedence. Where this occurs both the member whose name was drawn and the member who received the transfer are ineligible to be included in the draw until all other members in the same group in paragraph (2) with notices have been selected in the draw.

(6) The items drawn will appear in numerical sequence from 1 to 12 on the Notice Paper under "Items in the Order of Precedence". Those items not

25 *Minutes,* NSW Legislative Council, 6 May 2015, p 59.

drawn in the order of precedence will appear on the Notice Paper under "Items outside the Order of Precedence".

(7) The Clerk is to notify the members involved of the date, time and place of the draw no later than one day prior to the conduct of the draw.

(8) The order of precedence must not contain more than 12 items at any time.

(9) Any member whose name has been drawn and who has more than one notice of motion on the Notice Paper, must advise the Clerk as soon as possible following the draw which notice of motion is to be placed in the order of precedence. If a member fails to advise the Clerk within two working days, the first motion standing on the Business Paper in the name of the member will be included in the order of precedence.

(10) Further random draws will be conducted as necessary to determine items in the order of precedence, up to a maximum of 12 items.

Development summary		
1999-2003	Sessional order	Private Members' Business
2003	Sessional order	Conduct of the draw
2004	Standing order 185	Conduct of the draw
2011-2015	Sessional order	Substitution of items in the order of precedence

SO 185 sets out the procedures for the conduct of the draw by the Clerk.

Operation

Under SO 185(1), (2), (3) and (6), the Clerk, at the beginning of each session and from time to time (SO 185(10)), conducts a draw of 12 members' names from all the eligible members who have items of private members' business already on the Notice Paper, to establish the order of precedence. Names are drawn in order: opposition, crossbench, government, continuing from the previous draw. For example, if the last draw filled four spaces – opposition, crossbench, government, opposition, the first place in the next draw will be filled by a member from the crossbench, followed by government and opposition and so on.

In practice, places are filled by allocating eligible members' names in one group to bingo ball numbers and using a rotary bingo cage to draw, one by one, to fill each place available to that group before moving to fill the places available to the next group. The names drawn appear in numerical sequences from 1 to 12 on the Notice Paper in the order of precedence. Under SO(8) the order of precedence must not contain more than 12 items at any time. However, a Government motion for a sessional order was agreed to in 2005 increasing the number of items in the order of precedence from 12 to 24 'for the remainder of the present sittings and until the adjournment of the House for the winter recess'.[26]

26 *Minutes*, NSW Legislative Council, 7 June 2005, p 1419.

SO 185(4) and (5) provide for the eligibility to be included in the draw. A member is ineligible when:

- they already have an item in the order of precedence,
- they have previously been selected in a draw and had an item of business disposed of, when there are other members in the same group in paragraph (2) with notices who have not previously been selected in the draw,
- they have transferred their turn to another member who does not have an item of private members' business inside the order of precedence, and when they are the member to whom the turn has been transferred until all other members in the same group in paragraph (2) with notices have been selected in the draw.

A member is not deemed to have had an item 'disposed of' under SO 185(4) if the postponement of an item in the order of precedence results in the item being removed from the order of precedence and set down at the end of private members' business (see SO 188), or if the member has withdrawn an item from the order of precedence.[27]

The right of a member to transfer their turn under SO 185(5) only applies for the two-day period during which the member must notify the Clerk of their choice of item to be listed in the order of precedence under SO 185(9). Once the item of choice has been notified to the Clerk and published in the Notice Paper, the member may not transfer their position.

Under SO 185(7), the Clerk is to notify the members involved of the date, time and place of the draw no later than one day prior to the conduct of the draw. However, the current practice is for the Clerk to advise members of the date, time and place for the conduct of the draw by email several days before the conduct of the draw in order that members have sufficient opportunity to give notices of motions prior to the publication of the Notice Paper for the day of the draw, which is used to determine eligibility for the draw.

SO 185(9) provides that a member who has been drawn and who has more than one notice of motion on the Notice Paper, must advise the Clerk as soon as possible following the draw which notice of motion is to be placed in the order of precedence. Under the standing order, if a member fails to advise the Clerk within two working days, the first motion standing on the business paper in the name of the member will be included in the order of precedence.

Under a sessional order first adopted in 2011 and readopted in 2015, members can substitute items in the order of precedence with other items on the Notice Paper standing in the member's name.[28] Notification to a Clerk-at-the-Table must be given prior to the

27 See, for example, *Notice Paper,* NSW Legislative Council, 25 May 2011, p 201 (item no. 1 in the order of precedence in the name of Ms Fazio); *Minutes*, NSW Legislative Council, 25 May 2011, p 126 (item no. 1 in the order of precedence withdrawn); *Notice Paper,* NSW Legislative Council, 11 August 2011, p 1196 (Ms Fazio selected in the next draw and has an item in the order of precedence).

28 *Minutes,* NSW Legislative Council, 21 June 2011, pp 233-234.

last sitting day in the week preceding the next day on which general business is to take precedence. There have been a number of items in the order of precedence substituted under this provision.[29]

Background and development

The provisions for private members' business were first adopted in 1999[30] and were readopted each subsequent session in modified form until adopted as standing orders in 2004.[31] The background and development of standing orders 184 to 189 is outlined under SO 184.

Aspects of the current procedures for the conduct of the draw originated as variations to the sessional order on private members' business in 2000 and 2002 or variations to SO 185 by sessional order in 2011.

The original sessional order on the conduct of private members' business provided: 'A member who has an item already listed in the order of precedence is not eligible to have their name chosen'. This provision was included in later sessional orders on private members' business adopted in September 1999, April 2000 and March 2002.

In 2002, the sessional order was varied on the motion of The Greens to provide that a member was ineligible for the draw if the member had previously been selected in a draw and had had an item of business disposed of when there were other members in the same group (opposition, crossbench or government) with notices who had not been selected in the draw.[32]

The original eligibility provision dating from 1999 and the later provision adopted in 2002 were both included in the next sessional order on the conduct of private members' business adopted 30 April 2003.[33] However, in October 2003 the earlier provision was omitted and the procedure introduced in 2002 became SO 185(4).

The sessional order on private members' business adopted on 12 May 1999 allowed for the exchange of items in the order of precedence if a member would not be present to move their motion:

> When a Member has given at least 24 hours' written notice to the President that the Member is unable to be present to move their motion on the day referred to in the order of precedence, the President, with the written permission of the Members involved, may arrange for an exchange of the position in the order of precedence.[34]

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29 See, for example, *Notice Paper,* NSW Legislative Council, 24 October 2013, p 10717; 27 August 2015, pp 1245 and 1248.

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

31 *Minutes,* NSW Legislative Council, 8 September 1999, pp 31-32; 5 April 2000, pp 356-359; 12 March 2002, pp 34-43; 30 April 2003, pp 39-48; 14 October 2003, p 324.

32 *Minutes,* NSW Legislative Council, 7 May 2002, pp 137-138 (new paragraph 3A of sessional order).

33 *Minutes,* NSW Legislative Council, 30 April 2003, p 41, paragraphs 3(4) and 4.

34 *Minutes,* NSW Legislative Council, 12 May 1999, p 51, paragraph 8.

The same provision was included in the next sessional order on private members' business adopted on 8 September 1999. However, later in the session, the Leader of the Government moved a motion to adopt a modified sessional order which, among other things, omitted the procedure for the exchange of items and introduced a procedure allowing for items to be postponed. Under this procedure, an item in the order of precedence could be postponed but where the item was postponed a third time the item would be removed from the order of precedence and set down at the end of private members' business outside the order of precedence. The motion was agreed to with an amendment by a Crossbench member which qualified the requirement for the item to be placed at the end of private members' business as follows: 'unless the House otherwise orders, on motion moved without notice'.[35]

In 2002, a new procedure was adopted on the motion of The Greens which allowed a member selected in the draw to transfer their turn to another member who did not have an item in the order of precedence. If this occurred, both the member selected in the draw and the member to whom the turn had been transferred were ineligible for future draws until all other members in their group (opposition, crossbench or government) had been selected in the draw. The same procedure continued to be included in later sessional orders on private members' business until it was adopted as SO 185(5) in 2003.

The original sessional order on private members' business required the Clerk to notify eligible members of the date, time and place for the conduct of the draw two days prior to the conduct of draw. On 5 April 2000, on the motion of the Leader of the Government, the House agreed to a modified sessional order which included provision for the Clerk to notify eligible members no later than one day prior to the conduct of the draw.[36] The shortening of the timeframe for notifying members enabled a draw to be held on a Friday or a Monday after a private members' day rather than having to wait until the following Tuesday. The new timeframe continued to be included in later sessional orders on private members' business until the adoption of SO 185(7) in 2003.

The original sessional order on private members' business required a member whose name had been drawn and who had more than one notice of motion on the business paper to notify the Clerk of the notice to be placed in the order of precedence before the adjournment of the House on the second sitting day after the draw was conducted. If the member failed to notify the Clerk within that time, the first motion standing in the member's name on the business paper would be included in the order of precedence. The revised sessional order on private members' business adopted on 5 April 2000 provided that a member selected in the draw was to notify the Clerk of their choice of item as soon as possible and that if the member failed to do so within two *working* days the first motion standing in the member's name would be included.[37] The shorter timeframe continued to be included in later sessional orders on private members' business until the adoption of SO 185(9) in 2003.

35 *Minutes,* NSW Legislative Council, 5 April 2000, pp 356-359.

36 *Minutes*, NSW Legislative Council, 5 April 2000, pp 356-359, paragraph 3(5) of the sessional order.

37 *Minutes*, NSW Legislative Council, 5 April 2000, pp 356-359, paragraph 3(7) of the sessional order.

On 21 June 2011, during formal business, the House agreed to a Government motion for the adoption of a sessional order varying SO 185 to allow for the substitution of items in the order of precedence.[38] The sessional order followed a report of the Procedure Committee tabled on 17 June,[39] which noted that there was a lack of flexibility in the rules relating to the order of precedence which impeded the ability of members to respond to emerging issues by bringing forward items of current concern. To address this issue, the committee recommended the introduction of a sessional order amending SO 185 to allow members to substitute items in the order of precedence with other items standing in the member's name. The committee argued that such a procedure would enable members to prioritise items and bring forward matters of topical and immediate concern.[40] The sessional order, which has continued to be adopted in later sessions, provides:

> That, during the current session and unless otherwise ordered, standing order 185 be varied as follows:
>
> 1. A member who has an item of private members' business in the order of precedence may substitute for that item, an item of private members' business outside the order of precedence standing in the name of that member.
>
> 2. A member substituting an item in the order of precedence must hand a signed notification of the substitution to one of the Clerks-at-the-Table during a sitting of the House.
>
> 3. Notification is to be given no later than the last sitting day in the week preceding the next day on which general business has precedence under the sessional orders.
>
> 4. Once a motion has been moved, it cannot be substituted.

186. DEBATE ON MOTIONS

(1) An item of private members' business, other than a bill, must not receive more than three hours of debate.

(2) When an item other than a bill is being considered:

(a) the mover of the motion may speak for not more than 30 minutes, and

(b) any other member may speak for not more than 20 minutes.

(3) When an item other than a bill is not earlier disposed of, at 15 minutes before the end of the time provided for the consideration of the item, the President is to interrupt proceedings to allow the mover of the motion to speak in reply for not more than 10 minutes. The President will then put every question necessary to dispose of the motion, forthwith and

38 *Minutes*, NSW Legislative Council, 21 June 2011, pp 233-234.

39 *Minutes*, NSW Legislative Council, 17 June 2011, p 214.

40 Procedure Committee, NSW Legislative Council, *Report relating to private members' business and the sitting pattern*, Report No. 6 (June 2011), pp 4-5 and 8-9.

successively without further amendment or debate, unless the motion is withdrawn as provided by the standing orders.

Development summary		
1895	Standing order 66	Remanets
1999–2003	Sessional order	Private Members' Business
2003	Sessional order	Debate on motions
2004	Standing order 186	Debate on motions
2011	Sessional order	Variation to debate on private members' motions
2015	Sessional order	Variation to debate on private members' motions
2015	Sessional order	Debate on private members' motions

SO 186 sets time limits on debate on private members' business other than bills.

Operation

Under SO 186 any motion moved by a private member, other than a motion for the disallowance of statutory instruments under SO 78, is limited to an overall debate time of three hours, the mover may speak for 30 minutes on moving the motion and a further 10 minutes in reply and every other member may speak for not more than 20 minutes. Fifteen minutes prior to the end of the debate time the President is to interrupt the member speaking to allow the mover to speak in reply and for all questions to be put in order to dispose of the motion.

Private members' motions have tended to remain on the Notice Paper for weeks or months, with debate resuming only for it to be adjourned again immediately, or after one or two speakers. This practice reduced the overall number of items of private members' business being dealt with by the House.

In June 2011, following recommendations of the Procedure Committee, in order to increase the number of items of private members' business being considered, a sessional order was adopted, on motion of the Leader of the Government, to reduce the overall time for debate to two hours and to reduce speaking times to 20 minutes for the mover and a further 5 minutes in reply and for every other member to not more than 15 minutes.[41] In a further report tabled in November 2011, the Procedure Committee noted that since the adoption of the sessional order a total of 30 private members' motions had been debated and concluded, all but one of which had been dealt with within the reduced time limit provided by the sessional order.[42]

41 *Minutes,* NSW Legislative Council, 21 June 2011, pp 232-233.

42 Procedure Committee, NSW Legislative Council, *Report relating to private members' business, the sitting pattern, Question Time and petitions*, Report No. 6, p 5.

However, there have also been cases where standing and sessional orders have been suspended on contingent notice to extend the time for debate by 30 minutes,[43] by an hour,[44] by an hour and a half[45] or until all members who wished to speak to the motion have had an opportunity to do so.[46]

There have also been cases where leave has been granted for debate to continue to allow members who have not spoken in debate to speak for no more than three minutes each,[47] to allow two members to speak for no more than three minutes each,[48] and to allow the mover to speak beyond the time allowed for reply.[49] In a further case, where the mover of the motion was not present in the chamber when proceedings were interrupted to allow the mover to speak in reply, the member speaking continued to speak by leave and then moved that the debate be adjourned until the next sitting day on which general business takes precedence.[50]

In 2015, the House adopted an additional sessional order to regulate motions for extension of time by providing that, on the debate being interrupted to allow the mover to speak in reply, the mover, or any member who has not already spoken in debate, may move a motion without notice to extend the time and to set additional speaker times.[51] In May 2016, during debate on ANZAC day, the sessional order was used to extend debate twice. On the first occasion, debate was extended for 90 minutes with each additional speakers limited to no more than 15 minutes each and, on the second occasion, debate was extended for a further 30 minutes.[52]

Background and development

The provisions for private members' business were first adopted in 1999[53] and were readopted each subsequent session in modified form until adopted as standing orders in 2004.[54] The background and development of standing orders 184 to 189 is outlined under SO 184.

The provisions under the standing orders for time limits on debate have been modified since 1999.

43 *Minutes,* NSW Legislative Council, 21 March 2013, p 1575.
44 *Minutes,* NSW Legislative Council, 14 March 2013, p 1533; 29 August 2013, pp 1949-1950.
45 *Minutes,* NSW Legislative Council, 29 August 2013, pp 1951-1953.
46 *Minutes,* NSW Legislative Council, 31 May 2012, p 1029.
47 *Minutes,* NSW Legislative Council, 6 September 2012, p 1199.
48 *Minutes,* NSW Legislative Council, 15 September 2011, p 445.
49 *Minutes*, NSW Legislative Council, 29 August 2013, p 1950.
50 *Minutes,* NSW Legislative Council, 4 May 2006, p 2003.
51 *Minutes,* NSW Legislative Council, 6 May 2015, pp 58-59.
52 *Minutes,* NSW Legislative Council, 5 May 2016, p 867; 12 May 2016, p 906.
53 *Minutes,* NSW Legislative Council, 12 May 1999, pp 50-52.
54 *Minutes,* NSW Legislative Council, 8 September 1999, pp 31-32; 5 April 2000, pp 356-359; 12 March 2002, pp 34-43; 30 April 2003, pp 39-48; 14 October 2003, p 324.

The first two sessional orders on the conduct of private members' business, adopted on 12 May 1999 and 8 September 1999, included provisions concerning debate on items of private members' business without distinguishing between motions or bills. Under these provisions, debate on items was limited to three hours; the President was to put all the necessary questions for disposing of the item without amendment or debate 15 minutes before the end of the time allowed for the item; the mover of the motion was limited to 30 minutes speaking time with 10 minutes in reply; and other members were limited to 20 minutes.

On 5 April 2000, on the motion of the Leader of the Government, a modified sessional order was adopted which included separate provisions concerning debate on motions and debate on bills.[55] The provision concerning debate on motions included the same time limits and procedures for the putting of the question as had previously applied with respect to all items of private members' business. This provision continued to be included in later sessional orders on private members' business until it was adopted as SO 186 in 2003.

In Report No. 5, dated June 2011, the Procedure Committee argued that a reduction in the time allowed for debate on private members' motions would enhance the operation of the system of private members' business by increasing the number of items of private members' business able to be dealt with by the House. The committee therefore recommended that a sessional order be adopted to amend SO 186 to reduce the time for debate on private members' motions from three hours to two and the time limits on individual speeches.[56]

In June 2011, during formal business, on the motion of the Leader of the House, the House adopted a sessional order to reduce the overall time for debate and speaking times as recommended by the Procedure Committee.[57]

In 2015, the House adopted an additional sessional order to provide that, on debate being interrupted to allow the mover to speak in reply, the mover, or any member who has not already spoken in debate, may move a motion without notice to extend the time and to set additional speaker times.[58]

187. Debate on bills

(1) Where there is debate on the question for leave to bring in a bill the following time limits will apply:

(a) a maximum of one hour debate,

(b) the mover of the motion, and any other member, may speak for not more than 10 minutes, and

55 *Minutes,* NSW Legislative Council, 5 April 2000, pp 356-359.

56 Procedure Committee, NSW Legislative Council, *Report relating to private members' business and the sitting pattern*, Report No. 6, p 8.

57 *Minutes,* NSW Legislative Council, 21 June 2011, pp 232-234; 6 May 2015, pp 55-62.

58 *Minutes,* NSW Legislative Council, 6 May 2015, pp 58-59.

(c) 10 minutes before the end of the time for debate, the President is to interrupt proceedings to allow the mover of the motion to speak in reply for not more than 10 minutes.

(2) On any motion being agreed to for leave to bring in a bill, the question on the first reading and printing will be taken together as one motion, and put without amendment or debate.

(3) Where there is debate on the question for the second or third reading of a bill the following time limits will apply:

(a) the mover may speak for not more than 30 minutes, and

(b) any other member and the mover in reply may speak for not more than 20 minutes.

(4) After the second reading speech of the mover, debate on the bill must be adjourned for at least five calendar days, while retaining its position in the order of precedence.

Development summary		
1999-2003	Sessional order	Private Members' Business
2003	Sessional order	Private Members' Business
2003	Sessional order	Debate on bills
2004	Standing order 187	Debate on bills

SO 187 sets time limits on debate on the various stages of bills introduced by private members. Private members' bills proceed in accordance with the standing orders for public bills under SOs 136 to 163.

Operation

SO 187 sets time limits on debate for the motion for leave to bring in a bill and for the second and third readings of a bill. The standing order also clarifies that, as for government bills, on any motion being agreed to for leave to bring in a bill, the question on the first reading and printing will be taken together as one motion, and put without amendment or debate, and that, after the second reading speech of the mover, debate on the bill must be adjourned for at least five calendar days. Under SO 187, private members' bills in the order of precedence retain their position when adjourned for five calendar days.

Under SO 187, the motion for leave to bring in a bill is limited to an overall time of one hour, the mover and any other member may speak for no more than 10 minutes. At 10 minutes before the end of the time for debate, the President is to interrupt proceedings to allow the mover of the motion to speak in reply for not more than 10 minutes.

Debate on the second and third readings of a bill introduced by a private member has no overall time limit, but time limits apply to members speaking, with the mover speaking for not more than 30 minutes and a further 2 minutes in reply and all other members for no more than 20 minutes.

Unlike the provision under SO 138 for government bills, there is no provision in the standing orders for the expedited passage of private members' bills. However, in rare cases, standing orders have been suspended to allow a private members' bill to pass through all stages in one sitting.[59]

The adjournment of debate on the motion for the second reading on a bill for five calendar days is rarely debated but debate is not unprecedented.[60]

Background and development

The provisions for private members' business were first adopted in 1999[61] and were readopted each subsequent session in modified form until adopted as standing orders in 2004.[62] The background and development of standing orders 184 to 189 is outlined under SO 184.

The provisions under the standing orders for time limits on debate have been modified since 1999.

The sessional order on the conduct of private members' business adopted on 12 May 1999 included provisions concerning debate on items of private members' business without distinguishing between motions or bills. Under those provisions, debate on private members' items was limited to three hours; the President was required to put all the necessary questions for disposing of the item without amendment or debate 15 minutes before the end of the allocated time; the mover of the motion was limited to 30 minutes speaking time with 10 minutes in reply; and other members were limited to 20 minutes.

The same sessional order also included additional provisions regulating the stages of private members' bills. Under those provisions:

- On any motion being agreed to for leave to bring in a bill or for the restoration of a bill of a previous session the subsequent stages up to and including the second reading speech could proceed forthwith.
- After the second reading speech, debate on the bill was to be adjourned and the item placed at the bottom of the order of precedence and would again be considered when it reached the top of the order of precedence.
- The subsequent stages of the bill could be dealt with on days set aside for the consideration of government business by agreement between the Leader of the Government and the member in charge of the bill.

59 See, for example, *Minutes,* NSW Legislative Council, 31 October 2013, pp 2148-2149. (Same-Sex Marriage Bill. The bill was defeated at the second reading.)

60 For example, *Minutes,* NSW Legislative Council, 21 February 2013, p 1478.

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

62 *Minutes,* NSW Legislative Council, 8 September 1999, pp 31-32; 5 April 2000, pp 356-359; 12 March 2002, pp 34-43; 30 April 2003, pp 39-48; 14 October 2003, p 324.

In the next session, on the motion of the Government, the House adopted a sessional order which included the same provisions concerning debate and the stages of a bill with the following variations:

- Debate on a bill was to be adjourned following the mover's second reading speech for at least five calendar days (previously no time had been specified).
- Following the adjournment of debate, the item would retain its position in the order of precedence rather than dropping to the bottom of the order of precedence.[63]

Later in the same session, the House agreed to a Government motion adopting a further modified version of the sessional order which introduced separate provisions for debate on motions and debate on bills. Under the new provisions applying to bills:

- There was no overall time limit for debate on a bill.
- Debate on the question for leave to bring in a bill was limited to one hour, but there was no limit on debate on the questions for the second or third readings.
- Speakers on the motion for leave to introduce were limited to 10 minutes, speakers on the motions for the second and third readings were limited to 20 minutes, except for the mover who could speak for 30 minutes and 20 minutes in reply, but there was no time limit on speeches in committee of the whole.
- The questions on the first reading and printing of the bill were to be taken together as one motion and put without amendment or debate.[64]
- The former provision allowing for the consideration of a private member's bill on a government day by agreement with the Leader of the Government was omitted.[65]

The provisions concerning debate on bills continued to be included in later sessional orders on private members' business until they were adopted as draft SO 187 in October 2003. In May 2004, the draft provision was adopted as SO 187 except for the paragraph specifying that there are no time limits in committee of the whole.

188. POSTPONEMENT OF ITEMS IN ORDER OF PRECEDENCE

An item of private members' business listed in the order of precedence may be postponed. However, an item which is postponed for a third time will be removed from the order of precedence and set down at the end of private members' business outside the order of precedence unless the House otherwise orders, on motion moved without notice.

63 *Minutes,* NSW Legislative Council, 8 September 1999, pp 31-32, paragraph 9.

64 This provision was later adopted for all bills introduced in the Legislative Council – see SO 137.

65 *Minutes,* NSW Legislative Council, 5 April 2000, pp 356-360.

Development summary		
1999-2003	Sessional order	Private Members' Business
2003	Sessional order	Postponement of items in order of precedence
2004	Standing order 188	Postponement of items in order of precedence

SO 188 varies the general provision for postponement of business on the Notice Paper by limiting the number of times an item in the order of precedence can be postponed. The limitation was intended to ensure items were considered and disposed rather than constantly being postponed while retaining their place in the order of precedence.

A notice of motion or order of the day may be postponed by motion to a later hour on the same day or a subsequent day either at the time the President calls for postponements before the House proceeds to the business of the day or at the time the item itself is called on. (See SO 45).

Operation

Under SO 188, on the third occasion on which an item of private members' business in the order of precedence is postponed it is removed from the order of precedence and set down at the end of private members' business, unless the House otherwise orders. When this has occurred, a motion has been moved forthwith, according to SO 188, that the item remain in the order of precedence notwithstanding that it had been postponed three times.[66]

In June 2011, in a report to the House, the Procedure Committee argued that a reduction in the number of times a member could postpone a notice of motion would place a greater onus on members to give consideration to the relevancy of items in the order of precedence and encourage greater movement of business through the House.[67] On 21 June 2011, on the recommendation of the committee, the House adopted a sessional order to amend SO 188 to provide that notices of motions in the order of precedence, with the exception of notice of motions for bills, may only be postponed once and if postponed a second a time would be removed from the order of precedence and return to their position outside the order of precedence.[68] In a report to the House in November 2011, the Procedure Committee noted that since the sessional order had been adopted only one private member's notice of motion had been postponed, although several private members' bills, which are not subject to the sessional order, had been postponed a number of times.[69]

66 *Minutes,* NSW Legislative Council, 17 September 2003, pp 301-302; 21 June 2007, p 144.

67 Procedure Committee, NSW Legislative Council, *Report relating to private members' business and the sitting pattern*, Report No. 6, pp 7-8.

68 *Minutes*, NSW Legislative Council, 21 June 2011, p 232.

69 Procedure Committee, NSW Legislative Council, *Report relating to private members' business, the sitting pattern, Question Time and petitions*, Report No. 6, p 4.

Since that time, when an item has been postponed a second time and the item removed from the order of precedence, the item has later been restored to its place in the order of precedence by leave of the House.[70]

An item which has been postponed a second time and returns to its place outside the order of precedence is subject to the sessional order for the expiry of notices of motions on the Notice Paper for more than 20 days as if the item had not been in the order of precedence.[71]

According to practice, an item of business postponed and removed from the order of precedence is not considered an item 'disposed of' for the purposes of eligibility for the next private members' draw. (See also SO 184 relating to the draw).

The postponement of an item of private members' business until a later hour of the sitting is not considered a postponement for the purposes of standing order 188 if the matter proceeds later that day,[72] but it would be considered a postponement for the purposes of standing order 188 if it did not proceed that day.

Background and development

The provisions for private members' business were first adopted in 1999[73] and were readopted each subsequent session in modified form until adopted as standing orders in 2004.[74] The background and development of standing orders 184 to 189 is outlined under SO 184.

The sessional order on private members' business adopted on 12 May 1999 allowed for the exchange of items in the order of precedence if a member would not be present to move their motion (see SO 185 concerning the conduct of the draw). The same provision was included in the next sessional order on private members' business adopted on 8 September 1999. However, later in the session, the Leader of the Government moved a motion to adopt a modified sessional order which, among other things, omitted the procedure for the exchange of items and provided for an item of business in the order of precedence postponed a third time would be removed from the order of precedence and set down at the end of private members' business outside the order of precedence.[75]

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70 *Minutes,* NSW Legislative Council, 16 September, 2011, p 453; 31 May 2012, p 1033; 20 March 2014, p 2392.

71 *Minutes,* NSW Legislative Council, 14 March 2013, p 1535; *Notice Paper,* NSW Legislative Council, 19 March 2013, p 7803.

72 *Minutes,* NSW Legislative Council, 18 October 2012, pp 1292 and 1293; *Notice Paper,* NSW Legislative Council, 23 October 2012, p 6583 (Graffiti Control Amendment (Racist Graffiti) Bill 2012); *Minutes,* NSW Legislative Council, 26 September 2002, pp 400-402; *Notice Paper,* NSW Legislative Council, 22 October 2002, p 1396 (Australian Troops and Iraq).

73 *Minutes,* NSW Legislative Council, 12 May 1999, pp 50-52.

74 *Minutes,* NSW Legislative Council, 8 September 1999, pp 31-32; 5 April 2000, pp 356-359; 12 March 2002, pp 34-43; 30 April 2003, pp 39-48; 14 October 2003, p 324.

75 *Minutes,* NSW Legislative Council, 5 April 2000, pp 356-359.

On the motion of a Crossbench member, the paragraph of the motion which limited the number of times an item could be postponed was amended to add: 'unless the House otherwise orders, on motion moved without notice'.[76] In support of this amendment, it was argued:

> As it stands, paragraph 8 reminds me of the three strikes and you are out legislation that the community is currently debating. The motion gives a discretion back to the House because there may be exceptional circumstances that the House can then decide on.[77]

The resulting provision for the postponement of items in the order of precedence continued to be included in later sessional orders on the conduct of private members' business until it was adopted as SO 188 in 2003.

189. TIME LIMITS TO APPLY

When an item of private members' business is dealt with on days set aside for government business the time limits in this chapter apply.

Development summary		
1999-2003	Sessional order	Private Members' Business
2003	Sessional order	Debate on bills
2004	Standing order 187	Debate on bills

The House appoints the days or times on which government business and general business is to take precedence by sessional order under SO 40. However, it is not uncommon for standing and sessional orders to be suspended to bring forward items of private members' business on days or times set aside for government business. Where this occurs, SO 188 makes it clear that the time limits applying to debate on motions and bills under SOs 186 and 187 continue to apply.

Operation

Under SO 189 if an item of private members' business is considered on a day set aside for government business, the time limits applying under SOs 186 and 187 apply to the item of private members' business.

Background and development

The provisions for private members' business were first adopted in 1999[78] and were readopted each subsequent session in modified form until adopted as standing

76 *Minutes,* NSW Legislative Council, 5 April 2000, pp 356-359.
77 *Hansard*, NSW Legislative Council, 5 April 2000, p 4.
78 *Minutes,* NSW Legislative Council, 12 May 1999, pp 50-52.

orders in 2004.[79] The background and development of standing orders 184 to 189 is outlined under SO 184.

The terms of SO 189 first appeared in the sessional order on private members' business adopted by the House on 5 April 2000[80] but in the terms 'When an item of Private Members' Business is dealt with on days set aside for Government Business this Sessional Order applies'. The same provision continued to be included in later sessional orders on private members' business until it was adopted as SO 189.

79 *Minutes,* NSW Legislative Council, 8 September 1999, pp 31-32; 5 April 2000, pp 356-359; 12 March 2002, pp 34-43; 30 April 2003, pp 39-48; 14 October 2003, p 324.

80 *Minutes,* NSW Legislative Council, 5 April 2000, pp 356-359.

CHAPTER 30

CONDUCT OF MEMBERS AND STRANGERS

190. DISORDERLY CONDUCT BY MEMBERS

(1) If a member, after warning by the President:

(a) continues to obstruct the business of the House, or
(b) continues to abuse the rules of the House, or
(c) refuses to comply with an order of the Chair, or
(d) refuses to comply with the standing orders, or
(e) continues to disregard the authority of the Chair, or
(f) otherwise obstructs the orderly conduct of business of the House,

the President may name the member and report the member's offence to the House.

(2) If an offence indicated in paragraph (1) is committed by a member in committee of the whole, the Chair is to suspend the proceedings of the committee and report the offence to the President.

(3) A member who has been reported as having committed an offence may make an explanation or apology, as the member thinks fit, and then, if required by the Chair, withdraw from the Chamber. A motion may then be moved without notice that the member be suspended from the service of the House. No debate or amendment is allowed on the motion, which must be put immediately by the President.

Development summary		
1856	Standing order 151 Standing order 152 Standing order 153	Absences from House Other instances of Contempt Punishment of Contempts
1870	Standing order 167 Standing order 168 Standing order 169	Absences from House Other instances of Contempt Punishment of Contempts
1895	Standing order 94 Standing order 95 Standing order 222	Member named to withdraw after explanation Charge made against a Member A member may be named by the Chairman

Development summary		
	Standing order 258	Members called to order not to leave the Chamber except when called upon to withdraw
	Standing order 259	Member named by President as guilty of Breach of Standing Rules, Orders, &c
	Standing order 260	Punishment of Members for Contempt
2003	Sessional order 190	Disorderly conduct by members
2004	Standing order 190	Disorderly conduct by members

Disorderly conduct by members is dealt with in different ways depending on its severity. The more common procedure is for the President or the Chair of Committees to call a member to order. On three calls to order, the member's removal from the chamber is authorised until the end of the sitting under SO 192.

In more serious cases, the member may be named and reported by the President and suspended by motion without notice under SO 190. SO 191 deals with the duration of the suspension. The procedure for the suspension of a disorderly member draws on former SOs 259 and 260 as well as Senate SO 203.

Operation

SO 190 provides for a member to be named if, after a warning, the member continues with their disorderly conduct. To name a member, the President states 'I name' followed by the member's title (the Hon/Mr/Ms/Dr/etc) and name. In the Senate, the reporting of the offence is known as 'naming'[1] but SO 190 requires the President to name the member and report the offence.

After the offence has been reported the member must be given an opportunity to make an apology or explanation (SO 190(3)).[2]

SO 190(3) provides that the member must withdraw from the chamber after giving an explanation or apology if required to do so by the Chair.

Any member not satisfied by the explanation or apology may move that the member be suspended. However, in the only precedents to date, the motion has been moved by the Leader of the Government or Leader of the House (see below). The motion may not be amended or debated (SO 190(3)) which ensures the disruption can be dealt with expeditiously to allow the House's proceedings to resume.

While the Chair of Committees has the same powers as the President to maintain order in committee of the whole (SO 175), serious disorder in committee of the whole may only be censured by the House. In such a case, the Chair of Committees names the member, suspends the proceedings, leaves the chair and reports the offence to the President

1 Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 269.

2 In the Senate it is open to the Chair to accept the explanation or apology and in the House of Representatives there have been cases where the matter has not proceeded after the member has apologised but there are no relevant precedents for this in the Council.

under SOs 175 and 190(2) and the matter is dealt with by the House under SO 190(3). After the proceedings in the House have concluded, the President leaves the chair and the committee resumes.

In addition to the procedure in SO 190, the Council has an inherent common law power to suspend a member where necessary to protect its existence and the performance of its functions.[3] The power has been used to enforce orders for the production of documents by a minister and require a member to apologise for conduct falling short of the standards the House expects.[4] Where the common law power is used, the member is suspended by motion on notice in the usual way and the procedures in SO 190 such as the naming of the member do not apply.[5]

While no member has been suspended since the adoption of the current standing orders, issues have arisen in relation to the operation of SO 190.

In March 2004, while the current standing orders were in force as sessional orders, a Crossbench member moved an amendment to SO 190 to include provision for the suspension of members under the influence of alcohol or other drugs. The motion was amended to request the Parliamentary Ethics Adviser to give advice on the desirability and practicability of implementing an alcohol and drug policy for the Parliament and to consider the crossbench member's notice and another crossbench notice concerning an alcohol- and drug-free Parliament.[6] In his subsequent annual report to Parliament, the Ethics Adviser reported that he had discussed the Code of Conduct for Members with the joint Clerks but made no specific reference to the outcome of the reference from the House.[7]

In 2014, in a report on the regulation of alcohol consumption during sitting hours, the Procedure Committee expressed the view that there would be merit in ensuring that members understand that inappropriate behaviour resulting from a member's intoxication by alcohol or other substances 'falls clearly within the purview of the disciplinary mechanism outlined under SOs 190-192'. To that end, the committee recommended that

3 The common law power extends to expulsion. *Armstrong v Budd* (1969) 71 SR (NSW) 136. For further detail on the common law powers of the House, see *New South Wales Legislative Council Practice*, pp 84-86.

4 In that case, the House ultimately accepted a 'statement of regret' from the member in lieu of the apology and the suspension did not take effect: *Minutes*, NSW Legislative Council, 16 September 1998, pp 694-696.

5 Following the suspension of the Treasurer for failing to table documents in 1996, it was noted that: 'The procedures laid down under Standing Order 259 and Standing Order 260 [the forerunners to SO 190] were not followed in the present case. The plaintiff was not named or reported as having been guilty of a wilful or vexatious breach of any of the Standing Rules or Orders, and there is no suggestion he interrupted the orderly conduct of the business of the House': *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 669 per Gleeson CJ.

6 *Minutes,* NSW Legislative Council, 17 March 2004, pp 616-616; *Hansard,* NSW Legislative Council, 17 March 2004, pp 7385-7391.

7 Report of Mr Ian Dickson, Parliamentary Ethics Adviser, dated 9 December 2004, tabled *Minutes*, NSW Legislative Council, 22 February 2005, p 1220.

the President make a statement to make clear the standards expected of members,[8] which the President subsequently did.[9]

Background and development

Under the standing orders adopted in 1856, a member who wilfully disobeyed any order of the Council or vexatiously interrupted the orderly conduct of its business was to be held guilty of contempt (SO 152). If found guilty of contempt, a member was to be fined up to £20 and in default of payment could be committed to the custody of the Usher of the Black Rod for up to 14 days (SO 153).[10]

New standing orders adopted in 1895, 259 and 260, included procedures for the control of disorderly conduct based on the standing orders adopted by the Assembly the previous year.[11] Under these provisions, a disorderly member could not be found guilty of contempt unless he had been named by the Chair, the contempt motion could not be debated except for an explanation by the member, and a member found guilty of contempt was liable to be suspended from the House rather than fined or imprisoned:

> **259.** A Member named by the President or reported by the Chairman as having been named by him in Committee of the Whole House as guilty of a wilful or vexatious breach of any of the Standing Rules and Orders, or as interrupting the orderly conduct of the business of the House, may be adjudged by the House on Motion, without notice, guilty of contempt, no debate being allowed on such Motion except an explanation by the Member named.
>
> **260**. A Member adjudged by the House, for any of the causes hereinbefore mentioned, guilty of contempt, may be suspended from the service of the House for such time as the House shall by resolution declare.

SO 190, adopted in 2004, preserved the requirement for a member to be named before being suspended, but dispensed with the requirement for the member to be found guilty of contempt. In this respect, SO 190 reflects SO 203 of the Senate, which provides for a senator who has been reported by the Chair to be suspended by motion without notice without any finding of contempt. Other differences between SO 190 and former standing orders 259-260 include:

- Under the former standing orders the contempt motion could not be debated except for an explanation by the member, but there was no restriction on amendment or debate of the suspension motion and there were cases in which the

8 Procedure Committee, NSW Lagislative Council, *Deadlines for government bills; Regulation of the consumption of alcohol by members during sitting hours; Government responses to petitions*, Report No. 8 (March 2014), pp 13-14.

9 *Hansard*, NSW Legislative Council, 4 March 2014, p 26911.

10 Despite these provisions, it is uncertain whether the Council in fact had the power to fine or imprison in the absence of statutory authority. However, it appears that the punitive sanctions were never in practice applied. See *New South Wales Legislative Council Practice,* pp 84-86, for detail on common law powers of the Council.

11 See Legislative Assembly standing orders 387-393.

motion was debated[12] or an amendment to the motion was moved.[13] SO 190(3), by contrast, prohibits debate or amendment of the suspension motion in similar terms to Senate SO 203.

- There was previously no requirement for a member to be warned before being named although in practice where members were suspended the member would be warned or asked to reconsider. SO 190(1) formalises the earlier practice by expressly requiring the member to be warned before being named.
- Former SO 94 provided that a member who had been named by the President was to 'withdraw as soon as he has been heard in explanation'. SO 95 set out the procedures to follow a member being named under SO 94, in particular that once a member had spoken in explanation and had withdrawn, the House would then consider the matter. However, where members were suspended for disorderly conduct under SOs 259-260 the member remained present in the chamber after being heard in explanation until the suspension motion was passed, at which point the member left the chamber accompanied by the Usher of the Black Rod.[14] SO 190(3) now provides that the member must withdraw from the chamber after giving an explanation or apology if required to do so by the Chair.
- Former SO 260 provided that the member was to be suspended 'for such time as the House shall by resolution declare'. SO 190 does not refer to the period for which a member may be suspended but SO 191 includes provisions concerning the duration of suspension.

Members were suspended for disorderly conduct in 1915, 1922, 1989 and 1991:

- In 1915, on the only occasion which involved disorder in committee of the whole, a member was suspended for interrupting the orderly conduct of business. The suspension resolution was later rescinded after the member was permitted to return to the chamber and apologise.[15]
- In 1922, the member who had been suspended in 1915 was again ordered from the chamber under former SO 261 (current SO 192) for disorderly conduct. The President made a statement concerning the member's conduct in the chamber over a number of years and called on the acting representative of the Government to take steps to protect the dignity of the House. The representative of the Government then moved that the member be suspended

12 *Minutes*, NSW Legislative Council, 12 October 1922, p 102; *Hansard*, NSW Legislative Council, 12 October 1922, p 2508; *Minutes*, NSW Legislative Council, 14 November 1991, p 269; *Hansard*, 14 November 1991, p 4574.

13 *Minutes*, NSW Legislative Council, 18 October 1989, p 977.

14 A different procedure was followed in the case of the suspension of a member in 1922, when the member was suspended in his absence, having been removed by order of the Chair.

15 *Minutes*, NSW Legislative Council, 15 December 1915 pp 226 and 228; *Hansard*, NSW Legislative Council, 15 December 1915, pp 4749-4750 and 4771.

for the remainder of the session, which was agreed to in the member's absence following debate.[16] As the circumstances of that case were unusual, the process followed did not conform to SOs 259-260 in all respects in that the member was not named, given the opportunity to explain or found guilty of contempt before being suspended.

- In 1989, the President ruled that words used by a member were offensive and should be withdrawn. On the member refusing to withdraw, the President named the member and a motion was moved that the member be suspended for a period of 24 hours. The member was heard in explanation before the motion was agreed to and was then escorted from the chamber by the Usher of the Black Rod. Later in the sitting, the resolution suspending the member was rescinded after the President pointed out that the member had not been found guilty of contempt under SO 259 before being suspended under SO 260. The member was then found guilty of contempt and suspended a second time.[17]
- In 1991, the duration of the suspension was very short, the motion being moved just prior to the moving of the adjournment motion.[18] As in 1989, the disorder involved failure to withdraw offensive words after repeated requests to by the President.

191. SUSPENSION OF MEMBER

(1) A member found guilty of an offence under the standing orders may be suspended from the service of the House by motion moved without notice for any period of time that the House decides.

(2) Any suspension may have effect:

(a) until the House terminates the suspension,

(b) until the submission of an apology by the offending member, or

(c) both of the above.

(3) A member who is suspended from the service of the House is excluded from the chamber and galleries, and may not serve on or attend any proceedings of a committee of the House during the period of suspension. If a member enters the chamber during the member's suspension, the President will order the Usher of the Black Rod to remove the member from the chamber.

16 *Minutes*, NSW Legislative Council, 12 October 1922, p 102; *Hansard*, NSW Legislative Council, pp 2507-2508.

17 *Minutes*, NSW Legislative Council, 18 October 1989, pp 976-979; *Hansard*, NSW Legislative Council, 18 October 1989, pp 11379-11382.

18 *Minutes*, NSW Legislative Council, 14 November 1991, pp 268-269; *Hansard*, NSW Legislative Council, 14 November 1991, pp 4573-4574.

Development summary		
1895	Standing order 260 Standing order 262	Punishment of Members for Contempt Consequences of suspension
2003	Sessional order 191	Suspension of member
2004	Standing order 191	Suspension of member

SO 191 is mainly concerned with the consequences of a member's suspension including the duration and geographical extent. While aspects of these issues were addressed in the 1895 standing orders much of SO 191 is new.

Operation

Where a member has been named by the Chair and suspended for an offence of disorder under SO 190, the period of the suspension may be for such time as the House by resolution provides under SO 191(1). However, the House may decide to terminate the suspension and require the member to submit an apology before doing so. The same procedures also apply if a member is suspended for reasons other than disorderly conduct, such as failing to comply with an order for the production of documents.

Where a member is suspended under the standing orders, the period of the suspension and any conditions attached should not exceed what is necessary for the orderly conduct of the House, as section 15(1)(a) of the *Constitution Act 1902* only authorises the making of standing orders for the 'orderly conduct' of the Council.

Under SO 191(3), a member who has been suspended from the House is excluded from the chamber and the galleries and may not serve on or attend a committee of the House for the duration of the suspension. The member retains the right to access other areas of the Parliamentary Precincts, such as their office and the lobbies, and continues to receive their parliamentary salary and entitlements during the period of suspension.[19]

Notices of motions and questions on notice are not accepted from a member while suspended.[20] However, following the suspension of the Treasurer in 1998, items standing in his name remained on the Notice Paper and were moved by another minister on his behalf.[21] In the House of Commons, by contrast, notices of motion standing in the name of a suspended member are removed from the Notice Paper for the period of suspension.[22] In the House of Representatives there have been cases where notices of

19 Similarly, in the Senate or the House of Representatives, suspension does not affect a member's entitlements: *Odgers' Australian Senate Practice*, 13th ed, p 213; B C Wright (ed), *House of Representatives Practice* (Department of the House of Representatives, 6th ed, p 540).

20 *New South Wales Legislative Council Practice*, p 334.

21 For example, *Minutes*, NSW Legislative Council, 21 October 1998, p 784 (Minister for Public Works and Services, Mr Dyer, moved the second reading of the Olympic Roads and Transport Authority Bill); 21 October 1998, p 789 (Attorney General, Mr Shaw, moved a motion to extend the reporting date for the Joint Select Committee on Victims Compensation; 1 December 1998, p 991 (Mr Dyer moved the second reading of the Sydney Water Catchment Management Bill).

22 Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011), p 458.

motion standing in the name of a suspended member have been called on, and, not being moved or postponed, have lapsed, as have matters of public importance.[23]

Background and development

Under the standing orders adopted in 1895, a member who had been named by the Chair for disorderly conduct and found guilty of contempt by the House could be suspended 'for such time as the House shall by resolution declare' (SO 260). There was no provision for the termination of suspension or the submission of an apology.

Members were suspended for 24 hours for disrupting the orderly conduct of business[24] and for refusing to withdraw words ruled by the President to be offensive[25] and for the remainder of the sitting, which amounted to a very short time as the suspension occurred just before the adjournment of the House, for failure to withdraw offensive words after repeated requests by the President[26]. In 1922, a member was suspended for the remainder of the session, which amounted to 15 sitting days including the day of the suspension.[27] The unusual length of this suspension reflected the fact that the member had a lengthy history of defying the authority of the Chair which had already resulted in a previous suspension for disorder under former SO 260 (current SO 190) and repeated instances of removal from the chamber by order of the Chair under former SO 262 (current SO 192).

In the late 1990s, the Treasurer was suspended on three occasions for failing to table documents: for the remainder of the sitting,[28] for five sitting days or until he fully complied with the relevant orders[29] and for the remainder of the session or until he fully complied.[30]

In a further case, the House required a member to apologise for and withdraw certain imputations she had made in the House within five sitting days, and stipulated that if she failed to comply she would be suspended until she did.[31] However, the House later accepted a statement of regret from the member with the result that the suspension did not take effect.[32]

In 1996, after refusing to leave the chamber in accordance with a resolution suspending him from the House, the Treasurer was escorted from the Parliamentary Precincts to

23 *House of Representatives Practice*, 6th ed, p 540.
24 *Minutes*, NSW Legislative Council, 15 December 1915, p 226.
25 *Minutes*, NSW Legislative Council, 18 October 1989, p 976.
26 *Minutes*, NSW Legislative Council, 14 November 1991, pp 268-269.
27 *Minutes*, NSW Legislative Council, 12 October 1922, p 102.
28 *Minutes*, NSW Legislative Council, 2 May 1996, pp 114-118.
29 *Minutes*, NSW Legislative Council, 20 October 1998, pp 774-776. The minister remained suspended for five sitting days including the day on which he had been suspended.
30 *Minutes*, NSW Legislative Council, 26 November 1998, pp 952-961. The minister remained suspended for four sitting days, from 11.00 am on 27 November 1998, the deadline for return of the documents, until the end of the last sitting day of the session, 3 December 1998.
31 *Minutes*, NSW Legislative Council, 1 July 1998, pp 633-635.
32 *Hansard*, NSW Legislative Council, 16 September 1998, p 7457.

the footpath of Macquarie Street, pursuant to directions by the President[33] under the authority of former SO 262, which stated:

> When a member is suspended from the service of, or removed from the House, he shall be excluded from the House and all the rooms set apart for the use of members.

Later in the sitting, a point of order was raised that the exclusion of the Treasurer from the precincts of the House as distinct from the precincts of the chamber was not within the province of the Presiding Officer.

The President ruled that SO 262 'is reasonably interpretable to mean the precincts of the House' and stated that he had been influenced in that view by the advice provided by the Solicitor-General in 1990.[34] Subsequently the matter was considered by the New South Wales Court of Appeal which concluded that SO 262 did not justify the forcible exclusion of a member from more than the chamber and rooms set apart for the use of members. The removal of the Treasurer as far as the footpath therefore amounted to an unlawful trespass to the person.[35]

192. MEMBER CALLED TO ORDER

If the President or Chair of Committees calls a member to order three times in the course of any one sitting for any breach of the standing orders, or a member conducts themselves in a grossly disorderly manner, that member may, by order of the President or Chair of Committees, be removed from the chamber by the Usher of the Black Rod for a period of time as the President or Chair may decide but not beyond the termination of the sitting.

Development summary		
1895	Standing order 261	Member repeatedly called to order
2003	Sessional order 192	Member called to order
2004	Standing order 192	Member called to order

The President and the Chair of Committees are responsible for ensuring that business is conducted in an orderly fashion in accordance with the standing orders and principles of parliamentary practice (SO 83). This is normally achieved by ruling on points of order raised by members or ruling on questions of order without waiting for a point of order to be raised (SO 95). Where necessary, however, the President or the Chair may order the removal of a member for a limited time to preserve the orderly conduct of proceedings. The procedure was first provided for in the standing orders in 1895 but was expanded to include 'gross disorder' with the adoption of SO 192 in 2004**.**

33 *Minutes*, NSW Legislative Council, 2 May 1996, pp 114-118.

34 *Hansard,* NSW Legislative Council, 2 May 1996, p 713.

35 *Egan v Willis and Cahill*. See *New South Wales Legislative Council Practice,* pp 89-90.

Operation

A member who breaches the standing orders may be called to order. The Chair does so by stating 'I call the Honourable/Ms/Mr/Dr _____ to order for the first time', and so on. A member who has been placed on a call to order remains on the call to order until the conclusion of the sitting day even if the sitting day continues for more than one calendar day.[36]

On the third call, the President, or Chair of Committees, may state: 'Under standing order 192, I order that [the member] be removed from the chamber by the Usher of the Black Rod until _____'. Members have been removed by the President after three calls to order during debate on a motion until 1.00 pm,[37] during debate on the motion for the adjournment until the conclusion of the sitting,[38] and during Question Time until the end of Question Time, including when, in 2008, the President placed two members on a third call to order and ordered that they be removed from the chamber until the end of Question Time, despite the members not having previously been called to order that day.[39]

SO 192 also allows the President or Chair of Committees to remove a member who conducts themselves in a grossly disorderly manner, in which case the member is not required to have been called to order three times. Members have been removed for gross disorder during Question Time until the end of Question Time[40] and until the end of the sitting.[41]

In 2014, in response to a report of the Procedure Committee,[42] the President advised that grossly disorderly conduct in SO 192 includes inappropriate behaviour as a result of intoxication by alcohol or any other substance.[43]

A member removed by order of the Chair is excluded from the chamber and the galleries in the same way as a member who is suspended by resolution of the House (SO 191(3)).

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36 *Hansard*, NSW Legislative Council, 2 June 2011, p 1966.

37 *Minutes*, NSW Legislative Council, 8 May 2013, p 1689.

38 *Minutes,* NSW Legislative Council, 12 November 2015, p 582.

39 *Minutes*, NSW Legislative Council, 27 November 2008, p 931; *Hansard*, NSW Legislative Council, 27 November 2008, p 11938 (Mr Pearce for interjecting after warnings by the President about such conduct and Mr Lynn for interjecting following Mr Pearce's removal); *Minutes*, NSW Legislative Council, 27 June 2013, p 1882; *Hansard*, NSW Legislative Council, 27 June 2013, p 22087 (Mr Whan for breaching the rules for taking points of order and interjecting during question time); *Minutes*, NSW Legislative Council, 3 June 2015, p 174; *Hansard*, NSW Legislative Council, 3 June 2015, p 1265 (Ms Voltz for repeatedly interjecting during question time).

40 *Minutes*, NSW Legislative Council, 21 June 2007, p 145; *Hansard*, NSW Legislative Council, 21 June 2007, pp 1464 and 1467 (Mr Costa for refusing to withdraw offensive words).

41 *Minutes*, NSW Legislative Council, 19 June 2014, p 2620; *Hansard*, NSW Legislative Council, 19 June 2014, p 29883 (Mr Buckingham for repeating a remark directed against the President).

42 Procedure Committee, NSW Legislative Council, *Deadlines for government bills; Regulation of the consumption of alcohol by members during sitting hours; Government responses to petitions*, Report No. 8, pp 13-14.

43 *Minutes*, NSW Legislative Council, 4 March 2014, p 2315; *Hansard*, NSW Legislative Council, 4 March 2014, p 26911.

If removed during debate, the member may not continue speaking after the period of exclusion has expired but may seek to make an additional contribution by leave or make a contribution if an amendment were moved before the debate concludes.[44]

Background and development

SO 261, adopted in 1895, provided for removal from the chamber by order of the President or Chair of Committees where a member had been called to order three times:

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

Members were removed under this provision on five occasions between 1915 and 1922,[45] usually following a series of attempts by the Chair to bring the member to order. Curiously, the minutes recorded in each case that the member had been named by the Chair for wilfully interrupting the orderly conduct of business using language drawn from the then SO 259 rather than for being called to order three times as required by SO 261. On the last occasion, after the member had been escorted from the chamber under SO 261, the President reported the member's conduct to the House and the member was suspended by motion without notice under SO 260 (current SO 190) for the remainder of the session.[46]

In 1975, during a joint sitting of the Houses to elect a person to fill a casual vacancy in the Senate, the President ordered the removal of a member of the Assembly who had persisted in maintaining that the joint sitting was not bound by the rules which had been adopted by the Houses.[47] However, Opposition members ignored the President, disorder prevailed, the President was unable to be heard, and the order for removal was not put into effect.[48]

193. PRESIDENT MAY SUSPEND SITTING OR ADJOURN HOUSE

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

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44 *Hansard*, NSW Legislative Council, 8 May 2013, p 20115.

45 *Minutes*, NSW Legislative Council, 23 March 1916, p 276 (Mr Wilson for interrupting the conduct of business); 21 September 1916, p 113 (Mr Wilson for interrupting the conduct of business); 21 October 1920, p 74 (Mr Hepher and Mr Wilson for 'wilfully interrupting the orderly conduct of business'); 24 August 1922, pp 56 and 1300 (Mr Wilson for interrupting the conduct of business).

46 *Minutes*, NSW Legislative Council, 12 October 1922, p 102 (Mr Wilson).

47 *Hansard*, NSW Legislative Council, 27 February 1975, p 4002. The rules did not include any specific reference to the treatment of disorder or the removal of a member but provided that in all cases not specially provided for the proceedings shall be conducted according to the standing orders of the Council and parliamentary usage: Minutes of the joint sitting held on 27 February 1975 (ordered to be printed 4 March 1975), Appendix A, paragraph 1.

48 John Evans, *Power of the Chair to enforce order*, undated procedural briefing paper, p 2.

Development summary		
2003	Sessional order 193	President may suspend sitting or adjourn House
2004	Standing order 193	President may suspend sitting or adjourn House

In cases of grave disorder which cannot be controlled by the removal of a member by order of the Chair (SO 192), the suspension of a member by the House (SO 190) or the removal of persons from the galleries (SO 197), the President may suspend the sitting or adjourn the House.

The authority for suspension or adjournment by the Chair is intended for circumstances in which the temporary cessation of proceedings is the only effective means of promoting a return to order.

In 1908, the procedure in the House of Commons from which SO 193 is ultimately derived was described as standing 'in such glaring opposition to the traditions of the House … that it can only be looked upon as a specially effective reserve weapon for the maintenance of order'.[49]

Operation

When necessary, the President may suspend the sitting of the House for a period of time, or adjourn the House until the next sitting day without any motion.

When leaving the chair, the President may suspend the sitting until a stated time. For example, in 1997, following an interruption from the gallery, the Deputy President called for members of the public to remain quiet. Following a further interruption, the Deputy President announced that she would leave the chair and that the House would resume when the gallery had been cleared.[50] The sitting was suspended from 3.18 p.m. until 3.21 p.m.[51]

Alternatively, the chair could suspend the sitting without stating a specific time but instead indicate that the House would resume 'on the ringing of a long bell'. For example, in 1996, after the Treasurer had refused to leave the chamber in accordance with a resolution suspending him from the House, the President announced that he would leave the chair and 'cause, in due course, a long bell to be rung in order that I may deal with this matter'.[52] The President left the chair at 4.05 pm and the Usher of the Black Rod escorted the Treasurer from the Parliamentary Precincts pursuant to the directions of the President. The House resumed at 4.40 pm.[53]

If the House is adjourned, the sitting is terminated and the House resumes the next sitting day at the time set by sessional order.

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49 Josef Redlich, *The Procedure of the House of Commons; a study of its history and present form* (A Constable & Co. Ltd, 1908), vol I, p 158 and vol n, p 75.

50 *Hansard,* NSW Legislative Council, 27 May 1997, p 9155.

51 *Minutes,* NSW Legislative Council, 27 May 1997, p 750.

52 *Hansard,* NSW Legislative Council, 2 May 1996, p 712.

53 *Minutes,* NSW Legislative Council, 2 May 1996, p 118.

Only the President or a member acting as the President may suspend a sitting or adjourn the House. In the case of grave disorder in committee of the whole, the Chair of Committees reports the matter to the House (SO 173(7)), or the President resumes the chair without any question put (SO 175(4)), and the President may suspend the sitting or adjourn the House under SO 193.

The President can also leave the chair and suspend the sitting as a matter of practicality such as for lunch and dinner adjournments and, as occurred in 2016, following a lightning strike and power failure in Parliament House.[54]

Background and development

Although there was no equivalent provision in the earlier standing orders of the Council, regard would have been had to the practice in the House of Commons.

194. Powers of House not affected

Nothing in this chapter affects any power of the House to proceed against any member for any conduct unworthy of a member of the House.

Development summary		
2003	Sessional order 194	Powers of House not affected
2004	Standing order 194	Powers of House not affected

SOs 190-193 set out the procedures for dealing with disorderly conduct by members in the chamber. SO 194 makes it clear that those procedures are distinct from the House's power to proceed against a member for conduct unworthy of a member. The House may take action against a member for conduct unworthy committed inside or outside the House if such action is necessary to protect the House and the performance of its functions.

Operation

There have been few occasions on which the House has exercised its power to proceed against a member for conduct unworthy of a member of the House. The procedures for doing so are discussed below.

On 25 February 1969, the Hon John Fuller, the Leader of the Government in the Legislative Council, tabled a copy of court judgment in which the judge commented that Mr Alexander Armstrong, a member of the Legislative Council, had been a party to an arrangement to procure false evidence in divorce proceedings and had contemplated bribing a Supreme Court judge. The judge further observed that Mr Armstrong 'would not hesitate, if he thought it necessary for his own protection or advantage so to do,

54 *Minutes,* NSW Legislative Council, 23 February 2016, pp 644-645. See SO 23 for the provision for the President to leave the chair to suit the convenience of members.

to give false evidence'. Mr Fuller moved, as a matter of privilege and without notice, that in view of the evidence Mr Armstrong had given in court proceedings and the comments made by the judge, that he be adjudged guilty of conduct unworthy of a member, expelled from the House and his seat declared vacant. Points of order taken by Mr Armstrong that the motion was *sub judice* and unconstitutional and beyond the power of the Council were not upheld by the President. Following a lengthy debate, an amendment moved by the Leader of the Opposition, the Hon R R Downing, to refer the matter to a select committee rather than expel the member was negatived and the motion as originally moved was agreed to. At the direction of the President, the member was escorted from the chamber by the Usher of the Black Rod. [55]

Mr Armstrong subsequently challenged his expulsion in the Supreme Court of New South Wales, which upheld the House's action. In reaching that decision, the Court specified that the Council has such implied powers as are necessary to its existence and the proper exercise of its functions and that this implied grant of power:

> … comprehends not only the orderly conduct of deliberations in the sense of freedom from disturbance and unseemly conduct but also the integrity of those who participate therein which is essential to mutual trust and confidence amongst the members.[56]

In a separate case in 1997, following the tabling of the report of the Special Commission of Inquiry into allegations by Mrs Franca Arena, a member of the Legislative Council, the Attorney General, the Hon Jeff Shaw, moved according to notice that Mrs Arena was guilty of conduct unworthy of a member, and that she be expelled by the House and her seat declared vacant.[57] The motion was amended, on the motion of the Leader of the Opposition, the Hon John Hannaford, to refer Mrs Arena's conduct to the Privileges Committee for inquiry and report and for debate on Mr Shaw's motion to stand an order of the day for a later day.[58] After the Privileges Committee had reported in June the following year,[59] the order of the day for resumption of the debate on the motion of Mr Shaw for expulsion of Mrs Arena was discharged and a Government notice of motion on the Notice Paper for the censure of Mrs Arena was withdrawn.[60] The House then agreed to a motion on notice that Mrs Arena apologise for and withdraw certain imputations she had made in the House within five sitting days and stipulated that if she failed to comply she would be suspended until she did.[61]

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55 *Minutes,* NSW Legislative Council, 25 February 1969, p 318; *Hansard*, NSW Legislative Council, 25 February 1969, pp 3858-3890.

56 *Armstrong v Budd* (1971) 71 SR (NSW) 386 at 409 per Sugerman JA.

57 *Minutes*, NSW Legislative Council, 11 November 1997, pp 159 and 161-162.

58 *Minutes*, NSW Legislative Council, 12 November 1997, pp 169-173.

59 *Minutes,* NSW Legislative Council, 29 June 1998, p 613.

60 *Minutes*, NSW Legislative Council, 1 July 1998, p 629.

61 *Minutes*, NSW Legislative Council, 1 July 1998, pp 633-635.

However, the House later accepted a statement of regret from the member with the result that the suspension did not take effect.[62]

Background

The provisions of SO 194 were first adopted in 2004. The standing order makes clear that the procedures set out in SOs 190 to 193 must not be read as limiting the inherent power of the House at common law, as recognised in *Armstrong v Budd*, to proceed against a member for conduct unworthy.

62 *Minutes*, NSW Legislative Council, 15 September 1998, p 7457.

CHAPTER 31

VISITORS

195. DISTINGUISHED VISITORS

Distinguished visitors may be admitted to a seat on the floor of the House, by motion without notice.

Development summary		
2003	Sessional order 195	Distinguished visitors
2004	Standing order 195	Distinguished visitors

Persons other than members, Clerks-at-the-Table and other officers attending on the House are not permitted to pass beyond the Bar onto the floor of the House. However, under SO 195, a distinguished visitor may be admitted to a seat on the floor of the House by motion without notice. The admission of a visitor to the floor is relatively rare. The more common procedure is for a distinguished visitor to be admitted to the President's Gallery and announced to the House by the President.

Operation

While SO 195 permits the motion to be moved without notice, the House has tended to follow the practice in place prior to the adoption of the current standing orders whereby a minister would seek leave to move the motion, usually after the President has invited attention to the presence of the visitor in the President's Gallery. Since 2004, a number of distinguished visitors have taken a chair on the dais (the raised platform where the President's chair is located) on the right of the President.[1] In some cases, a motion has been moved by leave proposing that a distinguished visitor be invited to take a chair on the dais later in the day, in the event of the visitor's attendance.[2]

1 *Minutes*, NSW Legislative Council, 22 September 2005, p 1597 (Speaker of the Legislative Assembly of Northern Territory), 19 June 2012, pp 1070-1071 (Speaker of the Parliament of Solomon Islands), 27 June 2013, p 1881 (Speaker of the Bougainville House of Representatives).

2 *Minutes*, NSW Legislative Council, 3 December 2008, pp 960 and 962 (Speaker of the House of Representatives of Indonesia); 25 February 2010, pp 1668 and 1669 (Speaker of the Parliament of Bangladesh); 16 June 2011, p 208 (Speaker of the Parliament of the Solomon Islands).

Background and development

Before the adoption of SO 195 in 2004 there was no standing order concerning the admission of distinguished visitors.

SO 149 adopted in 1856 provided that: 'The President only shall have the privilege of admitting strangers to the body of the Council Chamber; but every Member may admit three Strangers, each day, by Order under his hand, to the Western Gallery'. Reference to admission to the body of the chamber appears to have been to the President's Gallery rather than the floor of the chamber. This was clarified in 1895, when SO 23 was adopted to provide for the President to admit strangers 'to the space at the back of the President's chair and bar'.

The procedure for admitting a visitor to the floor of the House has varied.

In 1905, debate was interrupted to call attention to the presence of the Earl of Jersey in the chamber, following which a motion was moved and seconded that a chair be provided for the Earl of Jersey on the right of President. The motion being agreed to, Lord Jersey took the chair on the right of the President and a motion was moved expressing pleasure at his presence.[3]

In 1911, a federal minister, the Postmaster-General, was, with concurrence, that is, no member objecting, invited by the President to occupy a seat on the floor of the House during the debate on the Address-in-Reply.[4]

In 1950, after the President had invited attention to the presence behind the Bar of members of the Senate of the University of Sydney, Mr Downing moved by consent without notice that the chancellor be invited to take a chair on the right of the President, which was agreed to. The chancellor having taken the chair provided, Mr Downing moved by consent without notice that the House offer its congratulations to the Senate on the celebration of the centenary of the university.[5]

In 1974, the President having invited attention to the presence beyond the Bar of members of the Board of Directors of the Bank of New South Wales, the donors of a Black Rod to commemorate the 150th anniversary of the first meeting of the Council, Sir John Fuller moved by consent that the president of the bank be invited to enter on to the floor of the House for the purpose of making the presentation. On the motion being agreed to, the president of the bank was conducted to the foot of the dais where he presented the Rod to the President of the Council who expressed appreciation.[6]

In 1989, at a meeting of both Houses in the Council chamber to hear an address by the Governor of Tokyo, the Usher of the Black Rod announced the presence beyond the Bar of Governor Suzuki and the Premier. The Leader of the Government in the Council moved that Governor Suzuki be invited to enter through the Bar on to the floor

3 *Minutes*, NSW Legislative Council, 6 December 1905, p 182.
4 *Hansard*, NSW Legislative Council, 16 May 1911, p 23.
5 *Minutes*, NSW Legislative Council, 10 October 1950, pp 23-24.
6 *Minutes*, NSW Legislative Council, 15 October 1974, p 124.

of the House to address the joint meeting. Governor Suzuki and the Premier were then conducted to chairs on the dais.[7]

In 1995, the President having invited attention to the presence in his gallery of Baroness Thatcher, former Prime Minister of the United Kingdom, the Leader of the Government obtained leave to move a motion to suspend standing orders to allow a motion to be moved forthwith for the Baroness to take a chair on the dais. The Leader of the Government then moved the suspension of standing orders by leave and as a matter of necessity without previous notice which was agreed to and then moved the substantive motion which was also agreed to.[8] A similar process was followed in relation to the attendance of the Governor-General of the Solomon Islands in 1996.[9]

In later precedents, however, the minister obtained leave to move the motion and then moved the motion by leave without the suspension of standing and sessional orders,[10] according to a procedure adopted by the House in 1999.[11]

In 2002, a motion was moved on notice that in the event of the attendance in the House of His Excellency Mr Kai Rala Xanana Gusmao, President of the Democratic Republic of East Timor, he be invited to take a chair on the dais.[12]

SO 163 which provides for an explanation under the *Constitution Act 1902* of a departmental bill, also allows a visitor to sit in the Legislative Council by motion without notice. Under SO 163, a minister of the Crown who is a member of the Legislative Assembly may, by motion without notice, be permitted to sit in the chamber for the purpose of explaining the provisions of a bill relating to or connected with any department administered by that minister.

A visitor has also been admitted to the floor of the House to give evidence. In 1998, according to a resolution of the House, the Auditor-General, Mr Anthony Harris, was summoned to attend under the *Parliamentary Evidence Act 1901,* to give evidence in relation to the Appropriation (1997-98 Budget Variations) Bill (No. 2) at the Bar of the House at a stated time and afterwards as required. The second reading of the bill and the cognate Public Finance and Audit Amendment (State Accounts) Bill was postponed until after the Auditor-General had given evidence.[13] At the time appointed for the witness' appearance, the President made a statement concerning the procedures to be followed for the examination of the witness and that she proposed to admit the witness to a table on the floor of the House. The President then directed the Usher of the Black Rod to admit

7 *Minutes*, NSW Legislative Council, 19 October 1989, p 989.

8 *Minutes*, NSW Legislative Council, 21 November 1995, pp 338-339.

9 E.g. *Minutes*, NSW Legislative Council, 12 November 1996, p 426 (Governor-General of the Solomon Islands). In that case, the motion admitted the visitor to a chair on left of the President).

10 *Minutes*, NSW Legislative Council, 12 October 1999, p 96 (President of the CNRT (National Congress for Timorese Reconstruction)); 7 June 2001, p 1019 (Speaker of the Legislative Assembly of Western Australia).

11 *Hansard,* NSW Legislative Council, 26 May 1999, p 391.

12 *Minutes*, NSW Legislative Council, 18 June 2002, p 231.

13 *Minutes*, NSW Legislative Council, 29 October 1998, pp 831-835.

Mr Harris to the Bar of the House. The Usher of the Black Rod having announced the presence of the witness, admitted the witness to a table within the Bar of the House where the Clerk administered the affirmation to the witness.[14] This was the first time a person was summonsed to the Bar of the House under the *Parliamentary Evidence Act 1901.*

196. CONDUCT OF VISITORS

(1) Visitors may attend in the galleries during a sitting of the Legislative Council, unless otherwise ordered by the House.

(2) The President only may admit visitors to the seating in the gallery on either side of the President's Chair.

(3) No person other than a member, a Clerk-at-the-Table or an officer attending on the House may enter any part of the chamber reserved for members, while the House is sitting.

(4) Paragraph (3) does not apply in respect of a member breastfeeding an infant.

(5) The Usher of the Black Rod, subject to any direction by the President, is to remove any person who enters any part of the chamber reserved for members while the House is sitting, or causes a disturbance in or near the chamber.

Development summary		
1856	Standing order 149 Standing order 150	Admission of Strangers Ordering to withdraw
1870	Standing order 165 Standing order 166	Admission of Strangers Ordering to withdraw
1895	Standing order 23 Standing order 24 Standing order 25 Standing order 263	Admission of Notice taken of presence of Strangers only admitted to Rooms specially set apart Removal of Strangers for Disorderly Conduct
2003	Sessional order 196	Conduct of visitors
2004	Standing order 196	Conduct of visitors

SO 196(1), (3) and (5) codify principles which had long been observed but had not previously been specified in the standing orders. SO 196(4), by contrast, modified the traditional concept of 'stranger in the House' by authorising the presence of a breastfeeding infant on the floor of the House in common with developments in a number of other parliaments. SO 196(2) has its origins in the former standing orders, which also included procedures that were discontinued in 2004, such as the right of a member to 'take notice' that strangers were present.

14 *Minutes*, NSW Legislative Council, 10 November 1998, p 841; *Hansard,* NSW Legislative Council, 10 November 1998, p 9458.

Operation

SO 196(1) provides that when the House is sitting, visitors may attend to view proceedings.

The President regularly announces the presence of visiting school and community groups in the public galleries.

While the galleries at the western end of the chamber are open to the public, access to the President's Gallery on either side of the President's chair is at the discretion of the President.

Under SO 196(2) the President only may admit visitors to the President's Gallery. It is not uncommon for distinguished visitors to be seated in the President's Gallery and members' attention drawn to their presence.

Government and opposition advisers are regularly permitted to sit in the President's Gallery, most commonly during Question Time. However, in 2013, due to ongoing disturbance, the President asked chamber attendants to remove those to his left in the President's Gallery.[15]

Unlike some parliaments, Hansard staff occupy a separate gallery at the eastern end of the chamber and do not go onto the floor of the House. A media gallery is also located at the eastern end of the chamber.

There have been many Presidents' rulings about the conduct of visitors in the galleries, and on a number of occasions the Chair has ordered the public galleries to be cleared.[16] The President has also made statements on the subject.[17]

In 2009, following a recommendation by the Procedure Committee,[18] the House adopted rules for visitors to the President's Gallery and visitors' galleries by resolution of continuing effect.[19] The rules seek to minimise noise from the gallery, to prevent visitors conversing with or seeking the attention of members, to prohibit food and drink in the chamber, to prevent protests interrupting proceedings, to prohibit the taking of photographs, to apply the same dress code to visitors as applies to members, and to make clear that visitors must comply with instructions given by chamber and support staff or other parliamentary staff.

Under SO 196(5), the Usher of the Black Rod has the authority, subject to any direction by the President, to remove any person who enters any part of the chamber reserved for members while the House is sitting, or causes a disturbance in or near the chamber.

Under SO 196(4), SOs 196(3) and (5) do not apply in the case of a member breastfeeding an infant.

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15 *Hansard*, NSW Legislative Council, 30 May 2013, p 21278.

16 See SO 197 for examples of the Chair ordering the public galleries to be cleared.

17 See, for example, *Hansard*, NSW Legislative Council, 4 June 2009, p 15752; 15 October 2015, pp 4328-4329.

18 Procedure Committee, NSW Legislative Council, *Report relating to limiting debate, tabling of papers when the House is prorogued, absence of a quorum and rules in the galleries*, Report No. 4 (March 2009).

19 *Minutes*, NSW Legislative Council, 10 November 2009, pp 1487-1488.

Background and development

SO 149 of 1856 provided that only the President could admit strangers to 'the body of the chamber', and that every member could admit three strangers each day to the western gallery by order under the member's hand. In 1895, this provision was replaced by SO 23 which stated that only the President could admit strangers 'to the space at the back of the President's Chair and the bar', and that members could admit 'two strangers' to the gallery 'by orders, not transferable'. 1895 SO 25 prohibited a member from bringing any stranger into any part of the buildings appropriated to the members of the House while the House or a committee of the whole was sitting except to such rooms as may be set apart for strangers. SO 61 adopted by the Legislative Assembly in 1894 was in similar terms.

SO 150 of 1856 provided that: 'At the request of any member … the President shall order strangers to withdraw…' SO 24 of 1895 provided that if any member 'shall take notice' that strangers were present, the President or the Chairman of Committees, as the case may be, was to put the question 'That strangers be ordered to withdraw' without debate or amendment and, on the question being resolved in the affirmative, strangers were to withdraw. Parliamentary reporting staff were deemed not to be strangers unless the President or Chairman so directed. SO 60 also adopted by the Legislative Assembly in 1894 was in similar terms.

SO 13 of 1856 provided that 'Before any Division, Strangers shall withdraw from the body of the House within the Bar; but may remain below the Bar, or in the Galleries, unless otherwise ordered'. A sessional order first adopted 1862, and in each subsequent session until 1870, varied SO 13 to provide that during a division, strangers on the right and left of the Chair could remain, as well as those below the Bar or in the galleries, unless otherwise ordered.[20] According to the *Sydney Morning Herald* report of proceedings, the object of the sessional order was to prevent the recurrence of an inconvenience which occurred because of the arrangement between the two Houses for seats to be provided for members of the other House on the right and left of the Speaker and President respectively but as there was no Bar in the Council the members of the other House had been obliged to withdraw during divisions.[21]

In 1870, the terms of the sessional order were adopted as standing order 15.

SO 263 of 1895, which provided for the removal of a visitor by the President in the case of disorder, introduced the circumstances in which the provisions of the standing order could be invoked: 'A person, not being a member, who interrupts the orderly conduct of the business of the House, or obstructs the approaches to the House, or occasions a disturbance within the precincts of the House…' The provisions of SO 263 were readopted in SO 197 in 2004 in similar, but modernised, terms.

There have been relatively few occasions on which strangers have been directed to be removed because they were in parts of the chamber reserved for members.

20 *Minutes*, NSW Legislative Council, 10 July 1862, p 27.

21 See SO 195 for further detail concerning the Bar of the House.

- In 1890, following repeated references in debate to persons present in the galleries, the President expressed the view that it was not desirable for members to refer to the presence of strangers and that if such action was repeated he would 'take notice of the matter by obtaining the opinion of the House with regard to the presence of strangers, as it is my duty to do'.[22]
- In 1915, when objection was taken to the presence of strangers, a further objection was taken that the rule for calling attention to the presence of a stranger should not include an official who was in the House. The President nevertheless proceeded to put the question under SO 24 'That strangers be ordered to withdraw'. A division was then called for, but as there was no second teller for the 'ayes' the question was resolved in the negative.[23]
- On 19 January 1926, a member complained that there were strangers in the Members' Lounge adjoining the chamber and asserted that it was the right of members to have the exclusive use of the rooms set apart for their use. The President stated that he regretted the incident had occurred and undertook to do his best with the assistance of his officers to preserve the privileges to which members were entitled.[24]
- On 31 August 1960, during debate on the Address-in-Reply, Sir Asher Joel drew attention to the presence of a stranger in the House and the stranger left the chamber accompanied by the Usher of the Black Rod.[25] No record was made in the Minutes of Proceedings.

The exemption under SOs 196(4) to 196(3) and (5) was initiated following media reports of a Victorian MP being asked to leave the chamber on 26 February 2003, as her 11-day-old baby, who was being breastfed, was not entitled to be on floor of the House.

197. REMOVAL OF STRANGERS FOR DISORDERLY CONDUCT

If a person, not being a member:

(a) interrupts the orderly conduct of the business of the House,

(b) obstructs the approaches to the House, or

(c) creates a disturbance within the precincts of the House,

the President or Chair of Committees may order the Usher of the Black Rod to remove that person from the precincts of the House and to exclude them from the House for the period directed by the President or Chair.

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22 *Hansard*, NSW Legislative Council, 1 October 1890, pp 4206-4207.

23 *Minutes*, NSW Legislative Council, 3 February 1915, p 113; *Hansard*, NSW Legislative Council, 3 February 1915, p 2125.

24 *Hansard*, NSW Legislative Council, 19 January 1926, pp 4121-4122.

25 *Hansard*, NSW Legislative Council, 31 August 1960, p 177.

Development summary		
1856	Standing order 149 Standing order 150	Admission of Strangers Ordering to withdraw
1870	Standing order 165 Standing order 166	Admission of Strangers Ordering to withdraw
1895	Standing order 23 Standing order 24 Standing order 25 Standing order 263	Admission of Notice taken of presence of Strangers only admitted to Rooms specially set apart Removal of Strangers for Disorderly Conduct
2003	Sessional order 197	Removal of strangers for disorderly conduct
2004	Standing order 197	Removal of strangers for disorderly conduct

As with disorderly conduct by a member (SO 192), disorder by a visitor may result in the removal of the offender by order of the President or the Chair of Committees. Former SO 263 provided a similar procedure which only extended to the President. SO 24 formerly gave both the President and the Chairman an unfettered discretion to order the withdrawal of strangers, but this was omitted from the redraft in 2004.

Operation

Under SO 197 the President or Deputy President has ordered the public gallery to be cleared as result of disorder,[26] directed the attendants to remove from the public gallery a person who was interjecting[27] and persons who were interjecting,[28] and directed the attendants to remove persons on his left in the President's Gallery.[29]

It is common for removal to be ordered without specifying a particular period of exclusion despite the reference to 'the period directed by' the Chair in SO 197. However, in one case, the removal of a visitor in the President's Gallery who had chatted through a member's speech, was expressed to be for the remainder of the sitting,[30] and on an occasion of the public gallery being cleared it was reopened by order of the President later in the same debate.[31]

Background and development

SO 150 of 1856 provided in part that 'in his own discretion, at any time, the President shall order strangers to withdraw and they shall immediately withdraw accordingly'. Similarly, SO 24 of 1895 provided that the President could order the withdrawal of strangers 'whenever he thinks fit' and extended the same discretion to the Chairman

26 *Minutes*, NSW Legislative Council, 13 November 2008, p 898.
27 *Hansard*, NSW Legislative Council, 4 June 2009, p 15758.
28 *Hansard*, NSW Legislative Council, 4 June 2009, p 15764.
29 *Hansard*, NSW Legislative Council, 30 May 2013, p 21278
30 *Minutes*, NSW Legislative Council, 27 November 2008, p 930.
31 *Minutes*, NSW Legislative Council, 13 November 2008, p 898.

of Committees. This unfettered discretion to order the withdrawal of strangers was omitted from the standing orders adopted in 2004.

SO 263 of 1895 provided for the removal of a visitor by the President in the case of disorder and the circumstances in which the provisions of the standing order could be invoked: 'A person, not being a member, who interrupts the orderly conduct of the business of the House, or obstructs the approaches to the House, or occasions a disturbance within the precincts of the House…' The provisions of SO 263 were readopted in SO 197 in 2004 in similar, but modernised, terms.

There have been numerous occasions on which visitors in the gallery have been directed to reduce noise or cease interjecting or clapping, but there have been relatively few occasions under previous standing orders on which the galleries have been ordered to be cleared, or an individual ordered to be removed from the chamber.

- In 1930, a member called attention to a stranger sitting behind the Bar who had insulted him as he was passing and asked the Temporary Chairman to request the stranger to leave the precincts of the House. Following the Temporary Chairman requesting the stranger to leave, the stranger was recorded in Hansard as seeking to take the opportunity to make a statement to the House before being called to order.[32]
- In 1991, persons interrupting proceedings were removed from the gallery at the President's direction.[33]
- In 1995, the President directed the Deputy Usher of the Black Rod to clear the gallery following a disturbance.[34]
- In 1997, during debate on a motion to adjourn to discuss a matter of public importance, the Deputy President left the chair due to disorder in the public gallery and announced that the House would resume when the gallery had been cleared.[35]
- In 1998, after the Forestry and National Park Estate Bill had been read a third time, the President directed the public gallery to be cleared following a disturbance.[36]

32 *Hansard*, NSW Legislative Council, 8 May 1930, p 4970.
33 *Minutes*, NSW Legislative Council, 17 October 1991, p 195; *Hansard*, NSW Legislative Council, 17 October 1991, p 2419.
34 *Minutes*, NSW Legislative Council, 30 May 1995, p 76.
35 *Minutes*, NSW Legislative Council, 27 May 1997, p 750; *Hansard*, NSW Legislative Council, 27 May 1997, p 9155.
36 *Minutes*, NSW Legislative Council, 26 November 1998, p 962.

CHAPTER 32

EFFECT AND SUSPENSION OF STANDING ORDERS

198. SUSPENSION OF STANDING ORDERS

(1) In urgent cases, any standing order or other order of the House may be suspended by the House in whole or in part:

(a) by a motion on notice, or

(b) by leave of the House.

(2) On a motion for the suspension of a standing or other order a member may not speak for more than five minutes, and if the debate is not concluded after the expiration of 30 minutes after the moving of the motion the question on the motion will then be put.

Development summary		
1856	Standing order 154	Motions for suspension
1870	Standing order 170	Motions for suspension
1895	Standing order 264	Suspension of Standing Rules and Orders – Procedure in Urgent Cases.
2003	Sessional order 198	Adjournment of debate
2004	Standing order 198	Adjournment of debate
2015	Sessional orders	Conduct of business – variation to SO 37 Passing of bills through all stages – variation to SO 154 Suspension of standing orders – variation to SO 198

The standing orders of the Legislative Council are intended to ensure the orderly, predictable and deliberative conduct of business of the House and that the rights of members under the standing orders are protected. However, from time to time, there is reason for the House to follow a course of action which is either not provided for by the standing orders, or which is contrary to the standing orders. SO 198 allows the House to suspend those standing orders which would otherwise prevent the matter from occurring.

When standing orders are suspended, it is only those standing orders which would otherwise prevent the specific matter from occurring that are suspended. See SO 199 for further information on the effect of suspension.

Operation

SO 198 provides two methods for suspending standing orders: by motion on notice, or by leave.

Under SO 198(1), any standing order or other order of the House may be suspended, in whole or in part, by the House agreeing to a motion moved on notice. The requirement for notice prevents matters from being brought before the House unexpectedly and provides members with an opportunity to consider and determine the appropriateness in each case. However, SO 198(1) also provides that standing orders can be suspended by leave, that is with the unanimous consent of all members present, any one member objecting preventing the matter from occurring.

In the majority of cases, standing orders have been suspended by motion on notice, usually on contingent notice. Contingent notices are used to satisfy the requirement for notice, and to avoid the need to seek leave for the suspension of standing orders. It became common practice for members to give a range of contingent notices of motions for the suspension of standing orders at the beginning of each session or on their election to the House. This practice first started by individual members seeking to suspend standing orders for specific purposes, such as giving precedence to a particular item of business, but by 1992, with the Government in a minority in the Council, members began to give a range of contingent notices in anticipation of some future need.[1] These contingent notices continued to be given each session until 2015. See below for the list of regular contingent notices published on the Notice Paper.

In May 2015, the House agreed to a number of sessional orders varying the requirement for notice of a motion for the suspension of standing orders, thereby removing the need for contingent notices in certain circumstances:[2]

- SO 198(1) was varied to provide a third method for suspending standing orders. On the President calling on a notice of motion, or reading the prayers, or on the Clerk being called on to read the order of the day, a motion may be moved without notice for the suspension of standing orders to bring on a particular item on the Notice Paper.[3] The provision is intended to simplify the procedure for the House agreeing to give precedence to a particular item on the Notice Paper. Previously, this had been achieved by a three-step process of moving a contingent notice for the suspension of standing orders to allow a subsequent motion to be moved forthwith, then moving a motion that a particular item on the Notice Paper be called on forthwith. If these two motions were agreed to, the item was then called on.[4]
- SO 37 was varied to allow a motion to be moved without notice for the precedence of government business and for a motion to be moved without

1 See, for example, *Notice Paper*, NSW Legislative Council, 24 September 1992.
2 *Minutes,* NSW Legislative Council, 6 May 2015, pp 61-62.
3 See, for example, *Minutes,* NSW Legislative Council, 18 November 2015, p 600.
4 See, for example, *Minutes,* NSW Legislative Council, 16 October 2014, pp 155-156.

notice for the suspension of standing orders to allow the moving of a motion relating to the conduct of business of the House.[5]

- SO 154 was varied to provide that, on a bill from the Assembly being presented for the concurrence of the Legislative Council, a motion for the suspension of standing orders could be moved without notice for the bill to proceed through all its stages on that day or in any one sitting.[6]

Debate on a motion for the suspension of standing orders

When speaking to a motion for the suspension of standing orders, members are limited to debating the question that standing orders be suspended. Remarks must be confined to that question and not to any substantive motion to be subsequently considered.

The Chair has ruled on numerous occasions:

- Members must not use the debate on suspension as an opportunity to put before the House, or debate, the substantive motion.[7]
- The case of urgency is not made by a member repeating the words 'This matter is urgent because' and then speaking on the substantive motion.[8]
- Arguing the importance of the matter is not the same as arguing urgency.[9]

Under SO 198, debate on the motion for the suspension of standing orders is limited to 30 minutes, with each speaker limited to no more than 5 minutes. The provision is intended to prevent time being spent on lengthy suspension motions. The sessional order adopted in May 2011 was amended in June 2011 to vary the provision under SO 198(1) for debate on the motion for suspension of standing orders. Under the new sessional order, which was again adopted in 2014 and 2015, debate on motions for the suspension of standing orders relating to an order for papers under SO52 or SO53 is restricted to a 5 minute statement of the mover and a minister only.[10] The sessional order arose from recommendations of Procedure Committee Report No. 5, tabled on 17 June 2011, which reported that the flow of business would be enhanced if time limits were restricted for such motions.[11]

There is nothing in the standing orders to prohibit the amendment of a motion for the suspension of standing orders, whether moved on notice given for the next sitting day or contingent on some matter occurring. Motions for the suspension of standing

5 See, for example, *Minutes,* NSW Legislative Council, 22 October 2015, pp 495-496.
6 See, for example, *Minutes,* NSW Legislative Council, 14 October 2015, p 442.
7 See, for example, *Hansard,* NSW Legislative Council, 29 October 2003, p 4267.
8 See, for example, *Hansard,* NSW Legislative Council, 5 June 2007, pp 686-687.
9 See, for example, *Hansard,* NSW Legislative Council, 25 March 2009, p 13691.
10 *Minutes,* NSW Legislative Council, 21 June 2011, p 233; 9 September 2014, p 8; 6 May 2015, p 61.
11 *Minutes,* NSW Legislative Council, 17 June 2011, p 214.

orders can be amended in the usual manner and there is considerable precedent of motions being amended by leave before being moved,[12] and by motion.[13]

There are precedents for motions for the suspension of standing orders being adjourned and subsequently resumed. In two recent examples, the order of the day for resumption of the debate was set down as business of the House on the Notice Paper for the next sitting day.[14]

Background and development

A provision for the suspension of standing orders was adopted by the Legislative Council among the first standing orders in 1856. SO 154 allowed for standing orders to be suspended either on motion with notice, or, in cases of pressing necessity, by leave of the Council.

The practice of suspending standing orders commenced almost immediately on the establishment of responsible government, with notice being given in 1857 regarding the presentation of a petition relating to a private bill.[15] The first motion to suspend standing orders to allow a bill to pass through all stages in one day, moved on contingent notice, was in 1860,[16] and leave was given to suspend standing orders for a bill to pass all stages in 1866[17] and to allow the presentation of a petition to introduce a private bill in 1870.[18]

There was no requirement to satisfy the House that there was a 'case of pressing necessity'. The moving of a motion 'as a matter of necessity' was akin to moving a motion by consent, or with concurrence, whereby the motion would be moved, and then any member could object. If no member objected, the motion would be put.[19]

In 1870, SO 170 was repealed and a new standing order adopted to provide that standing orders could be suspended with the leave of the Council.[20] There were no reasons given for omitting the provision for suspending standing orders on motion with notice or for omitting the qualification that standing orders could be suspended by leave 'in cases of pressing necessity'. Despite the adoption of the new standing order the practice of suspending standing orders by motion on notice continued.[21]

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12 See, for example, *Minutes,* NSW Legislative Council, 4 June 1990, p 275; 31 May 2012, p 1029 (amendment to contingent notice of motion for suspension of standing orders by leave).

13 See, for example, *Minutes,* NSW Legislative Council, 16 November 2004 p 1135; 1 December 1994, pp 443-444 (amendments to motions on contingent notice for the suspension of standing orders); *Minutes,* NSW Legislative Council, 25 November 1903, p 152 (amendment to motion on notice for suspension of standing orders).

14 See, for example, *Notice Paper,* NSW Legislative Council, 25 May 2006, p 64; 26 November 2013, p 11364.

15 *Minutes,* NSW Legislative Council, 16 March 1857, p 80.

16 *Minutes,* NSW Legislative Council, 2 May 1860, p 80.

17 *Minutes,* NSW Legislative Council, 21 December 1866, p 152.

18 *Minutes,* NSW Legislative Council, 14 April 1870, p 61.

19 *Minutes,* NSW Legislative Council, 31 January 1865, p 15.

20 *Minutes,* NSW Legislative Council, 10 November 1870, p 66.

21 See, for example, *Minutes,* NSW Legislative Council, 26 February 1874, p 112.

1895 SO 264[22] re-established the two methods for suspending standing orders by motion on notice and in cases of necessity on motion without notice. As originally adopted, SO 264 provided that, when moving a motion for the suspension of standing orders without notice, the question of necessity was to be decided by the House without debate, except a statement by the mover limited to 10 minutes.

On 22 December 1931, SO 264 was amended to require that standing orders could be suspended on motion with 24 hours' notice, or, in cases of necessity, on motion made without notice and without objection. The amendment had been adopted to prevent motions for the suspension of standing orders being considered when the majority of members were not in attendance and to assist members living some distance from the Parliament to be present when urgent business was undertaken. The Government opposed the amendment on the basis that motions for suspension were only moved at the end of the session to facilitate the conclusion of the Government's legislative agenda. Despite the Government's opposition, the amendment was agreed to on division with 49 votes in favour and 41 against the motion.[23]

The 1931 amendment also removed the provision for the mover to speak to the motion for 10 minutes. Between 1931 and 1991, when seeking to suspend standing orders without notice, a member would move a motion as a matter of necessity and without previous notice for the suspension of standing orders and, if no member objected, the question would be put.[24] If objection was taken, the motion would lapse.[25] However, the amended standing order being silent as to debate on the motion for necessity, the capacity or extent of debate was a regular point of argument, largely contingent on the point at which objection was taken. If objection was immediately taken, the Chair would determine that the motion had lapsed through the objection. If objection was not taken immediately, or if the Chair did not immediately inquire if there was objection, debate on the motion would ensue.[26] A ruling given in 1986 confirmed that once objection was taken it was fatal to the motion proceeding.[27] In October 1987, debate ensued on the motion for suspension of standing orders moved as a matter of necessity, and no objection was taken, but the motion was negatived on division.[28]

In 1991, the practice for moving the motion, and for the Chair to inquire as to whether there was any objection to the member proceeding, was varied. Under this new practice, members would first seek leave of the House to move a motion to suspend standing orders. The Chair would then immediately inquire as to whether any member

22 Adopted as SO 265 but renumbered SO 264 following the repeal of SO 210.

23 *Minutes,* NSW Legislative Council, 22 December 1931, pp 416-417; *Hansard,* NSW Legislative Council, 22 December 1931, pp 7553-7555.

24 See, for example, *Minutes,* NSW Legislative Council, 26 June 1990, p 322.

25 See, for example, *Minutes,* NSW Legislative Council, 1 November 1934, p 174.

26 See, for example, *Minutes,* NSW Legislative Council, 14 November 1979, p 226; *Hansard,* NSW Legislative Council, 14 November 1979, pp 2966-2967.

27 *Minutes,* NSW Legislative Council, 24 September 1986, p 297; *Hansard,* NSW Legislative Council, 24 September 1986, p 3825.

28 *Minutes,* NSW Legislative Council, 22 October 1987, p 1177.

objected. If objection was taken, the matter would lapse. If no objection was taken, the member would then move that standing orders be suspended 'as a matter of necessity and without previous notice', to which objection could also be taken. If no objection was taken, the question would be put.[29]

On 26 May 1999, the President made a statement concerning a new practice to be followed in cases where members sought leave to move a motion that also involved the suspension of standing orders, for example, to allow the moving of a motion for a particular item to be called on contrary to the order of business on the Notice Paper.[30] Under the new practice, leave obtained to move a motion would obviate the need to also move a motion for the suspension of standing orders. If no objection was taken, the member would then move the substantive motion.[31]

SO 198 was intended to formalise the practice endorsed by the President in 1999, as it replaced the provision that standing orders could be suspended 'on motion made without notice and without objection' with 'by leave'. However, despite members initially taking advantage of the simplified procedure endorsed by the President, it was never comprehensively established in practice. From 1999, contingent notices of motions for the suspension of standing orders continued to be used, members rarely seeking leave to move a motion to suspend standing orders. However, in 2012, leave was granted to move a motion to suspend standing orders to allow a rescission motion to be moved, following which a subsequent motion for the suspension of standing orders was moved, contrary to the practice endorsed by the President in 1999 and provided for by the new standing order.[32]

In 2010, following an increase in the number of irregular petitions being presented by members, standing orders having been suspended on motion moved by leave, the President made a statement regarding the suspension of standing orders in much the same terms as that of the President in 1999. The President stated that if a member obtained leave of the House to suspend standing orders for the presentation of an irregular petition, this would be considered sufficient authority by the House to proceed with its presentation and no subsequent motion for the suspension of standing orders was necessary.[33] (See SOs 68 to 70 for further information on petitions).

SO 198 introduced a time limit on debate on the motion for the suspension of standing orders. Under a sessional order adopted in 2009, 2011 and 2014, where a standing order or other order of the House was suspended in whole or in part, any subsequent procedural motion was put without amendment or debate.[34] This provision was

29 See *Minutes,* NSW Legislative Council, 14 March 1991, p 78; 19 March 1991, p 83; 9 April 1991, p 108; 18 April 1991, p 155.

30 *Hansard,* NSW Legislative Council, 26 May 1999, p 391.

31 See, for example, *Minutes,* NSW Legislative Council, 23 May 2000, p 441.

32 *Minutes,* NSW Legislative Council, 12 September 2012, p 1226.

33 *Minutes,* NSW Legislative Council, 23 February 2010, p 1652; *Hansard,* NSW Legislative Council, 23 February 2010, pp 20675-20676.

34 *Minutes,* NSW Legislative Council, 3 June 2009, p 1188; 9 May 2011, p 72; 9 September 2014, p 8.

related to the three-step process for suspending standing orders on contingent notice and is not required under the sessional order adopted in May 2015.

Contingent notice of motions for the suspension of standing orders

Contingent notices for the suspension of standing orders are used to satisfy the requirement for notice of a motion for the suspension of standing orders, and to overcome the need to seek leave to move such a motion. It became common practice for members to give a range of contingent notices of motions for the suspension of standing orders relating to the following matters at the beginning of each session or on their election to the House:

- on a paper being tabled, for a motion to be moved that the House take note of a paper which has just been tabled
- on a bill being read a second time, for a motion to be moved for an instruction to the committee of the whole in relation to a bill
- on the President calling on the Clerk to read the order of the day, for a motion to be moved that a particular item of business be called on forthwith
- on a bill being received from the Legislative Assembly, for the passage of a bill through all its stages during any one sitting of the House
- on the conclusion of an item of business, for a motion to be moved relating to the conduct of the business of the House
- on the President having read the prayers, for a motion to be moved that a particular item on the Notice Paper be called on
- on the President calling on the Clerk to read the order of the day, for a particular item of government business to be called on
- on a minister failing to table documents according to an order of the House, for a motion to be moved for the censure of a minister
- on a minister failing to table documents according to an order of the House, for a motion to be moved adjudging the minister guilty of contempt of the House.

In recognition that nearly all members routinely gave these contingent notices to satisfy the requirement to give notice of a motion for the suspension of standing orders, the process became somewhat artificial. The contingent notices were a safeguard in case of need, but aside from the contingent notices for the conduct of business, for bringing on a particular item of business, and for an instruction to committee of the whole, they were rarely used and many not at all.

The adoption of a number of sessional orders at the beginning of the 56th Parliament removed the need for the majority of these contingent notices.[35] Only two of the regularly given contingent notices have since been given by non-government members:

35 *Minutes,* NSW Legislative Council, 6 May 2015, pp 55-62.

to allow a motion to be moved for the censure of a minister, or to adjudge a minister guilty of contempt of the House on failing to table documents according to an order of the House.

See SO 137 for more information on suspension of standing orders relating to bills.

199. Effect of suspension

The suspension of a standing or other order is limited in its operation to the particular purpose for which the suspension has been sought.

Development summary		
2003	Sessional order 199	Effect of suspension
2004	Standing order 199	Effect of suspension

Standing order 199 expresses a well-established and well-understood principle that when a motion for the suspension of standing orders is agreed to it is only those standing orders which would otherwise prevent the specific matter from occurring that are suspended. All the other rules remain in operation.

Operation

As outlined under SO 198, any standing order can be suspended to allow the House to follow a course of action that is otherwise contrary to the rules and orders of the House. Standing orders can only be suspended by motion on notice, or by leave.

Contingent notices of motions have been used to satisfy the provision in the standing orders for motions for the suspension of standing orders to be moved on notice.

A motion to suspend standing orders does not usually contain the details of the standing orders sought to be suspended. In previous years, the motion was moved in the terms: 'That so much of the Standing Orders be suspended as would preclude the …' The current form of the motion is: 'That standing and sessional orders be suspended to …'

In most cases, there is more than one standing order which would otherwise prevent the matter from occurring. For example, for a rescission motion to be moved without notice, it would not be sufficient to move the motion under SO 73, which allows a motion to be moved by leave of the House. In order for a rescission motion to be moved without notice, the standing order which requires seven days' notice of a rescission motion (SO 104) must be suspended, as would the standing and sessional orders which determine precedence and the routine of business.

When the House agrees to a motion for the suspension of standing orders to allow an item on the Notice Paper to be brought on contrary to the routine of business, it has agreed to the item having precedence over those items of business on the Notice Paper

which would otherwise have had precedence. The standing and sessional orders which schedule certain business at a fixed time, such as Question Time and the interruption to allow the adjournment motion, are not suspended. When an item of business is interrupted by such a standing or sessional order, the item is set down for a later hour of the sitting in the normal way according to SO 46 and no longer has precedence over other items on the Notice Paper. For the item to resume, standing orders must again be suspended.[36]

For an item of business to have precedence over all business of the House, or beyond an interruption by another standing order, the House must agree to a motion which would have that effect. For example, in 1990, standing orders were suspended to allow consideration forthwith of a motion of confidence in a minister and for the motion to have precedence 'over all other business of the House until determined'.[37] On another occasion, the House agreed to allow the consideration of a notice on the Notice Paper to be considered forthwith and for the resumption of the adjourned or interrupted debate to stand 'an Order of the Day for each succeeding Private Day, with precedence of all other General Business, until such debate is concluded'.[38] In 2010, a motion was moved for the suspension of standing orders for a particular bill to be called on forthwith and take precedence of all other business on the Notice Paper until concluded.[39]

Background

There was no equivalent standing order to SO 199 prior to 2003. SO 199 is in identical terms to SO 210 of the Senate.

36 See, for example, *Minutes*, NSW Legislative Council, 7 September 2006, pp 184-185 and 187.
37 *Minutes*, NSW Legislative Council, 26 June 1990, pp 322-323.
38 *Minutes*, NSW Legislative Council, 18 October 1990, pp 479-480.
39 *Minutes*, NSW Legislative Council, 7 September 2010, pp 2027-2028.

CHAPTER 33

MATTERS OF PUBLIC IMPORTANCE AND MOTIONS OF URGENCY

200. PROPOSAL FOR DEBATE

(1) A member may give notice of a motion – That the following matter of public importance should be discussed forthwith: [specifying the matter].

(2) Consideration of the motion is to take precedence of all other business set down on the Notice Paper for that day, except business taking precedence under standing order 74(3).

(3) When the motion has been made, the question is to be decided without amendment or debate, except a statement by the mover and a statement by a Minister not exceeding 10 minutes each.

(4) If the question is agreed to, subsequent discussion of the matter may not exceed one hour thirty minutes, whether on the same or subsequent sitting days, excluding the reply of the mover.

(5) The following time limits on speeches will apply:

(a) member proposing the matter – 15 minutes,

(b) any Minister first speaking – 15 minutes,

(c) Leader of the Opposition or member nominated by the Leader of the Opposition, when the matter is proposed by a member of the government – 15 minutes;

(d) any other member – 10 minutes,

(e) proposer in reply – 10 minutes.

(6) If discussion of a matter is adjourned to another sitting day, the order of the day for its resumption is to take precedence as provided in paragraph (2).

(7) Only one matter of public importance may be proceeded with on any sitting day, but this is not to preclude the resumption of an adjourned discussion on the same day.

(8) Matters of public importance will only be considered on days on which government business has precedence.

Development summary		
1988–2003	Sessional order	Discussion of matter of public interest
2003	Sessional order 200	Proposal for debate
2004	Standing order 200	Proposal for debate

SO 200 provides an opportunity for the House to afford debate on a topical matter precedence of all other business on the Notice Paper for a particular day (except for matters that fall under SO 74(3), being a motion for a special adjournment, a matter that falls under the category of 'business of the House' under SO 39, or a motion relating to a matter of privilege). Debate on the matter is subject to time limits and at the conclusion of the allocated time debate simply concludes, with no question put on the motion.

Operation

A member initiates a motion under SO 200 by giving notice that on the next sitting day, they will move: 'That the following matter of public importance be discussed forthwith: [Topic for discussion]' (SO 200(1)). Under SO 200(2), such motions are prioritised on the Notice Paper over all other business other than matters that fall under SO 74(3). The resumption of an adjourned or interrupted debate on a matter of public importance is similarly afforded precedence (SO 200 (6)).

When the motion is 'That the following matter of public importance be discussed forthwith', only the mover of the motion and a minister speaking on behalf of the government may speak to the motion, for no more than 10 minutes each. The question cannot be amended (SO 200(3)). If that motion is agreed to, debate on the substantive matter commences. Debate may proceed for up to one and a half hours, with individual speakers subject to the following time limits:

- The member proposing the matter and the first minister to speak to the motion may speak for 15 minutes each. If the matter has been proposed by a member of the government, the Leader of the Opposition (or a member nominated to speak on the Leader's behalf) may also speak for 15 minutes.
- All other members may speak for 10 minutes.

On the expiration of one and a half hours' debate, the President will call on the mover to speak in reply. The mover may speak for no more than 10 minutes (SO 200(4) and (5)). At the conclusion of the mover's contribution in reply, debate on the matter concludes with no question put.

Only one matter of public importance may be proceeded with on any sitting day. However, under SO 200(7), a debate previously adjourned or interrupted may resume on a day on which a new matter under SO 200 has been moved. Matters of public importance may only be considered on days on which government business has precedence (SO 200(8)).

Since 2004, matters discussed under SO 200 have included racial vilification in Fairfield Council and the Government's policy in regard to gaming machine taxes.[1] Matters proposed but not agreed to have included the Government's financial performance against principles under the *Fiscal Responsibility Act 2005*,[2] projected Government expenses growth[3] and monthly financial statement requirements under the *Public Finance and Audit Act 1983*.[4] Using this last example, the form of the motion moved under SO 200 would be:

> That the following matter of public importance be discussed forthwith: General Government Monthly Financial Statements and the requirements of the Public Finance and Audit Act 1983.

Background

SO 200 finds its genesis in a sessional order first agreed to in 1988. Prior to that time, the only mechanism available to members to afford debate on a topical matter priority over other business was to move the adjournment of the House under former SO 13(a) in order to discuss a matter of urgent public importance (see SO 201 for background), or to suspend standing orders to bring on a matter of private members' business. The provision for debate on matters of public importance overcame some of the restrictions and difficulties in raising matters by way of these other procedures.

On 13 October 1987, the Leader of the Opposition moved a sessional order to make provision for discussion of a matter of importance, with a view to reflecting practice in the Australian Senate.[5] The sessional order took a similar form to the standing order currently in operation today, with several key variations:

- debate was limited to two hours
- no provision was made for the Leader of the Opposition to speak for an extended period of 15 minutes to a motion moved by a government member, as is currently the case under SO 200(5)(c)
- debate on matters of public importance were not restricted to days on which government business takes precedence, as is the case under SO 200(8).[6]

In moving the motion, the Leader of the Opposition stated that the genesis for the procedure was a general sense of the inadequacy of the provisions under SO 13 for debate on a matter of urgency, as a member could advise the President only a matter of moments before moving the motion, effectively ambushing the Government and the

1 *Minutes*, NSW Legislative Council, 17 November 2005, p 1759; 12 October 2005, p 1621.
2 *Minutes,* NSW Legislative Council, 14 May 2008, p 590.
3 *Minutes,* NSW Legislative Council, 9 April 2008, p 531.
4 *Minutes,* NSW Legislative Council, 21 October 2008, p 818.
5 However, under the Senate procedure no question is put to the House as to whether the matter should be discussed forthwith.
6 *Minutes*, NSW Legislative Council, 13 October 1987, pp 1114-1115.

House.[7] The Leader observed that the Council was 'the only parliamentary Chamber of which I am aware where a sensible approach to urgent matters of public importance does not exist'.[8]

To address this shortcoming and increase the likelihood of the Government agreeing to the motion, he proposed that 24 hours' notice be given of a matter of urgency. The Leader of the Opposition acknowledged that the requirement for notice may preclude a genuinely urgent debate being raised immediately, but argued that the proposal was a workable alternative to SO 13.[9] The proposal also required the mover to establish urgency and afforded a minister the opportunity to respond, and placed a time limit on debate.

On the motion of the Leader of the Government, the proposal was referred to the Standing Orders Committee.[10] The Standing Orders Committee did not report before prorogation of the session.

On 25 May 1988, following a periodic election (and in a new session), the Leader of the Government, who had moved the earlier proposal in Opposition, proposed a new sessional order with several minor amendments:

- the motion was referred to as a 'matter of public interest', rather than an important matter
- debate would proceed for one and a half hours, rather than two hours
- members were explicitly confined to debating the subject of the motion
- the restriction on the consideration of only one such matter per sitting day would not extend to the resumption of the adjourned debate on a matter previously moved and set down for consideration on a future day.

The motion was agreed to[11] and readopted in each session between 1988 and 1992.[12] In 1993, the provision for 'the Minister or first member speaking' to make a contribution to debate was amended to provide for a contribution from 'the Leader of the Opposition, or a person nominated by the Leader, first speaking when the motion has been moved by a member of the Government'.[13]

In 1995, the sessional order was further amended, without debate, to provide that:

- debate on a matter of public interest adjourned to a subsequent day would take precedence of all other business on the Notice Paper for that day, except business taking precedence under SO55

7 *Hansard*, NSW Legislative Council, 13 October 1987, p 14248.
8 *Hansard*, NSW Legislative Council, 13 October 1987, p 14249.
9 *Hansard*, NSW Legislative Council, 13 October 1987, p 14249.
10 *Hansard*, NSW Legislative Council, 13 October 1987, p 14251; *Minutes*, NSW Legislative Council, 13 October 1987, pp 1114-1115.
11 *Minutes*, NSW Legislative Council, 25 May 1988, p 64.
12 *Minutes*, NSW Legislative Council, 18 August 1988, p 27; 22 February 1990, p 26; 21 February 1991, p 27; 2 July 1991, p 19; 4 March 1992, p 25
13 *Minutes*, NSW Legislative Council, 2 March 1993, p 26, readopted 2 March 1994, p 31.

- more than one notice for discussion of a matter of public interest on any one sitting day could be given, though only one matter could proceed, and motions would be considered in the order in which they were given
- a notice of motion not reached on the day set down for consideration would be set down on the Notice Paper for the next sitting day, with precedence of all other notices for matters of public interest not specifically set down for that day
- the resumption of an adjourned discussion and one new matter could be dealt with on the same day, and
- matters of public interests would only be considered on days on which government business has precedence.[14]

The sessional order was readopted in this final form over each subsequent session.[15]

In 2004, the procedure was incorporated into the revised standing orders as SO 200 and renamed a 'matter of public importance'. The provisions of the SO were substantially the same as the sessional order, with the exception of the following:

- additional provision was made for any other member (other than the mover, minister and Leader of the Opposition) to speak for 10 minutes
- provision for more than one notice to be given for any one sitting day was omitted (although in practice this provision still applies)
- provision for a matter not reached on the day set down for consideration to be set down for the following day was omitted, however, in practice, this provision also still applies.

201. URGENCY MOTIONS

(1) A member may move a motion, without notice – That the House now adjourn to discuss the following matter of urgency: [specifying the matter].

(2) The member proposing the motion to debate the matter of urgency must hand to the President, prior to the commencement of the sitting on the day to which the proposal relates, a written statement of the proposed matter of urgency.

(3) The President will inform the House at the conclusion of formal business that a motion has been received, at which time the President will put the question on urgency without amendment or debate, except a statement by the mover and a statement by a Minister not exceeding 10 minutes each.

(4) If urgency is agreed to, the following time limits on speeches will apply:

(a) member proposing the matter – 15 minutes,

14 *Minutes*, NSW Legislative Council, 24 May 1995, p 36.

15 *Minutes*, NSW Legislative Council, 17 April 1996, p 30; 17 September 1997, p 40; 12 May 1999, p 47; 8 September 1999, p 28; 12 March 2002, pp 37-38; 30 April 2003, pp 47-48.

(b) any Minister first speaking – 15 minutes,

(c) Leader of the Opposition or member nominated by the Leader of the Opposition, when the matter is proposed by a member of the government – 15 minutes;

(d) any other member – 10 minutes,

(e) proposer in reply – 10 minutes.

(5) At the conclusion of the debate the motion will lapse, with no question being put.

(6) No second motion for the adjournment of the House to discuss a matter of urgency may be made on the same day.

Development summary			
1895	Standing order 13	Motions for adjournment	Adopted
1987	Sessional order	Motions for adjournment	Adopted
2003	Sessional order 201	Urgency motions	Adopted
2004	Standing order 201	Urgency motions	Adopted terms of 2003 sessional order

SO 201 provides a mechanism for members to debate an urgent matter without the requirement for notice to have been given. However, before the matter can proceed the House must first decide whether the matter is urgent.

Operation

The mechanisms for debate provided for under SOs 200 and 201 are very similar in many respects – debate under either standing order takes precedence of most other business for the day, the contributions of members are subject to similar time limits, and neither debate results in a question being put at the conclusion of debate, as the motion simply lapses or concludes following the contribution of the mover in reply. Nevertheless, each procedure inherently serves a very different purpose. Motions debated under SO 200 provide members with prior notice, or warning, ensuring that members have adequate opportunity to prepare their contributions to debate and may in turn be more willing to vote in favour of the matter being discussed. Motions under SO 200 are also subject to an overall time limit of one and a half hours.

In contrast, motions debated under SO 201 may be brought on suddenly, without prior notice. SO 201 requires only that the member proposing the motion provide the President, prior to the commencement of the sitting on the day to which the proposal relates, a written statement of the proposed matter of urgency (SO 201 (2)). At the conclusion of formalities under SO 38 that day, when the House would ordinarily proceed to business on the Notice Paper, the President then notifies the House that the request has been received. For this reason, motions under SO 201 arguably have the capacity to 'ambush' other members in the House. In some cases, the nature of such motions can work to the benefit of a member who is sure that a requisite number of members will vote in support of their motion to bring the matter on for debate. However, the lack of prior notice can

also work against the member as their colleagues may be reluctant to vote in support of debating a motion for which they have not had adequate time to prepare a contribution.

The President has no discretion in choosing whether to inform the House of the receipt of the proposal. The requirement for the proposal to be provided in writing to the President prior to the commencement of the sitting does, however, provide the President (and the Clerk) the opportunity to consider whether the proposal complies with the standing orders and practice. Once the House has been notified, the question as to urgency is put. The question must be determined without amendment[16] or debate, except for statements by the mover and a minister (speaking on behalf of the government) of no more than 10 minutes each (SO 201(3)).

If urgency is agreed to, debate on the matter takes precedence over all other items of business until all members who wish to make a contribution to the debate have spoken. If another order of the House interrupts debate, resumption of the debate has varied according to the circumstances. In most cases, where the urgency motion has been interrupted by Question Time, the debate on the urgency motion has resumed at the conclusion of Questions.[17] However, on one occasion, committee reports took precedence after Question Time according to sessional order and the urgency debate resumed after committee reports,[18] and on another occasion the Opposition Whip postponed all orders of the day for committee reports and the urgency motion resumed.[19] On several occasions, the urgency debate has resumed following certain formalities being conducted after Questions, such as messages being reported or papers tabled.[20] Where the motion has been interrupted by a joint sitting, the debate resumed at the conclusion of the joint sitting.[21]

A motion to supersede the question can also interrupt debate on an urgency motion. For example, in 2005, a minister adjourned the House to supersede a motion under SO 201.[22] (Motions to supersede, or dilatory motions, are discussed further under SO 105.)

Contributions to debate on an urgency motion are subject to the following time limits:

- The member proposing the matter and the first minister to speak to the motion may speak for 15 minutes each. If the matter has been proposed by a member of the government, the Leader of the Opposition (or a member nominated to speak on the Leader's behalf) may also speak for 15 minutes.

16 In 1993, a member sought to move an amendment to an urgency motion. The Deputy President ruled the amendment out of order on the grounds that the motion for adjournment is a procedural device to provide an opportunity to discuss a matter of public importance and the moving of an amendment to that motion is outside the rules of the House. (*Hansard*, NSW Legislative Council, 19 May 1993, p 2250; *Minutes*, NSW Legislative Council, 19 May 1993, pp 149-150.)

17 For example, *Minutes*, NSW Legislative Council, 31 August 2004, p 954; 2 September 2004, p 970; 23 October 2007, p 289; 23 September 2008, pp 769-770.

18 *Minutes*, NSW Legislative Council, 13 May 2009, pp 1152-1155.

19 *Minutes*, NSW Legislative Council, 3 May 2006, pp 1985-1988.

20 *Minutes*, NSW Legislative Council, 2 September 2004, p 970; 13 May 2009, pp 1152-1155; 12 September 2012, pp 1224-1225; 3 May 2006, pp 1985-1988; 8 November 2007, pp 333-334.

21 *Minutes*, NSW Legislative Council, 11 October 2005, pp 1614-1615.

22 *Minutes*, NSW Legislative Council, 20 September 2005, p 1584.

- All other members, and the mover of the motion speaking in reply, may speak for 10 minutes (SO 201 (4)).

At the conclusion of the debate the motion lapses, with no question being put (SO 201(5)).

Only one motion under SO 201 may be debated on any one sitting day (SO 201(6)). Unlike motions debated under SO 200, motions under SO 201 cannot be adjourned until a future day as the motion requires the House to adjourn.

Since 2004, matters debated under SO 201 have included: the deterioration of rail services; problems associated with the Cross City Tunnel; policing in Port Stephens; aged rental accommodation; law enforcement proposals; the care and protection of vulnerable children; the Government's fiscal performance; and education funding.[23]

Background

Provision for debate on an urgency motion was first made in 1895 (SO 13), taken from the terms of the Assembly's new equivalent standing order (Assembly 1894 SO 49). However, unlike the 2004 equivalent, no provision was made for the House to conclude the debate and move on to other business.

To prevent the House adjourning at the conclusion of debate, two practices developed. In some cases, at the conclusion of debate the President would put the question 'that this House do now adjourn'. If negatived, the House moved on to other business.[24] In later years, members sought leave to withdraw the motion for adjournment at the conclusion of debate.[25] In most cases, leave was granted, however, in one case objection was taken and the House adjourned until the next sitting day.[26]

The practice also developed over time of the President asking whether members had any objection to the matter being considered urgent, rather than putting the question. If no member objected, the matter proceeded and the member moved the adjournment.[27] If objection was taken, the President then put the question, without amendment or debate, and a division was called.[28] The practice continued until 30 October 1980, when, the President immediately put the question on urgency after announcing receipt of a notice from a member, as required by the standing order. On a point of order being taken, the President did not give reasons for the change in practice, but simply noted

23 *Minutes*, NSW Legislative Council, 2 September 2004, p 970; 11 October 2005, p 1614; 17 October 2006, p 258; 29 May 2007, p 74; 23 October 2007, p 289; 8 November 2007, p 333; 23 September 2008, p 769; 13 May 2009, p 1152; 12 September 2012, p 1223.

24 *Minutes*, NSW Legislative Council, 26 July 1916, p 16; 24 August 1916, p 50; 8 November 1928, p 82.

25 *Minutes*, NSW Legislative Council, 26 April 1934, p 10; 31 March 1936, p 85; 28 April 1936, p 107; 19 May 1936, p 130; 27 February 1979, p 199.

26 *Minutes*, NSW Legislative Council, 19 June 2001, pp 1029-1030.

27 For example, *Minutes*, 23 September 1919, p 45; 1 October 1931, p 352; 23 February 1932, p 430; 26 April 1934, p 10.

28 For example, *Minutes*, 25 October 1955, p 41; 6 December 1967, p 250; 27 February 1979, p 199.

the outcome of the question.[29] As the standing order stated that the question should be decided 'on motion', this new procedure appears to have been more in keeping with the intention of the standing order than the practice that previously applied.

Adoption of sessional order

On 3 June 1987, Mr Hannaford, a member of the Opposition, requested that the House adjourn under SO 13 to discuss a matter of urgent public importance regarding the communication of the opinion of the former Senior Crown Prosecutor in the prosecution of Laurence John Brereton in the Botany case. The question as to urgency was negatived on division, however, later that day the President made a statement advising that the notice was out of order as it contained matters of a substantive nature, including allegations against ministers of the Crown, that were couched in terms requiring the House to express a decision. The President went on to observe that the Council's standing order (as opposed to the Assembly's equivalent) did not make provision for the Leader of the Government to be notified of any proposal received, and this may be a matter for the consideration of the Standing Orders Committee in the near future.[30]

However, the matter was not referred, notwithstanding that use of the urgency procedure had been increasing since the reform of the Council in 1978. Instead, on 13 October 1987, the House agreed to a sessional order, on the motion of the Government, to provide that members deliver proposals to move the adjournment of the House under SO 13 to the President in writing at least two hours before the meeting of the House, and to provide that, if the President deemed the matter in order, he would advise the minister in charge of the House and the Leader of the Opposition as soon as practicable after the receipt of the notice.[31] In speaking to the motion, the Leader of the Government stated that the new rules would bring practice in the Council into line with that in the Senate and the NSW Legislative Assembly, which each required that notice for the adjournment be received prior to the House sitting.[32]

The sessional order was opposed by both the Opposition and the Crossbench, which argued that the procedure should first be considered by the bipartisan Standing Orders Committee, in keeping with the longstanding tradition of the House.[33] The Leader of the Opposition noted that he had attempted to negotiate with the Government to come to an agreed form of words for a new procedure, to no effect. He had instead been forced to place his own notice for amendment of SO 13 on the Notice Paper, which provided

29 *Hansard*, NSW Legislative Council, 30 October 1980, p 2424 (ruling of President on new practice); *Minutes*, NSW Legislative Council, 30 October 1980, p 166. The practice then continued: *Minutes*, NSW Legislative Council, 18 November 1980, pp 200-201; 16 February 1985, pp 153-154.

30 *Minutes*, NSW Legislative Council, 3 June 1987, pp 1052-1053 and 1057; *Hansard*, NSW Legislative Council, 3 June 1987, pp 13364-13365 and 13451.

31 *Minutes*, NSW Legislative Council, 13 October 1987, pp 1108-1109.

32 *Hansard*, NSW Legislative Council, 13 October 1987, pp 14189-14198. The Senate imposed a deadline of 90 minutes prior to the sitting, and the NSW Legislative Assembly a deadline of 30 minutes.

33 *Hansard*, NSW Legislative Council, 13 October 1987, pp 14149-14192.

for notice of urgency to be given the prior day and for a time limit on debate.[34] This procedure later became the basis of the practice for consideration of matters of public importance under SO 200.

An amendment to refer the matter to the Standing Orders Committee was negatived on division, and the Government's original proposal was subsequently agreed to.[35]

The sessional order was not readopted, however, the new procedure for urgency motions continued to be applied on an informal basis in subsequent years.[36] It is not known whether the requirement for the Leader of the Government and Leader of the Opposition to be notified beforehand also continued to apply, or fell away.

When new SO 201 was adopted in 2004, it had the effect of formalising the requirement that the President be notified beforehand, and of providing a means for the motion to lapse at the conclusion of debate, obviating the need for members to seek leave to withdraw the motion. However, the standing order does not specify the period of time before the sitting in which the President must be notified (eg. two hours, as previously proposed), and does not require that the Leaders of the Government or Opposition, or any other member, be notified.

34 *Hansard*, NSW Legislative Council, 13 October 1987, p 14191 (notice published in *Minutes*, NSW Legislative Council, 22 September 1987, p 1091).

35 *Minutes*, NSW Legislative Council, 13 October 1987, pp 1108-1109; *Hansard*, NSW Legislative Council, 13 October 1987, pp 14192-14199.

36 For example, *Minutes*, NSW Legislative Council, 4 April 1989, p 488; 2 May 1990, p 104; 16 October 1990, pp 467-468; 21 April 1994, p 144; 6 June 1995, p 106; 18 October 2001, p 1221.

CHAPTER 34

CITIZEN'S RIGHT OF REPLY

202. PERSON REFERRED TO

(1) Any person who has been referred to in the House by name, or in such a way as to be readily identified, may make a submission in writing to the President, on any one or more of the following grounds, claiming:

(a) that they have been adversely affected:

(i) in reputation,

(ii) in respect of dealings or associations with others,

(b) that they have been injured in occupation, trade, office or financial credit, or

(c) that their privacy has been unreasonably invaded, and requesting that they should be able to include an appropriate response in the parliamentary record.

(2) Where a person makes a submission to the President, the President must, as soon as practicable, consider the submission and decide whether:

(a) to refer the submission to the Privileges Committee for inquiry and report, or

(b) it is inappropriate to be considered by the committee on the grounds that the subject matter of the submission is trivial, frivolous, vexatious or offensive in character.

(3) The President must inform the person in writing of the decision.

Development summary		
1997-2003	Resolution	Citizen's Right of Reply
2003	Sessional order 202	Person referred to
2004	Standing order 202	Person referred to

While statements made by members in the House may not be questioned in the courts, a person who is adversely referred to in the House may seek the publication of a response in the parliamentary record under SOs 202 and 203. The person makes a written submission to the President who may refer the submission to the Privileges Committee

(SO 202). The Privileges Committee having considered the submission may recommend to the House that a response from the person be published or that no further action be taken (SO 203). The procedure was first adopted in 1997 as a resolution of continuing effect based on a practice of the Senate, before being incorporated into the standing orders in 2004.

Operation

A 'person' who may make a submission for a citizen's right of reply includes an incorporated associate, corporation and body corporate (SO 203(6)). Since 1997, submissions have been received from a wide range of sources, including private citizens,[1] academics,[2] a judge,[3] local councillors,[4] a university[5] and religious organisations.[6] Submissions have responded to statements made in debate, including that on motions to adopt reports from the Privileges Committee concerning earlier rights of reply,[7] during Question Time,[8] and in answers to questions on notice published in the Council's Questions and Answers Paper including an answer from an Assembly minister.[9]

The standing orders do not place any limit on the time which may elapse between the making of the statement by the member and the provision of a submission by the citizen. However, in 2012, the Privileges Committee reported that submissions should be received within 12 months of the statements being made unless the applicant can show exceptional circumstances to explain the delay.[10] This principle is now applied as a matter of practice.

The right of reply procedure only applies to a person or entity who has been referred to in the House. A person adversely mentioned in proceedings of a committee may write to the committee concerned, which decides on any appropriate action. This may include inviting the person to make a written submission or appear as a witness to present their point of view.

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1 See, for example, Privileges Committee, NSW Legislative Council, *Citizen's right of reply (Mrs Julie Passas) (No 3)*, Report No. 64 (November, 2012). (The members' statements and the citizen's response in that case concerned a political dispute).

2 See, for example, Privileges Committee, NSW Legislative Council, *Citizen's right of reply (Dr Andrew Mackintosh)*, Report No. 74 (February, 2015).

3 Privileges Committee, NSW Legislative Council, *Report on person referred to in the Legislative Council (Hon Justice Sheahan)*, Report No. 7 (September, 1998).

4 See, for example, Privileges Committee, NSW Legislative Council, *Citizen's Right of Reply (Councillors James Hawkins, Jeff Maybury, Graham Smith and Bob Pynsent)*, Report No. 52 (September, 2010).

5 See, for example, Privileges Committee, NSW Legislative Council, *Citizen's Right of Reply (UNSW)*, Report 60 (April, 2012).

6 See, for example, Privileges Committee, NSW Legislative Council, *Citizen's Right of Reply (Church of Scientology, Australia*), Report No. 48 (March, 2010).

7 See, for example, Privileges Committee, NSW Legislative Council, *Report on person referred to in the Legislative Council (Mr T Bidder) (No 2)*, Report 19 (October, 2002).

8 See, for example, Privileges Committee, NSW Legislative Council, *Citizen's Right of Reply (Mr Brendan Ritson)*, Report 65 (November, 2012).

9 See, for example, Privileges Committee, NSW Legislative Council, *Citizen's Right of Reply (Mr D Kennedy) (No. 2)*, Report No. 49 (March, 2010).

10 Privileges Committee, NSW Legislative Council, *The right of reply process*, Report 61 (June, 2012), p 12.

Background and development

In the second reading speech on the Defamation Bill in September 1996 the Attorney General stated:

> The Government also proposes to refer to the relevant parliamentary committees the recommendation of the [Law Reform] Commission that consideration be given to amending standing orders to introduce right of reply procedures to provide a mechanism for individuals to respond to allegations made about them in Parliament. The Standing Orders and Procedure Committee of the Legislative Assembly has already considered this issue and I understand that today it will consider an amendment to its sessional orders to introduce a right of reply procedure in the House. The Government favours the implementation of a right of reply.
>
> While I am sure that all honourable members of this House endeavour to exercise the greatest care and responsibility when addressing the Chamber, with the protection of privilege some statements made under the protection of parliamentary privilege can have devastating effects, particularly when further publicised by unfair reports. The right of reply procedures adopted by the Senate provide a valuable model, and I hope both Houses of this Parliament will give the matter their consideration and support.[11]

The use of members' freedom of speech arose again the following month after a member made allegations concerning a former member and a former judge in a speech to the Council.[12] Some weeks later, the Council agreed to a Government motion referring an inquiry to the Standing Orders Committee on procedures for a person to respond to allegations made about them in the House.[13] Later the same day, during debate on an unsuccessful motion to refer the member's allegations to the Privileges Committee, members expressed support for the introduction of a procedure for a right of reply.[14]

The Standing Orders Committee reported in relation to its inquiry on 11 November 1997. The committee found that 'there is a need for a clear and uncomplicated method for persons claiming to have been adversely referred to in debate in the House to have a right of reply to those allegations'[15] and recommended that the Council adopt similar provisions for a citizen's right of reply as those adopted by the Senate on 25 February 1988. On 13 November 1997, on the motion of the Leader of the Government, the Council agreed to a resolution of continuing effect establishing a procedure for a citizen's right of reply similar to the Senate's.[16] In 2004, the resolution of continuing effect was replaced by SOs 202 and 203.

Since 1997, 43 requests for a right of reply have been considered by the Privileges Committee.

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11 *Hansard*, NSW Legislative Council, 18 September 1996, pp 4227-4228.

12 *Hansard*, NSW Legislative Council, 31 October 1996, pp 5621-5625.

13 *Minutes*, NSW Legislative Council, 14 November 1996, p 447.

14 *Hansard*, NSW Legislative Council, 14 November 1996, pp 5950 and 5963.

15 Standing Orders Committee, NSW Legislative Council, *Report on a Citizen's Right of Reply* (November, 1997), p 4.

16 *Minutes*, NSW Legislative Council, 13 November 1997, pp 176-178.

203. REFERENCE TO COMMITTEE

(1) Where a submission is referred to the Privileges Committee, the committee may decide not to consider a submission referred to it if, in the opinion of the committee, the subject matter of the submission is not sufficiently serious or is frivolous, vexatious or offensive in character. The committee must report its decision to the House.

(2) Where the committee decides to consider a submission, the committee may confer with, but not take evidence from any person, including:

(a) the person who made the submission, and

(b) any member who referred to the person in the House.

(3) In considering any submission, the committee:

(a) must meet in private,

(b) must not consider or judge the truth of any statements made in the House or in the submission,

(c) must not make public:

(i) any minutes of proceedings,

(ii) any evidence, or

(iii) any submissions, either in whole or in part, except in its report to the House.

(4) In reporting to the House on a submission, the committee may recommend:

(a) that no further action be taken by the House or by the committee in relation to the submission, or

(b) that a response by the person who made the submission, in a form of words agreed to by the person and the committee and specified in the report of the committee, be published in the Minutes of the Proceedings or incorporated in Hansard, and must not make any other recommendation.

(5) Any response by a person who made a submission and which is included in a report to the House:

(a) must be succinct and strictly relevant to the questions in issue,

(b) must not contain anything offensive in character,

(c) must not contain any matter where publication would have the effect of:

(i) unreasonably adversely affecting or injuring a person, or unreasonably invading a person's privacy, in the manner referred to in paragraph 1, or

(ii) unreasonably adding to or aggravating any adverse effect, injury or invasion of privacy suffered by a person.

(6) In this order, person includes an unincorporated association, a corporation and a body corporate.

(7) A notice of motion to adopt a report from the Privileges Committee on a citizen's right of reply:

(a) is to be placed on the Notice Paper as business of the House for six sitting days following the giving of the notice of motion,

(b) if not dealt with within the six sitting days, the motion will be placed on the Notice Paper as general business.

Development summary		
1997-2003	Resolution	Citizen's Right of Reply
2000-2003	Sessional order	Citizen's Right of Reply
2003	Sessional order 203	Reference to committee
2004	Standing order 203	Reference to committee

SO 203 prescribes the procedures to be followed if a submission is referred by the President to the Privileges Committee under SO 202. Most of these provisions were first adopted by the House in 1997 by resolution of continuing effect. However, SO 203(7), which concerns the adoption by the House of reports from the committee on citizen's rights of reply, originated in a sessional order introduced in 2000.

Operation

The Privileges Committee may decide not to consider a submission which has been referred to it by the President if, for example, it considers that the subject matter is not serious or the submission is offensive in character (SO 203(1)). If the committee decides to consider the submission, its role is confined to recommending that a response be published or that no further action be taken (SO 203(4)). In performing this limited role, the committee is precluded from investigating the truth of statements made by the member or the citizen (SO 203(3)(b)). Rather, the committee assesses the suitability of the submission for publication against a list of specified criteria (SO 203(5)).

The committee usually finds it necessary to edit the submission to ensure it conforms to the listed criteria, for example, to ensure that that the submission is succinct and strictly relevant and does not adversely reflect on any person. Where the submission is edited, the committee contacts the person to seek his or her agreement as any response recommended to the House must be in a form of words agreed to by both the person and the committee (SO 203(4)(b)).

The committee may confer with the member referred to in the submission (SO 203(2)(b)) but has not found it necessary to do so,[17] as its role is to provide a channel for the publication of a response rather than to investigate the truth. However, when agreeing to a report recommending the publication of a response, the committee resolves that the member and the person be notified of the proposed tabling of the report which ensures the member is not caught unawares when the report is tabled.

17 Privileges Committee, *The right of reply process*, Report No. 61, p 4.

If the committee recommends the publication of a response, the House will consider a motion to adopt the report. SO 203(7) provides that a notice of motion to adopt a report from the Privileges Committee on a citizen's right of reply is to be placed on the Notice Paper as business of the House for six sitting days following the giving of the notice of motion, and that if not dealt with within the six sitting days the motion will be placed on the Notice Paper as general business. The notice of motion is given in the usual way under SO 71. SO 203(7) gives a motion for adoption of the report precedence as business of the House for six days after the tabling of the report, in order for members to have sufficient time to consider the response before voting on the motion.

When the House adopts the committee's report, the response is published in Hansard, for the day on which the motion is passed. The publication of the response by the House in Hansard attracts absolute privilege but any republication by the citizen or by anyone else is subject to the usual law.

In each of its reports under SO 203, the committee has recommended that a response from the citizen be published in Hansard except for the first report which recommended publication in Hansard and the minutes.[18] All of the committee's reports recommending the publication of a right of reply have been adopted by the House except for the second report. The motion to adopt that report was amended to recommit the report to the committee for further consideration, and in particular whether the response met with the guidelines agreed to by the House in relation to a citizen's right of reply and the appropriateness of the present guidelines in relation to procedures agreed to by the House involving citizen's right of reply.[19] However, the committee did not report on the further reference before the House was prorogued, causing the further reference to lapse.

There has been a case in which a submission has been referred to the committee from a solicitor seeking a right of reply on behalf of his client. The committee advised the solicitor that unless a submission was received from the citizen himself the committee would take no further action. No submission from the citizen was received and the matter rested there. In a further case, a citizen whose submission had been referred to the committee later withdrew the submission. The committee took no further action in relation to the matter. In neither case did the committee report on the matter to the House.

In several cases, submissions referred to the committee have responded to statements made in the House by a member who was also a member of the committee. In each case, the member concerned did not attend the meeting at which the committee adopted its report recommending publication of a response, but sent an apology.[20]

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18 Standing Committee on Parliamentary Privilege and Ethics, *Report on person referred to in the Legislative Council (Hon Justice Sheahan*), Report No. 7 (September, 1998).

19 Standing Committee on Parliamentary Privilege and Ethics, *Report on person referred to in the Legislative Council (Mr Robert Walker*), Report No. 8 (October, 1998); *Minutes,* NSW Legislative Council (12 November 1998), pp 861-862.

20 Privileges Committee, *Report on person referred to in the Legislative Council (Mr G Glossop)*, Report 31 (November, 2005); *Citizen's right of reply (Mrs Julie Passas) (No. 3)*, Report No. 64; *Citizen's right of reply (Mr Brendan Ritson)*, Report 65.

In one case, however, the member concerned had his dissent noted in the minutes of a subsequent meeting at which the committee resolved to table its report.

The Legislative Council Privileges Committee, like the Senate Privileges Committee, has tended to take a liberal approach to requests for rights of reply, having recommended the adoption of a reply in relation to all but two requests since 1997.[21]

Background and development

The resolution of continuing effect establishing the right of reply procedure in 1997 did not include any provision as to the adoption by the House of reports recommending the publication of a citizen's response.[22] When the committee's first report on a right of reply was tabled, the committee Chair obtained leave to suspend standing orders to allow a motion to adopt the report to be moved forthwith and the motion was moved and agreed to by the House then and there.[23] However, when the second report was tabled, leave was denied[24] and the motion was brought on some weeks later by contingent notice. However, an amendment to recommit the report to the committee for further consideration, in particular as to whether the response met with the guidelines agreed to by the House in relation to a citizen's right of reply, and whether the guidelines continued to be appropriate, was agreed to.[25] When the third and fourth reports were tabled, the notices to adopt the reports were set down on the Notice Paper as general business outside the order of precedence.[26]

In December 2000, while the third report had been on the Notice Paper for almost a year and the fourth had been listed for two weeks, the House agreed to a Government motion for the following sessional order:

1. That, during the present session and notwithstanding anything in the Standing Orders, a notice of motion to adopt a report from the Standing Committee on Parliamentary Privilege and Ethics on a citizen's right of reply is to be placed on the Notice Paper as Business of the House for 6 days after the giving of the notice of motion.

2. Any existing notice of motion on the Business Paper is to be dealt with as Business of the House on the next sitting day after the adoption of this resolution.[27]

The next day, the motions to adopt the two outstanding reports were moved and agreed to under paragraph 2 of the sessional order.[28]

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21 For further information, see Privileges Committee, *The right of reply process,* Report 61, p 12.
22 *Minutes*, NSW Legislative Council, 13 November 1997, pp 176-178.
23 *Minutes*, NSW Legislative Council, 17 September 1998, p 702.
24 *Minutes*, NSW Legislative Council, 29 October 1998, p 829.
25 *Minutes*, NSW Legislative Council, 12 November 1998, p 861.
26 *Notice Paper*, NSW Legislative Council, 27 October 1999, p 389; 23 November 2000, p 2399.
27 *Minutes*, NSW Legislative Council, 6 December 2000, p 814.
28 *Minutes*, NSW Legislative Council, 7 December 2000, p 822.

Paragraph 1 of the sessional order was readopted in the next session.[29] A modified version was adopted in the next session as follows:

1. A notice of motion to adopt a report from the Standing Committee on Parliamentary Privilege and Ethics on a citizen's right of reply is to be placed on the Notice Paper as Business of the House for 6 sitting days after the giving of the notice of motion.

2. The notice may be dealt with on any day after the giving of notice, including by way of formal business.

3. If the notice is not dealt with after six sitting days it is to be removed from Business of the House and set down as Private Members' Business outside the Order of Precedence in the order in which it was given.[30]

Paragraphs 1 and 3 of the sessional order were adopted as SO 203(7) in 2004. However, while the sessional order provided that if not dealt with within six sitting days the notice was to be set down as 'Private Members' Business outside the Order of Precedence in the order in which it was given', SO 203(7) simply states that the notice is to be listed as 'general business'. In practice, the notice is set down under 'Private Members' Business Items Outside the Order of Precedence'.

29 *Minutes*, NSW Legislative Council, 12 March 2002, p 42.
30 *Minutes*, NSW Legislative Council, 30 April 2003, 48.

CHAPTER 35

COMMITTEES

204. SESSIONAL COMMITTEES

(1) The House may establish sessional committees at the commencement of each session of Parliament to consider matters relating to the provision of services to members.

(2) The functions and composition of any sessional committee will be as determined by the House from time to time.

Development summary		
1895	Standing order 280	Sessional orders
1912	Standing order 281	Extension of Duration of Certain Parliamentary Sessional committees
1927	Standing order 280 Standing order 281	Sessional orders Extension of Duration of Certain Parliamentary Sessional committees
1938	Standing order 281	Extension of Duration of Certain Parliamentary Sessional committees
1968	Standing order 280	Sessional orders
1985	Standing order 280	Sessional orders
2003	Sessional order 204	Sessional committees
2004	Standing order 204	Sessional committees

The purpose of the standing order is to authorise the House to establish sessional committees at the start of each session of Parliament. In the Council's history, sessional committees have considered matters relating to the provision of services to members and the operation of the chamber. Under SO 204(2), the House may determine the functions and composition of any sessional committees it establishes.

Sessional committees cease to exist on prorogation.

Operation

Sessional committees are established by motion on notice, traditionally moved by a minister. Sessional committees have operated in the same manner and under the same

rules and practices as other Council committees, but have tended not to have public hearings or call witnesses.

No committees have operated as sessional committees since the introduction of the 2004 standing orders.

Sessional committees in the Legislative Council have often worked with their Legislative Assembly counterparts as their functions concerned the management of the Parliament.[1]

Sessional committees, as the name suggests, are established only for a session of Parliament and cease to exist on prorogation.

Background and development

Historically, a Standing Orders Committee, Library Committee, Printing Committee and a Refreshment Room Committee were appointed as sessional committees at the start of each parliamentary session. The Library Committee and Refreshment Room Committee were appointed to deal with matters relating to the provision of services to members. The Printing Committee considered whether to order the publication and distribution of tabled papers and the Standing Orders Committee (now the Procedure Committee – see SO 205) considered matters affecting the procedures of the House.

The 1895 standing orders provided separately for select committees under SOs 232 to 257 and sessional committees under SO 280. Standing order 280 provided for the House to appoint a Standing Orders Committee, a Library Committee, a Printing Committee and a Refreshment Room Committee. The committees were appointed at the start of each parliamentary session and members were appointed in the resolution establishing the committees.

In 1912, the House, on the recommendation of the Standing Orders Committee, adopted SO 281 to provide that members of the sessional committees were to hold office until the appointment of their successors, and that they had the power to sit during any adjournment or prorogation of the House.[2] The report of the Standing Orders Committee did not detail the reasons for the introduction of this standing order. One possible explanation was to ensure the smooth running of Parliament all year round, notwithstanding prorogation (noting that at the time there tended to be an annual session of parliament and annual prorogation). However, in 1938 the words 'or prorogation' were removed from the standing order as it was thought that committees could not operate during prorogation as it was 'opposed to parliamentary practice'.[3] The Assembly initially made this amendment to its standing orders following a recommendation from the Assembly Standing Orders Committee and invited the Council to make a similar amendment to ensure the Houses maintained comparable provisions.[4]

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1 *Hansard*, NSW Legislative Council, 22 November 1927, p 437.

2 *Hansard*, NSW Legislative Council, 19 September 1912, p 1279.

3 *Hansard*, NSW Legislative Council, 6 September 1938, p 1554. The view on whether standing committees can operate during prorogation has since changed.

4 *Hansard*, NSW Legislative Council, 6 September 1938, pp 1553-1554.

Minor amendments were made to SO 280 in 1927 to rename the Refreshment Room Committee the 'House Committee';[5] in 1968 to omit a reference to an earlier resolution providing that the Library Committee was granted leave to act jointly with the Library Committee of the Legislative Assembly; and in 1985 to omit a reference in the standing order to the time of meeting of the House.

In 2003, an internal review recommended the discontinuation of the Library, House and Printing committees as they had become outdated.[6]

The Standing Orders Committee, formerly a sessional committee, is now known as the Procedure Committee. It is established as a standing committee under SO 205 and is appointed for the life of a Parliament.

205. PROCEDURE COMMITTEE

(1) A Procedure Committee will be appointed at the commencement of each Parliament.

(2) The committee may:

(a) consider on its own initiative any amendments to the standing orders,

(b) propose to the House changes in practice and procedures of the House, and

(c) consider any matter relating to the procedures referred to it by the House or the President.

(3) The President, Deputy President, Leader of the Government and Leader of the Opposition are to be among the members of the committee.

(4) Members may be appointed to the committee as substitutes for a member of the committee, by notice in writing to the Chair of the committee.

(5) Nominations may be made by the Leader of the Government, the Leader of the Opposition, the Government and Opposition Whips, and Cross Bench Members, as applicable.

Development summary		
1895	Standing order 280	Sessional orders
2003	Sessional order 205	Procedure Committee
2004	Standing order 205	Procedure Committee
2011	Resolution	Procedure Committee
2015	Resolution	Procedure Committee

Standing order 205 requires a Procedure Committee to be appointed each Parliament with responsibility for considering the internal practices and procedures of the House. The Procedure Committee exists for the life of a Parliament.

5 *Hansard*, NSW Legislative Council, 22 November 1927, p 437.

6 David Blunt, *Sessional Committees*, discussion paper, 2003.

Operation

Under SO 205, a Procedure Committee is established at the beginning of each Parliament by motion on notice.

Under SO 205(2), the Procedure Committee may:

(a) consider on its own initiative any amendments to the standing orders,[7]

(b) propose to the House changes in practice and procedures of the House,[8] and

(c) consider any matter relating to the procedures referred to it by the House[9] or the President.[10]

To reflect the centrality of the Procedure Committee to the effective functioning of the House, the President, Deputy President, Leader of the Government and Leader of the Opposition are ex officio members of the committee. Standing order 205 provides that nominations may be made by the Leader of the Government, the Leader of the Opposition, the Government and Opposition Whips, and crossbench members, as applicable. This standing order is broader than that of SO 210 (relating to committee membership) as it allows Whips to nominate members.

The House may appoint other members to the committee and since 2004 the House has appointed the Assistant President, the Deputy Leader of the Government and Deputy Leader of the Opposition, Government and Opposition Whips, one other government member and two crossbench members.

Until 2011 these members were appointed by name[11] rather than by office, which meant further resolutions of the House were needed to reflect membership changes when office holders changed. This issue was addressed in the 2011 resolution appointing the committee by only referring to office holder positions, not member names.[12] The 2015 resolution appointing the committee added one other government member and two crossbench members to the committee.[13] In the event of change of office holder, the new office holder automatically becomes a member of the committee.

7 See, for example, Procedure Committee, NSW Legislative Council, *Report relating to formal business, pecuniary interest, quorum and broadcasting of proceedings* (2008).

8 See, for example, self-referral to consider review of all rules and orders of the House; Standing Orders Committee (now known as the Procedure Committee), NSW Legislative Council, *Proposed New Standing Rules and Orders* (2003).

9 See, for example, *Minutes,* NSW Legislative Council, 10 May 2011, pp 82-83; referral agreed to by the House as an amendment to a motion for a sessional order: *Minutes,* NSW Legislative Council, 15 October 2014, p 143.

10 See, for example, *Minutes,* NSW Legislative Council, 23 February 2016, p 644.

11 See, for example, *Minutes,* NSW Legislative Council, 10 May 2007, p 59.

12 *Minutes,* NSW Legislative Council, 10 May 2011, pp 82-83.

13 *Minutes,* NSW Legislative Council, 12 May 2015, pp 89-90.

Under SO 205(4), members may be appointed to the committee as substitutes for a member of the committee, by notice in writing to the Chair of the committee. However, this provision has been deemed not to apply to ex officio members. In light of this interpretation, prior to 2015 there were sometimes delays in finalising inquiries and reports due to difficulties scheduling meetings when all ex officio members could attend.

In order to address this issue, the 2015 resolution varied the standing order to provide that if an ex officio member, with the exception of the President, Deputy President or Assistant President, was unable to attend a meeting they could be substituted for that meeting only.[14] Such substitutions can only be made by the Leader of the Government or Leader of the Opposition by notice in writing to the Committee Clerk.

Under the resolution, substitutes can be provided for the non ex officio government member and crossbench members on an ongoing basis in the same manner as committee members on other standing committees.[15] These substitutions can only be made by the Leader of the Government, Government Whip or Deputy Government Whip, or – in the case of a crossbench member – by another crossbench member.[16]

The 2015 resolution also included the provision for electronic participation in the same terms as have been adopted by other standing committees and make it clear that the President is the Chair of the committee.[17] (Prior to 2015, the President was nominated Chair as a matter of convention, however, the appointment was not expressly required under SO 205 or under the resolution appointing the committee).

Background and development

Both the 1856 and 1895 standing orders provided for the appointment of a Standing Orders Committee at the commencement of each session.[18]

The first inquiry by the Standing Orders Committee in 1856 was to consider the development of standing orders for the Council.[19] The committee reported in

14 For example, this provision was used during the 2016 inquiry into young children accompanying members into the House, when the Government Whip was substituted by another member for one meeting.

15 This provision was also used during the 2016 inquiry into young children accompanying members into the House, when the non ex officio government member was substituted by another member for the duration of the inquiry.

16 *Minutes,* NSW Legislative Council, 12 May 2015, pp 89-90.

17 *Minutes,* NSW Legislative Council, 12 May 2015, pp 89-90.

18 See SO 204 for the development and background to sessional committees.

19 The *Constitution Act* of 1855 empowered both Houses of the new bi-cameral Parliament to adopt standing orders for the orderly conduct of business. On 23 May 1856, the second sitting day of the new parliament, the House resolved that, until further orders were made, the proceedings would be conducted according to the English Parliament. *Minutes,* NSW Legislative Council, 23 May 1856, p 6, and referred to the Standing Orders Committee on 27 May 1856; *Minutes,* NSW Legislative Council, 27 May 1856, p 7.

November 1856, recommending 154 new standing orders for the operations of the House.[20] As the committee had conferred with the Assembly,[21] the standing orders contained complementary standing orders for communication between the Houses and the passage of legislation.

Since that first report, the Standing Orders Committee has conducted numerous inquiries into individual or groups of standing orders or procedures and conducted three complete reviews, as outlined in the Introduction.

In 2003, the Standing Orders Committee commenced a review of the 1895 standing orders. Among the recommended changes to the standing orders was a redrafted provision for a Procedure Committee, including that:

- the committee be renamed Procedure Committee
- the Procedure Committee would exist for the life of the Parliament rather than be established as a sessional committee
- the functions of the committee, consistent since 1856, were codified, and
- the committee would be comprised of senior members of the House, similar to the composition of the Australian Senate Procedure Committee.[22]

206. STANDING COMMITTEES

(1) The House may establish standing committees which have power to sit during the life of the Parliament.

(2) The functions, source of references and composition of any standing committee will be as determined by the House in the resolution appointing the committee.

Development summary		
1856	Standing orders 45–54	Select committees
1870	Standing orders 55–66	Select committees
1895	Part XXIV	Select Committees
1985	Standing order 257A Standing order 257B Standing order 257C	Appointments Rules and Orders to apply Report from time to time: Duration of Committee
2003	Sessional order 206	Standing committees
2004	Standing order 206	Standing committees

20 *Journal of the Legislative Council*, 1856-57, pp 145-162.

21 Instructed to confer with Standing Orders Committee of the Legislative Assembly. *Minutes,* NSW Legislative Council, 6 June 1856, p 8.

22 Standing Orders Committee, NSW Legislative Council, *Proposed New Standing Rules and Orders* (2003), p 72; Australian Senate, SO 17.

Standing order 206 provides for the House to establish standing committees which exist for the life of the parliament, as well as to determine the functions, sources of references and composition of those committees.

The establishment of the Standing Committee on Social Issues and the Standing Committee on State Development in 1988 marked the birth of the modern committee system in the Legislative Council. The committee system was further consolidated in 1995 with the establishment of the Standing Committee on Law and Justice, followed by the establishment of five general purpose standing committees in 1997.

A sixth general purpose standing committee was established in 2015 and, in 2017, general purpose standing committees were renamed 'portfolio committees'.[23] At the beginning of each Parliament the Legislative Council also establishes a Procedure Committee (under standing order 205) and a Privileges Committee, established since 1988.

Operation

Under SO 206 the House may establish standing committees. The resolutions establishing the committees include the functions of each committee, the sources of references, any specific powers such as the power to undertake site visits and appoint sub-committees, the composition of each standing committee including provision for substitute or participating members, quorum requirements, the authority for a member to participate by way of electronic communication and the conduct of committee proceedings. The resolutions establishing the committees make it clear that these functions and powers operate notwithstanding anything to the contrary in the standing orders.

In addition, the resolution appointing the portfolio committees includes the portfolios allocated to each committee. If portfolios change, the resolution is amended accordingly.

Power of committees to meet and transact business following prorogation of the House

One of the most contested areas of the operation of standing committees is the ability of these committees to meet and transact business after the prorogation of the House. It is the view of the Legislative Council that a standing committee continues to have the power to operate for the life of the parliament and, therefore, after prorogation of the House, although this has been the subject of conflicting views. Following receipt of Crown Solicitor's advice in 1994,[24] the then Government took the view that while standing committees continue to exist after prorogation (though not after the dissolution of the Assembly) they may not meet and transact business unless authorised by statute. The Crown Solicitor expressed the view that the Legislative Council standing order 257C

23 *Minutes*, NSW Legislative Council, 7 March 2017, pp 1425-1426.

24 Crown Solicitor's Advice, *Status of Standing Committees after prorogation of the Parliament*, 13 December 1994.

(and its Assembly equivalent) were invalid to the extent to which they purported to authorise committees to sit after prorogation.

The Legislative Council has consistently taken the position that the Crown Solicitor's advice was based on 'an extremely restricted view of the powers of the Council,'[25] notwithstanding that the Crown Solicitor reiterated his 1994 advice as recently as 2011.[26] The views of the Clerks of the Council are consistent with those of the former Solicitor-General of the Commonwealth, who concluded in a legal opinion tabled in the Senate that the 'House of Commons in 1901 was empowered to authorise its committees to sit during a period of its prorogation'.[27] In line with this interpretation, there are many examples from other Australian parliaments, including the Senate, of committees being authorised by the relevant House, either through resolution or the standing orders, to sit and transact business despite prorogation.[28]

The effect of prorogation on the functioning of standing committees was tested prior to the state election in 2011.

On 15 December 2010, the Government announced the sale of state electricity generators (the 'Gentrader' transactions). Subsequently, on 22 December 2010, the Parliament was prorogued by the Governor several months before the election of 26 March 2011. Despite the prorogation of Parliament, the following day on 23 December 2010, General Purpose Standing Committee (GPSC) No. 1 self-referred terms of reference for an inquiry into the Gentrader transactions, following advice from the Clerk that it had the power to do so.

The Government subsequently obtained legal advice from the Crown Solicitor arguing that the committee did not have the power to proceed. The Crown Solicitor maintained the view that standing committees cannot function while the House is prorogued unless they have legislative authority to do so, that the committee would have no power to compel the attendance of witnesses or require them to answer questions, and that there was a risk that statements made and documents provided to the committee would not be protected by parliamentary privilege.[29]

The Clerk of the Parliaments in turn provided separate advice arguing that the committee did have the power to proceed, based on a more modern reading of the system of responsible government in New South Wales and the 'reasonable necessity' of committee inquiries to hold the government to account after prorogation.[30] The position adopted by the Clerk was supported in a legal opinion by Mr Bret Walker SC, who

25 See Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), pp 575- 577.

26 In 2004, the provisions of standing order 257C were adopted in the new standing order 206(1); Crown Solicitor's Advice, *Prorogation: effect on Standing Committees*, 2 January 2011, p 2.

27 Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 9th ed, 2008), p 507.

28 See J Davis, 'Matters concerning the effect of Prorogation: An Argument of Convenience', 41st Conference of Presiding Officers and Clerks, Darwin, 2010.

29 Crown Solicitor's Advice, *Prorogation: effect on Standing Committees*, 2 January 2011, p 2.

30 Advice of the Clerk of the Parliaments, *Advice to the President of the Legislative Council on the power of standing committees to sit during the prorogation of the House*, 11 January 2011.

agreed with the Clerk's view regarding the present-day understanding of responsible government and the ability of committees to continue functioning during prorogation.[31]

As the matter did not go to the courts for resolution, the issue of whether the committee's proceedings were properly constituted and had the protection of parliamentary privilege remains unresolved.[32] Nevertheless, the Council has maintained its position, with, for instance, the Select Committee on the Planning Process in Newcastle and the Hunter Region, tabling its final report on 3 March 2015, one day after the prorogation of the 55th Parliament. The Government provided a response to the select committee's report on 18 June 2015.

Background and development

Until 1982, there was no provision in the standing orders for the appointment of standing committees. On 17 March 1982, the Legislative Assembly requested that a joint committee on road safety be established. In order to agree to this request, the Council amended the 1895 standing orders to insert standing orders 257A to 257C to provide for:

- the appointment of standing committees
- the rules relating to select committees to apply to standing committees
- standing committees to have the power to report from time to time and sit during the life of a Parliament.[33]

In 1985, the Council established a select committee to inquire into the constitution, operation, funding, staffing and accommodation of a system of standing committees in the Legislative Council.[34]

The select committee reported in 1986 and recommended the establishment of three standing committees covering state progress, social issues and country affairs and the revamping of the then existing Subordinate Legislation and Deregulation Committee.[35] This was a pivotal turning point in the history of the Legislative Council, leading to the birth of the modern committee system.

After the 1988 election, the newly elected Coalition Government agreed to establish a standing committee on social issues and a standing committee on state development.[36]

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31 Mr Bret Walker SC, *Legislative Council's General Purpose Standing Committee No. 1 – Effect of prorogation*, 21 January 2011, p 7.

32 For more detailed discussion on the effect of prorogation on standing committees, see Teresa McMichael, 'Prorogation and principle: The Gentrader Inquiry, Government accountability and the shutdown of Parliament', *Australasian Parliamentary Review*, Autumn 2012, vol 27(1), pp 196-206; and the Hon Amanda Fazio, Proceedings of the C25 Seminar: Marking 25 years of the Committee System in the Legislative Council, 20 September 2013, pp 19-20.

33 *Minutes*, NSW Legislative Council, 17 March 1982, pp 261-263.

34 *Minutes*, NSW Legislative Council, 28 February 1985, pp 333-334.

35 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), pp 6-7.

36 *Minutes*, NSW Legislative Council, 9 June 1988, pp 182-186.

Internally, the Coalition leadership had proposed that five policy committees be established, but the Government had concerns about allowing so many committees to exist, including concerns regarding the cost.[37] The Standing Committee on Law and Justice was established in May 1995, following the election of a Labor Government.[38]

In May 1997, the Council agreed to a Coalition Opposition motion to appoint five general purpose standing committees, each responsible for overseeing specific ministerial portfolios and for conducting the annual budget estimates hearings.[39] The general purpose standing committees were modelled on the Australian Senate legislation and reference committees. The establishment of the general purpose standing committees was opposed by the Government in both 1997 and 1999. However, since then, the motion for their establishment has been routinely moved by the government of the day at the start of a Parliament.[40] A sixth general purpose standing committee was appointed in May 2015.[41]

In addition to these subject and accountability committees, since 1988 the Council has appointed a Privileges Committee.[42] The committee was established following a recommendation by the Joint Select Committee on Parliamentary Privilege,[43] which observed that in the absence of a Privileges Committee, since 1856 the House had been obliged to decide matters of privilege as they arose, debating matters forthwith in the House, 'without necessarily having the benefit of both sides of the case or supporting documentation'.[44] (See SO 77 for the practice of considering matters of privilege).

The Council also appoints a Procedure Committee at the start of each Parliament under SO 205.

207. SELECT COMMITTEES

(1) The House may appoint select committees to consider matters referred by the House. A select committee has power to sit during the life of the Parliament. When the committee completes its inquiry and presents its final report to the House, the committee ceases to exist.

(2) The composition of any select committee will be as determined by the House.

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37 David Clune, *Keeping the executive honest: the modern Legislative Council committee system*, A Commemorative Monograph: Part One of the Legislative Council's oral history project (2013), p 21.

38 *Minutes*, NSW Legislative Council, 24 May 1995, pp 36-43.

39 *Minutes*, NSW Legislative Council, 7 May 1997, pp 674-680.

40 *Minutes*, NSW Legislative Council, 3 July 2003, pp 220-233; 10 May 2007, pp 55-57; 12 May 2011, pp 98-102; 6 May 2015, pp 65-68.

41 *Minutes*, NSW Legislative Council, 6 May 2015, pp 65-68.

42 Originally established as the Standing Committee on Parliamentary Privilege (*Minutes*, NSW Legislative Council, 13 October 1988, p 155; 20 October 1988, p 190), then renamed the Standing Committee on Parliamentary Privilege and Ethics (*Minutes,* 24 May 1995, pp 42-43) then the Privileges Committee in June 2004 (*Minutes*, NSW Legislative Council, 1 June 2004, pp 809-810).

43 Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege, *Parliamentary privilege in New South Wales*, 1984, p 114.

44 Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege, *Parliamentary privilege in New South Wales*, 1984, p 113.

Development summary		
1856	Standing orders 45-54	Select committees
1870	Standing orders 55-66	Select committees
1895	Part XXIV	Select Committees
2003	Sessional order 207	Select committees
2004	Standing order 207	Select committees

Standing order 207 provides for the appointment of select committees by the House. Select committees have the power to sit for the duration of the life of the Parliament in which they are appointed or until they report, whichever occurs first. Unlike standing committees, select committees cease to exist once their final report has been presented to the House.

Operation

Select committees operate similarly to standing committees, with one key exception: they cease to exist on tabling their final report**.**

The composition of a select committee is determined by the House under SO 207(2), consistent with SO 210 which regulates the appointment of members to serve on committees. The number of members on a select committee usually varies between six and seven.[45]

The Chair and Deputy Chair are either appointed in the resolution of the House according to SO 213(2) or elected at the committee's first meeting. In recent years select committees have tended to be chaired by a member of the crossbench.[46] It is not uncommon for contemporary select committees to be established against the wishes of the government and comprise a non-government majority of members and a non-government Chair.

Select committees have continued to be appointed notwithstanding the development, since 1988, of the standing committee system in the Legislative Council. Fourteen select committees were established in the 55th Parliament (2011-2015), compared with four in the 52nd Parliament (1999-2003) and three in the 53rd (2003-2007) and 54th (2007-2011) Parliaments.

45 On occasion, there may be more than seven members. For example, the Select Committee on the Legislative Council Committee System had eight members and the Joint Select Committee on Companion Animal Breeding Practices in New South Wales had nine members.

46 See, for example, the Select Committee on Cronulla Fisheries Closure; Select Committee on the Kooragang Island Orica Chemical Leak; Select Committee on the Agistment of Horses at Yaralla Estate; Select Committee on the Planning Process in Newcastle and the Broader Hunter Region; Select Committee on Ministerial Propriety in New South Wales; Select Committee on the Partial Defence of Provocation.

Background

Select committees are the oldest type of committee in the New South Wales Parliament, and were the main type of committee in the Council prior to the introduction of standing committees in the 1980s.

Both the 1856 and 1895 standing orders provided for the appointment and operation of select committees. Since 1856, select committees have been established for a variety of reasons, including preparation of the Address-in-Reply to the Governor's opening speech,[47] to assist in resolving disputes between the Houses regarding bills,[48] to inquire into matters of public interest,[49] and to inquire into the subject matter and objectives of public and private bills.[50]

The first Legislative Council select committee, which reported in 1825, inquired into the Female Factory at Parramatta. The Governor tabled a dispatch from the Secretary of State for the Colonies which directed that the Female Factory, a female prison, be placed under the immediate protection of the Governor and Legislative Council. The Council appointed a select committee to consider this letter, which reported great irregularities at the factory, and recommended that it be placed under control of the Governor and Legislative Council.[51]

Under SO 226, select committees have leave to report 'from time to time', thus allowing committees to table interim reports. Standing order 207, introduced in 2004, provided the first explicit statement that select committees cease to exist once they have tabled their final report in the House. Prior to the adoption of SO 207 in 2004, under SO 248 a select committee required the leave of the House to report from 'time to time' because it would otherwise cease to exist on reporting. So, for example, in 1920, a motion was moved to allow a select committee examining the agriculture industry to seek leave to 'report from time to time'.[52]

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47 See, for example, Select Committee on the Address-in-Reply to the Governor-General's Opening Speech, *Minutes*, NSW Legislative Council, 23 May 1856, p 5; Select Committee on the Address-in-Reply to the Governor-General's Opening Speech, *Minutes*, NSW Legislative Council, 31 August 1859, pp 6-7.

48 See, for example, the Select Committee on District Courts Bill, *Minutes*, NSW Legislative Council, 21 October 1858, p 91. Select committees have also been appointed to draw up reasons for insisting on the Council's amendments disagreed to by the Assembly, see, for example, Select Committee on Public Schools Bill, *Minutes*, NSW Legislative Council, 19 December 1866, p 146.

49 See, for example, Select Committee on the Power of Married Women to Hold Real and Personal Estate, *Minutes*, NSW Legislative Council, 12 December 1856, p 33; Select Committee on Shipwrecks and Disasters to Shipping, *Minutes*, NSW Legislative Council, 26 September 1856, p 13.

50 See, for example, Select Committee on Underwood's Estate Distribution Bill, *Minutes*, NSW Legislative Council, 18 September 1878, p 13; Select Committee on City of Sydney Improvement Bill, *Minutes*, NSW Legislative Council, 6 February 1879, p 104.

51 Parliament of NSW, Parliamentary Library, compiled by R F Doust, *New South Wales Legislative Council 1824-1856: The Select Committees* (2011), p 5.

52 *Minutes,* NSW Legislative Council, 27 October 1920, p 78. See discussion in note 1 in the annotation of SO 226 regarding the tabling of an interim report by the 1977 select committee examining

Under SO 207 select committees, like standing committees, exist during the life of the Parliament (unless they have tabled their report) and thus no longer cease to exist on prorogation.[53] See SO 206 for further information on the power of committees to operate during prorogation of the House.

208. POWERS

A committee has power:

(a) to adjourn from time to time,

(b) to adjourn from place to place,

(c) to send for and examine persons, papers, records and things,

(d) to make visits of inspection within New South Wales and, if authorised by the House, with the approval of the President, elsewhere in Australia and outside Australia, and

(e) to request the attendance of and examine members of the House.

Development summary		
1895	Standing order 246	Adjournment of committee
1988-2003	Resolution	Standing Committees
2003	Sessional order 208	Powers
2004	Standing order 208	Powers

The power of inquiry is an inherent aspect of the role of the Legislative Council as a House of Review. Like many other legislatures, the NSW Legislative Council routinely delegates this role (and therefore these powers) to its committees.

Standing order 208 encapsulates several significant inquiry powers of Legislative Council committees. These include the power to set the time and place of their meetings, require witnesses to attend and give evidence, compel answers to questions, order the production of state papers, undertake visits of inspection and examine members of the Legislative Council.

Committee powers are also regulated by various other standing orders as well as a number of statutes, including the *Parliamentary Evidence Act 1901*, *Defamation Act 2005* and the *Parliamentary Papers (Supplementary Provisions) Act 1975*.

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the reconstitution of the Legislative Council. By tabling its interim report without gaining the agreement of the House to report from 'time to time', the committee extinguished itself.

53 For example, the Select Committee on Home Schooling was established on 28 May 2014 and tabled its final report in December 2014 following the prorogation of the House for one day on 8 September 2014.

To adjourn from time to time and from place to place

Operation

SO 208(a) allows committees to set meeting times as they see fit. The only qualification is that a committee cannot meet when the House is sitting (SO 209). Meeting times are usually set by the Committee Chair, after canvassing members as to their availability. In the absence of the Chair, the Deputy Chair would undertake this role.

If a member or the committee does not want to proceed with a planned hearing or meeting, the committee simply considers a motion to that effect.

While most committee hearings are held at Parliament House, SO 208(b) allows committees to meet outside the Parliament, subject to the requirements of SO 208(d) which requires a committee to seek approval for visits of inspection outside of New South Wales (see below). Without this standing order, a committee would have to seek the permission of the House each time it wanted to meet elsewhere.

Background

The ability of committees to set the time of their meetings has been provided for since the 1895 standing orders.[54] Up until 1988, committees required the leave of the House to adjourn from place to place.[55] However, this changed in 1988 when the resolution appointing the first subject standing committees allowed these committees to meet outside of the Parliamentary Precincts without requiring the leave of the House.

To send for and examine persons, papers, records or things

Operation

Under standing order 208(c), committees are authorised 'to send for and examine persons'. This power is complemented by the *Parliamentary Evidence Act 1901*[56] which provides that any person resident in New South Wales, other than current members of either House, can be summoned to appear before a parliamentary committee.

Prior to 2000, all witnesses, other than members, were served with a summons on arrival at a hearing, based on the assumption that the protections that relate to giving evidence before a parliamentary committee only applied to a witness who has been summoned. The routine summoning of all witnesses ceased in 2000, following advice from Mr Bret

54 1895, SO 246.

55 1895, SO 246.

56 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, pp 494-495. Until 1881, there was no statute governing the attendance of witnesses before committees and the Council relied on its common law power to require the attendance of witnesses. The 1881 Act was replaced by the *Parliamentary Evidence Act 1901*.

Walker SC that a summons was not required to trigger parliamentary privilege for a witness' evidence.[57]

Most witnesses appear before committees on a voluntary basis, but on occasion a committee will issue a summons to secure the attendance of a reluctant witness. For example, during the 2004 Orange Grove inquiry, a ministerial staff member appeared before the committee in response to a summons after declining the committee's invitation to appear.[58] In other instances, the threat of a summons may persuade a reluctant witness to attend.

A summons must be signed by the Chair[59] and include the time, date, and place where the witness is called to appear.[60] It must be served on the recipient personally.[61] It is usually served by the Usher of the Black Rod, although this is not required. Under section 6 of the *Parliamentary Evidence Act 1901*, every witness summoned is entitled to be paid reasonable expenses associated with their appearance (presumably to cover such things as meals and transport). These payments are calculated with reference to the scale of allowance for witnesses attending trials at the Supreme Court, as published in the *Government Gazette*.

A reluctant witness may be persuaded by the fact that a committee intends to summon them, avoiding the need to issue a summons at all. In 2010, the Select Committee on the NSW Taxi Industry wished to obtain certain information from the Chairman and Chief Executive Officer of the largest taxi car operator in NSW, Cabcharge, Mr Reg Kermode. Mr Kermode was reluctant to attend and there was a lengthy exchange of correspondence between the committee and Cabcharge and its lawyers. Ultimately, and following much deliberation, the committee resolved to indicate to Mr Kermode that should he not accept the committee's further invitation to attend to give evidence, a summons would be issued to require his attendance. Following a further exchange of correspondence, Mr Kermode did indeed appear as a witness, without the committee issuing a summons.[62]

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57 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, p 496. The 2015 Select Committee on the Conduct and Progress of the Ombudsman's Inquiry, 'Operation Prospect', is a recent exception. All of the witnesses who appeared before the committee were summoned following legal advice from Mr Bret Walker SC. Mr Walker advised that given witnesses were likely to be asked to provide information that would be covered by statutory secrecy provisions, summoning witnesses would provide clarity to the compulsion exerted on persons who would otherwise not be permitted to answer questions or provide information. See Bret Walker SC, 'Parliament of New South Wales – Legislative Council Select Committee on Ombudsman's "Operation Prospect": Opinion', 14 January 2015, pp 3-4.

58 General Purpose Standing Committee No 4, NSW Legislative Council, *The Designer Outlets Centre, Liverpool* (2004).

59 *Parliamentary Evidence Act 1901*, s 4(2).

60 See Form 74A, Schedule F, Supreme Court Rules 1970 [NSW].

61 *Parliamentary Evidence Act 1901*, s 4(2).

62 Select Committee on the NSW Taxi Industry, NSW Legislative Council, *Inquiry into the NSW Taxi industry* (2010), Minutes of Proceedings, pp 250 and 254.

The *Parliamentary Evidence Act 1901* details the procedure to be followed if a witness subject to a summons does not attend. This includes seeking a warrant for the apprehension of the person from the Supreme Court (section 7). While there have been threats to invoke this section, it has never been used. During the 2011 General Purpose Standing Committee No. 1 inquiry into the Gentrader transactions, seven key witnesses failed to appear before the committee despite being summoned. In accordance with the Act, the Chair requested that the President seek a warrant to apprehend the witnesses. The President refused to seek the warrant due to the uncertainty surrounding the application of parliamentary privilege during the prorogation of Parliament.[63]

Another power under the Act that allows committees to undertake their inquiry role is the power to compel an answer to a 'lawful' question.[64] Generally speaking, a question of fact, as opposed to an opinion, relevant to the committee's terms of reference would be a lawful question. If a committee resolves to press a question and the witness continues to decline to answer, the committee could consider whether such action might amount to a possible contempt under the *Parliamentary Evidence Act 1901*, if he or she has taken an oath or affirmation.[65] The penalty for refusing to answer a lawful question is one month in gaol.[66]

In addition to the power to send for and examine persons, SO 208 also authorises a committee to send for and examine papers, records and things.[67]

The Legislative Council has a common law power to order the production of state papers from the executive, as affirmed by the High Court in *Egan v Willis* (1998) (see SO 52). The Council's position is that committees also have the power to order the production of state papers in the context of a particular inquiry, although only the House can deal with non-compliance with a committee's order for papers.[68]

Between 1999 and 2001, documents were routinely provided by the Government subsequent to formal committee orders.[69] However, in 2003, the New South Wales

63 General Purpose Standing Committee No. 1, NSW Legislative Council, *The Gentrader Transactions* (2011), pp 11-12.

64 The position of the Executive is that a question may not be lawful if the answer is 'privileged', e.g. legal professional privilege, public interest immunity or the privilege against self-incrimination, but this view is not necessarily shared by the Legislative Council. See Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, pp 508-517.

65 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, p 508.

66 *Parliamentary Evidence Act 1901*, s 11(1).

67 Presumably the term 'things' refers to items other than documents. The equivalent Legislative Assembly standing order 329 authorises committees to send for 'persons, papers, records and exhibits'.

68 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, pp 538-542. A small number of joint committees have a statutory power to order papers, for example, s 71 of the *Health Care Complaints Act 1993* establishes a joint parliamentary committee which has power to send for persons, papers and records.

69 See, for example, the Standing Committee on Social Issues, NSW Legislative Council, *Inquiry into Residential and Support Services for People with Disability*, Minutes No. 11 (14 October 1999), entry No 2; General Purpose Standing Committee No. 5, NSW Legislative Council, *Report on inquiry into Northside Storage Tunnel – Scotts Creek Vent*, Report No. 9 (2000), pp 142-143; General

Government contested the power of committees to order the production of state papers. The Premier's 2003 guidelines for public servants appearing before parliamentary committees, reissued in 2011, state:

> If a Committee requires an officer to hand over documents in the officer's possession at the hearing, the officer should request that the Committee refer the matter to the relevant House.[70]

The Government's position was in accordance with advice from the Crown Solicitor, which suggested that while the Legislative Council has the power to compel the production of state papers, it had not been determined that a committee of the Legislative Council has such a power, or can have it delegated to it by the House.[71]

Several attempts by committees to order documents subsequent to 2001 have been resisted. In some of these cases, a member of the committee has subsequently moved a motion in the House under SO 52. Such motions usually include a preliminary paragraph that the documents be provided, notwithstanding the power of the particular committee to order the documents in question.[72]

Advice from Mr Bret Walker SC in 2015, regarding an order for papers from 'bodies not subject to direction or control by the Government', supports the Council's view regarding committees' power to order state papers, albeit in the context of a hearing. In his advice, Mr Walker argues that the *Parliamentary Evidence Act 1901* empowers the Council (or one of its committees) to require the production of documents by a person attending to give evidence, including by producing those documents.[73]

Background

Prior to 1988, there was no standing order explicitly authorising committees to send for and examine persons, papers, records or things. However, it was relatively commonplace for resolutions establishing select committees to empower the committee to take evidence and send for persons and papers.[74]

Purpose Standing Committee No. 3, NSW Legislative Council, *Cabramatta Policing*, Report No. 8 (2001), p 269; General Purpose Standing Committee No. 1, NSW Legislative Council, *Inquiry into Multiculturalism – Interim report*, Report No. 9 (2000), pp 142- 143.

70 Department of Premier and Cabinet circular C2011-27, 'Guidelines for appearing before parliamentary committees', 20 October 2011; Department of Premier and Cabinet circular C2013-47, 'Guidelines for appearing before parliamentary committees', 17 November 2003.

71 Crown Solicitor Re: Production of Documents to Legislative Council General Purpose Standing Committee No. 1, 28 September 2001.

72 *Minutes*, NSW Legislative Council, 27 November 2013, p 2268.

73 Advice from Mr Bret Walker SC, *Parliament of New South Wales, Legislative Council: Orders for papers from bodies not subject to direction or control by the Government*, 18 November 2015, p 15.

74 See, for example, *Minutes*, NSW Legislative Council, 18 May 1865, p 86; 27 February 1884, p 82; 19 March 1884, p 99; 29 August 1963, p 246.

Witnesses were routinely summoned to give evidence before select committees, with the committee sometimes resolving that the Chair 'have full authority to issue such summonses as he may deem desirable for the purposes of [the] inquiry'.[75]

Historically, it was rare for committees to order papers, and these orders were not always complied with. For example, in 1888, following an unsuccessful order, the Chair of the Select Committee on Defences of the Colony moved a motion in the House to express the Council's 'regret that the Colonial Secretary should have hindered the acquisition … of information it was appointed to obtain' and that an Address be presented to the Governor conveying this resolution.[76] The motion was negatived following a lengthy debate where it was revealed that although the Colonial Secretary had indeed not provided the information, the Committee Chair had subsequently failed to follow protocol and had written directly to the Agent General in London to obtain the information.[77]

In 1988, the resolution establishing the subject standing committees included the provisions in current paragraph (c) and this provision was included in the resolutions establishing the standing committees in each Parliament until 2004 when these powers were incorporated into the standing orders.[78]

To make visits of inspection

Operation

SO 208(d) states that committees can make visits of inspection within New South Wales and, if authorised by the House, with the approval of the President, elsewhere in Australia and outside Australia. However, the resolution establishing the three subject standing committees varies the standing order so that these committees only require the approval of the President (and not the House) to make visits outside New South Wales and overseas.[79]

Committees frequently undertake site visits within New South Wales, and less frequently interstate. No Council committee has travelled overseas since 2001.

A portfolio committee or select committee seeking to travel interstate will generally authorise the committee Chair to move a motion seeking the House's agreement to the visit. Once the House has agreed to the motion, the secretariat prepares a detailed submission for the President's approval setting out the purpose of the visit and all relevant details, including cost. This occurred, for example, in 2011 when the House authorised

75 *Journal of the Legislative Council*, 28 April 1887, p 506.

76 *Minutes*, NSW Legislative Council, 24 October 1888, p 7.

77 *Minutes*, NSW Legislative Council, 7 November 1888, p 15; *Hansard*, NSW Legislative Council, 24 October 1888, pp 64-75; 7 November 1888, pp 274-281.

78 *Minutes,* NSW Legislative Council, 9 June 1988, p 184; 24 May 1995, p 40; 25 May 1999, p 80; 21 May 2003, p 100.

79 Paragraph 9 of the resolution establishing the standing committees, *Minutes*, NSW Legislative Council, 6 May 2015, pp 62-65.

GPSC No. 5 to travel to Chinchilla, Queensland as part of the coal seam gas inquiry. The subject standing committees also prepare a detailed submission when seeking the President's approval to travel interstate, such as when the Standing Committee on Law and Justice visited Melbourne in 2012 for the inquiry into opportunities to consolidate tribunals in NSW.

Background

Before the 1988 resolution establishing the subject standing committees, Council committees required the leave of the House by resolution to make visits of inspection. It was relatively common for committees to be granted leave to 'visit places and examine witnesses thereat'. This power was granted either in the resolution establishing the committee[80] or at a later time when it became clear the committee needed to make a visit of inspection.[81] Some resolutions granting leave were very narrow, such as for the 1886 Select Committee on the Vine Diseases Bill which only granted the committee leave to 'visit and inspect the vineyards said to be infested with Phylloxera Vastatrix at and near Camden Park'.[82]

The 1891 Select Committee on the Children's Protection and Infants' Protection Bills conducted extensive site visits which included making visits of inspection to certain dancing saloons on a Saturday night to determine whether children frequented those places and conducting a hearing at Elizabeth Street to examine newsboys selling newspapers. In all, 15 newsboys were heard as witnesses and were paid one shilling each. By resolution, the committee was accompanied by two police officers in plain clothes for both site visits.[83]

Since 1988, the resolution establishing the three subject standing committees has only required these committees to seek the approval of the President to make visits outside New South Wales and overseas.[84] The resolution establishing the first general purpose standing committees in 1997 only allowed these committees to make visits of inspection in New South Wales.[85] Following the adoption of the 2004 standing order, the general purpose standing committees were allowed to make interstate and overseas visits, subject to approval by the House and the President.

To request the attendance of and examine members of the House

Under SO 208(e), a committee may request the attendance of and examine members of the Legislative Council. Under section 4 of the *Parliamentary Evidence Act 1901,* members

80 See, for example, *Minutes*, NSW Legislative Council, 11 November 1909, p 111; 27 October 1920, p 78; 31 August 1921, p 16.
81 See, for example, *Minutes*, NSW Legislative Council, 9 September 1886, p 266; 25 March 1908, p 19; 18 November 1891, p 128.
82 *Minutes*, NSW Legislative Council, 9 September 1886, p 266.
83 *Journal of the Legislative Council*, 28 November 1891 and 18 December 1891, p 1075.
84 *Minutes*, NSW Legislative Council, 9 June 1988, p 184.
85 *Minutes*, NSW Legislative Council, 7 May 1997, p 679.

of the Council and Assembly may not be summoned to attend and give evidence before a Council committee. Nevertheless, if a member of the Council refuses an invitation to attend a committee hearing, the House can order the member to attend.[86]

Unlike some other Houses, such as the Australian Senate, it is standard practice for Council committees to invite ministers of both Houses to appear as witnesses, including during the annual budget estimates inquiry.

Members of the Assembly may appear before a Council committee at the Assembly's discretion. Legislative Assembly SO 328 states that: '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'.[87]

Background

The 1988 resolution establishing the first subject standing committees included the provisions in paragraph (e). The provisions were replicated in the resolution establishing the subject standing committees in each new Parliament until 2004 when these powers were incorporated into the standing orders.[88] Prior to the introduction of the 2004 standing orders, specific committees were granted leave to invite Council members as witnesses. For example, in 1995 the House granted leave to the Standing Committee on Parliamentary Privilege and Ethics to invite Council members and officers to appear before the committee and give evidence in relation to its inquiry into a draft code of conduct for members.[89]

Although a rare occurrence, prior to 1988 several committees called members of the Council as witnesses.[90] This sometimes included examining a member serving on the committee,[91] and on one occasion a member was legally represented by counsel and attorney following a request to the House by petition.[92] In 1887, during a meeting of the Select Committee on the Law Respecting the Practice of Medicine and Surgery, the committee Chair, the Hon John Creed, expressed his desire to give evidence to the inquiry as he was a registered medical practitioner and President of the NSW Branch of the British Medical Association. To facilitate this, another member was called to the chair *pro tempore* (for the time being). Mr Creed was sworn and examined, and afterwards retook the chair for the remainder of the committee's meeting.[93]

86 Sir William McKay (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 23rd ed, 2004), p 759.
87 NSW Legislative Assembly, 2006, SO 328.
88 *Minutes,* NSW Legislative Council, 9 June 1988, p 184; 24 May 1995, p 40; 25 May 1999, p 80; 21 May 2003, p 100.
89 *Minutes*, NSW Legislative Council, 20 September 1995, p 170.
90 See, for example, *Journal of the Legislative Council*, 2 November 1893, p 201; 13 November 1912, p 246.
91 *Journal of the Legislative Council*, 22 February 1888, p 79; 5 December 1906, p 299.
92 *Minutes*, NSW Legislative Council, 2 May 1860, pp 78-79.
93 *Journal of the Legislative Council*, 8 July 1887, p 510.

More recent examples of members being given leave to appear before a committee occurred in 1997 when the House granted leave by resolution for its members to appear before and give evidence to a select committee, and resolved that a message be forwarded to the Assembly requesting that that House give leave for its members to appear before the same committee.[94] In 1999, the House referred to the Standing Committee on Parliamentary Privilege an inquiry into statements made by members of the Legislative Council regarding the Sydney Lord Mayor. The House granted leave to the two members concerned to appear and give evidence before the committee.[95]

209. MUST NOT SIT WHILE THE HOUSE IS SITTING

(1) A committee may sit during any adjournment of the House.

(2) A committee must not sit while the House is sitting, unless the House otherwise orders.

Development summary		
1859	Standing order 62	Sitting during adjournment of Council
1895	Standing order 247	Sittings during adjournment of House
1988-2003	Resolution	Standing Committees
1997-2003	Resolution	General Purpose Standing Committees
2003	Sessional order 209	Must not sit while the House is sitting
2004	Standing order 209	Must not sit while the House is sitting

The purpose of the standing order is to prohibit committees from meeting while the House is sitting unless expressly allowed by resolution of the House. This ensures that members' committee duties do not conflict with their primary duty to the House.

Operation

Legislative Council committees are prohibited to meet while the House is sitting under SO 209. Consequently, committee meetings and hearings must be scheduled on non-sitting days or during adjournments of the House, including the lunch or dinner adjournment.[96]

A committee seeking the authorisation of the House to meet while the House is sitting must do so by notice of motion. For example, on 3 July 2001, the House authorised the Standing Committee on Social Issues, on the motion of the Special Minister of State, to sit while the House was sitting. In speaking to the motion the Minister stated:

94 *Minutes*, NSW Legislative Council, 16 October 1997, p 114.

95 *Minutes*, NSW Legislative Council, 14 September 1991, pp 52-53.

96 Committees commonly meet during lunch and dinner breaks on sitting days. While technically these are not adjournments of the House, this is a pragmatic response to the need for members to balance their House and committee responsibilities and has become established practice.

> The House does not normally grant leave for a committee to sit while the House is sitting. However, this is an unusual set of circumstances. Community groups have been invited to attend committee hearings tomorrow on the assumption that the House would not be sitting. As we are at the end of the session, I ask the House to support this special case.[97]

Some select committees have also been authorised by the resolution appointing the committee to meet during a sitting of the House, such as the resolution of the House appointing the Select Committee on the Financial Institutions (NSW) Bill and cognate bill on 7 May 1992.[98] In that instance, the committee only had 12 days to report on the bill, which was described at the time as 'most important reform in the history of the credit union movement'.[99]

Background and development

From 1856, the House was required to grant leave to select committees in order to allow them to sit during adjournments of the House.[100] This occurred on numerous occasions.[101] In 1859, the House agreed to a motion moved without notice that select committees have leave to sit during any adjournment of the House.[102] Initially the member was only going to move a motion to permit the Select Committee on the Medical Bill 1859 to meet during adjournments of the House. However, another member then suggested that the motion be extended to all select committees 'in order that some business might be got on with'.[103]

Later that year, on the recommendation of the Standing Orders Committee, the House adopted two new standing orders to provide for the first meeting of select committees, and the power of select committees to sit during an adjournment of the House not exceeding beyond a period of one week, and during any longer adjournment, with the leave of the Council.[104] This practice was later adopted in the 1895 standing orders,[105] which included an amendment to state that if a committee was to sit during a longer adjournment it would require the leave of the House.

In 1986, the Select Committee on Standing Committees recommended that standing committees not be permitted to meet while the House is sitting on the basis that, although some parliaments permit their committees to meet during sittings, 'the Council is a small House and its performance and image could suffer from a significant absence

97 *Hansard,* NSW Legislative Council, 3 July 2001, p 16120 (John Della Bosca).
98 *Minutes*, NSW Legislative Council, 7 May 1992, pp 188-191.
99 *Hansard,* NSW Legislative Council, 7 May 1992, pp 3887-3888 (Richard Jones).
100 See, for example, *Minutes*, NSW Legislative Council, 26 September 1856, p 14.
101 See, for example, *Minutes,* NSW Legislative Council, 9 April 1884, p 121; 3 March 1886, p 57; 21 September 1887, p 7.
102 *Minutes*, NSW Legislative Council, 6 October 1859, p 21.
103 *Sydney Morning Herald*, 7 October 1859, p 2.
104 *Minutes*, NSW Legislative Council, 14 December 1859, p 41.
105 1895, SO 247.

of members attending committee meetings'.[106] The select committee also noted that it was likely that committee proceedings would frequently be interrupted by division and quorum calls if they were permitted to be held while the House is sitting, and considered there was more benefit in 'taking advantage of the proximity of Members [particularly country members] in Parliament House by arranging committee meetings before or after sitting times'.[107]

In 1988, the resolution appointing the first subject standing committees, and the 1997 resolution appointing the general purpose standing committees, adopted this recommendation by providing that committees shall not meet while the House is sitting unless the House otherwise orders.[108] This was modified in 1991 to also state that sub-committees[109] cannot sit while the House is sitting.[110]

The 1988 and 1997 resolutions also overrode the requirement to seek leave to sit during long adjournments.

The 2003 resolution appointing the subject standing committees went even further to provide that a standing committee 'may sit during any adjournment of the House'. The shift to being able to sit at any time during adjournment was significant, most likely reflecting the increased importance of committees in the work of the House. The resolution also removed the reference to sub-committees and was subsequently adopted in the 2004 standing order.[111]

210. MEMBERSHIP

(1) The composition of each committee is to be determined by the House in the resolution appointing the committee.

(2) Government members are to be nominated by the Leader of the Government.

(3) Opposition members are to be nominated by the Leader of the Opposition.

(4) Cross bench members are to be nominated by agreement between cross bench members.

106 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), pp 44-45. This was relevant as historically the House often had to adjourn due to a lack of a quorum. On one occasion, committee proceedings were interrupted by the Usher of the Black Rod who summoned the committee members 'to make a House' so that it would have a quorum (*Journal of the Legislative Council*, 1887-88, Part 4, vol 43, p 510).

107 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), pp 44-45.

108 *Minutes*, NSW Legislative Council, 9 June 1988, p 186.

109 Note, sub-committees will be discussed in standing order 217.

110 *Minutes*, NSW Legislative Council, 2 July 1991, p 29.

111 *Minutes*, NSW Legislative Council, 21 May 2003, p 100.

(5) In the absence of any agreement the representation on a committee is to be determined by the House.

(6) Nominations for membership of the committees are to be in writing to the Clerk within seven days of the passing of the resolution appointing the committee.

(7) Members may at any time, by motion on notice, be discharged by the House from attending a committee, and other members appointed or added.

(8) The President may not be elected to any committee other than one of which the President is an ex officio member.

(9) If the Deputy President is elected to serve on a committee and declines to do so, another member is to be elected.

(10) No member may take part in a committee inquiry where the member has a pecuniary interest in the inquiry of the committee.

Development summary		
1856	Standing orders 45-50	Select Committees
1870	Standing orders 55-60	Select Committees
1895	Standing order 232	Number of members
1997-2003	Resolution	General Purpose Standing Committees
2003	Sessional order 210	Membership
2004	Standing order 210	Membership
2007-2015	Sessional order	Pecuniary interest – SO 210(10)

This standing order regulates the membership of Legislative Council committees, including the process for nominating and discharging members.

Operation

Under SO 210(1), the composition of each committee is to be determined by the House in the resolution appointing the committee. While there are a number of examples of the House appointing members by name, recent resolutions establishing committees have generally provided that the committee be comprised of a specific number of government, opposition and crossbench members. Where this occurs the Leader of the Government nominates the government members (SO 210(2)), the Leader of the Opposition nominates the opposition members (SO 210(3)) and the crossbench members are nominated by agreement between crossbench members (SO 210(4)). If agreement cannot be reached on the nominees, as sometimes occurs, the President informs the House and a motion is moved forthwith under SO 210(5) that the House determine the matter. The usual practice is for the House to determine the matter by ballot conducted under SO 135, but it would also be open for the motion to propose the member to be appointed to the committee. In 2015, in the first session of the 56th Parliament, ballots were conducted to determine the crossbench representatives for GPSC No. 5, the Standing Committee on State Development, the Standing Committee on Law and

Justice, the Standing Committee on Social Issues,[112] the Privileges Committee,[113] and the Select Committee on the Legislative Council Committee System.[114]

Nominations for membership under SO 210(2), (3) and (4) are made in writing to the Clerk within seven days of the passing of the resolution appointing the committee (SO 210(6)) and the House is advised accordingly. Members nominated may also be replaced by nomination under SO 210(2), (3) and (4).[115]

Where members of a committee are appointed by resolution of the House, only the House may discharge the member from a committee and appoint another member in their place,[116] or appoint another member in place of a member who has resigned (SO 210(7)).[117]

SO 210(8) provides that the President may not be elected to serve on a committee other than one of which the President is an ex officio member, and SO 210(9) provides that if the Deputy President is elected to serve on a committee and declines to do so, another member is to be elected.

There is no provision for persons who are not members of Parliament to serve on a Legislative Council committee. An attempt was made in 1940 during a motion to establish a select committee on the Burrinjuck Dam Improvement Bill for the committee to comprise of engineers from a range of government agencies. The President declined to put the question as it was 'obviously quite contrary to the provisions of the Standing Orders' which required committees to be comprised of members of the House.[118]

Standing order 210(10) provides that no member may take part in a committee inquiry where the member has a pecuniary interest in the inquiry. The intent behind the standing order is not to prevent participation by a member in an inquiry *per se*, but rather to prevent participation in an inquiry where the decisions and recommendations of the committee may affect the member's pecuniary interests.[119] This standing order was varied by sessional order adopted in June 2007 and readopted in May 2011 and May 2015 as follows:

> No member may take part in a committee inquiry where the member has a *direct pecuniary interest* in the inquiry of the committee, *unless* it is in common with the general public, or a class of persons within the general public, or it is on a matter of state policy [emphasis added].[120]

112 *Minutes,* NSW Legislative Council, 14 May 2015, pp 108-109.
113 *Minutes,* NSW Legislative Council, 26 May 2015, p 118.
114 *Minutes,* NSW Legislative Council, 11 August 2015, p 269.
115 See, for example, *Minutes,* NSW Legislative Council, 14 May 2014, pp 2509-2510.
116 See, for example, *Minutes,* NSW Legislative Council, 23 June 2005, p 1506.
117 See, for example, *Minutes,* NSW Legislative Council, 22 September 2005, p 1596.
118 *Minutes,* NSW Legislative Council, 21 May 1940, p 374.
119 See State Crown Solicitor's Office advice, *Pecuniary interest of a member in a committee inquiry*, 26 June 2007, p 6.
120 *Minutes*, NSW Legislative Council, 9 May 2011, p 73; 9 September 2014, p 9; 6 May 2015, p 58.

This amendment is consistent with SO 113(2) which relates to voting in a division in the House where a member has a direct pecuniary interest.

During the 2011 inquiry into the Kooragang Island Orica chemical leak, the Chair of the select committee sought advice as to whether his interest in a company which had a relationship to a subsidiary of Orica Ltd, constituted a 'direct pecuniary interest' for the purposes of SO 210(10) as amended by sessional order. The Clerk subsequently sought advice from the Crown Solicitor, who advised that the Chair's interests as shareholder and director of the company did conflict with his interests as Committee Chair, and that his direct pecuniary interest was not in common with the general public or a class of persons within the general public. Based on this advice, the Chair on his own initiative stood down from the committee and was replaced as a member and as Chair by a member of the same political party.[121]

Background and development

The 1895 standing orders required that a notice of motion for the appointment of a select committee should include the names of members to serve and that the member moving the motion must be a proposed member of the committee.[122]

The 2004 standing order does not contain either of these stipulations. The provisions of SO 210(2) to (6) were first adopted in the 1997 resolution appointing the first general purpose standing committees.[123] The resolution provided for committee members to be nominated by their party group in writing to the Clerk within seven days of the resolution. If consensus could not be reached through this process, the membership was to be determined by the House. In most cases, a motion has been agreed to requiring that the member be chosen by ballot, rather than being appointed by the House. The procedure for a ballot is currently set out in SO 135 and was previously contained in 1856 SO 48 and 1895 SO 236. The provisions of SO 210(2) to (6) are similar to Australian Senate SO 22A(2).

SO 46 of 1856 and SO 232 of 1895 provided that no select committee was to consist of less than 5 or more than 10 members. No such provision was carried over to the 2004 standing orders: 210(1) states that the composition of each committee is to be determined by the House in the resolution appointing the committee.

Both SO 50 of 1856 and SO 239 of 1895 also provided for members to be discharged from a committee; this provision has been carried over under current SO 210(7).

Standing order 210(8) and (9) also originate from 1856 SO 45 and 1895 SO 233. Under the 1856 and 1895 standing orders, it was not compulsory for the President or Chairman

121 State Crown Solicitor's Office advice, *Participation by Hon R Borsak in Select Committee on Orica chemical leak*, 18 November 2011, p 5, and *Minutes,* NSW Legislative Council, 22 November 2011, p 596.

122 1895, SO 235. See, for example, *Minutes*, NSW Legislative Council, 5 November 1896, p 212; 5 August 1897, p 106.

123 *Minutes*, NSW Legislative Council, 7 May 1997, p 678.

of Committees to serve on a select committee, although 1895 SO 234 provided that the President was to be an ex officio member of the sessional Standing Orders and Library committees. The 2004 standing order states that the President cannot serve on a committee other than one of which the President is an ex officio member, such as the Procedure Committee, while the Deputy President may decline to serve on a committee. SO 210(8) and (9) are very similar to Australian Senate SO 27(3) and (4).

SO 210(10) stems from 1895 SO 238, which states that no member shall sit on a committee if they are pecuniarily interested in an inquiry the committee is conducting.

The variation of SO 210(10) by sessional order was made after terms of reference were referred to the Standing Committee on State Development for an inquiry into the agriculture industry in New South Wales in June 2007. The Committee Chair had interests in the citrus industry, raising concerns that he could not participate in the inquiry. To ensure the Chair could participate, a sessional order was therefore adopted on 28 June 2007 that varied SO 210(10) to provide that no member can take part in a committee inquiry if they have a *direct* pecuniary interest, 'unless it is in common with the general public, or a class of persons within the general public, or it is on a matter of state policy'.[124] This sessional order has been readopted each session since 2007.[125]

211. Chair and Deputy Chair

(1) Chairs and Deputy Chairs of Committees are to be appointed or elected by the committee in accordance with the resolution of the House appointing the committee.

(2) The member nominated as Deputy Chair is to act as Chair when the Chair is absent from a meeting.

(3) In the absence of both the Chair and Deputy Chair from a meeting of a committee, a member of the committee is to be elected by the members present to act as Chair for that meeting of the committee.

(4) The Chair, Deputy Chair or other member acting as Chair at a meeting of a committee has a deliberative vote and, in the event of an equality of votes, a casting vote.

Development summary		
1856	Standing order 52	Electing Chairman
1870	Standing order 64	Electing Chairman
1895	Standing order 242	Chairman
1988-2003	Resolution	Standing committees
2003	Sessional order 211	Chair and Deputy Chair
2004	Standing order 211	Chair and Deputy Chair

124 *Minutes*, NSW Legislative Council, 28 June 2007, p 193.

125 *Minutes*, NSW Legislative Council, 9 May 2011, p 73; 9 September 2014, p 9; 6 May 2015, p 58.

This standing order explains how Chairs and Deputy Chairs are appointed or elected to committees and their roles, including the use of their casting vote.

Operation

The Chair and Deputy Chair are elected at the first meeting of a committee unless the resolution of the House appointing the committee provides otherwise (see SO 213).[126]

When elections are required, such as when the House has nominated the Chair but not the Deputy Chair[127] or when the resolution has made no reference to either the Chair or the Deputy Chair,[128] at the first meeting of the committee the Clerk conducts the election for the Chair, and the Chair conducts the election for the Deputy Chair.

The procedure for electing a Chair conforms with procedures for electing the President in the House under SO 12.

The method for removing a Chair depends on the process by which the Chair was appointed. If the committee elected the Chair, the committee may vote to remove and replace the Chair, or the House can remove or replace the Chair. Where the Chair was nominated by the Leader of the Government, as occurs with the subject standing committees, the Chair can be removed or replaced by the Leader of the Government, or by the House. Where a Chair was appointed by resolution of the House, only the House can remove or replace the Chair.

The Deputy Chair acts as Chair when the Chair is absent from a meeting and assumes all the authority of the Chair (SO 211(2)). This provision is intended to cover situations where the Chair is unexpectedly absent. If the position of Chair is vacated permanently the committee must either elect a new Chair at its next meeting, or the Chair is to be replaced under the provisions of the resolution establishing the committee.

In the temporary absence of both the Chair and Deputy Chair from a meeting, a member of the committee is elected to act as Chair for that meeting only (SO 211(3)). For example, during one hearing the Chair of the committee was substituted by another member, leading the committee to elect, by ballot, a member to act as Chair for the duration of the hearing.[129] In another instance, elections for the position of Chair were conducted at three

126 Resolutions of the House establishing committees have nominated the Chair and Deputy Chair (for example, select committee on the leasing of electricity infrastructure; *Minutes*, NSW Legislative Council, 6 May 2015, pp 75-81), or have provided that the Chair and Deputy Chair be nominated by the Leader of the Government and the Leader of the Opposition respectively in writing to the Clerk (for example, resolution establishing the standing committees; *Minutes*, NSW Legislative Council, 6 May 2015, pp 62-65).

127 Resolution establishing the Joint Select Committee on Companion Animal Breeding Practices in New South Wales, *Minutes*, NSW Legislative Council, 13 May 2015, pp 99-102.

128 Resolution establishing the general purpose standing committees, *Minutes*, NSW Legislative Council, 6 May 2015, pp 65-68.

129 General Purpose Standing Committee No. 2, NSW Legislative Council, *Budget estimates 2005-2006* (2006), pp 14-15.

consecutive meetings when the Chair of a committee was unable to attend but could not be replaced by the Deputy Chair who had been substituted for the duration of the inquiry.[130]

The Chair, Deputy Chair or other member acting as Chair at a meeting has a deliberative vote and, in the event of an equality of votes, a casting vote (SO 211(4)).

Background and development

The provisions of SO 211 are based on 1856 SO 52 and then 1895 SO 242, which provided that, in the absence of the Chair, members present should elect another member to act as Chair. 1895 SO 242 also provided that the Chair be elected as the committee's first item of business and that the Chair have only a casting vote.

The 1988 resolution establishing the first standing committees modified and introduced new provisions relating to the Chair and Deputy Chair as follows:

- to include the appointment of Deputy Chairs for the first time
- to provide for the Leader of the Government to nominate the Chair of each subject standing committee and for the Leader of the Opposition to nominate the Deputy Chair of each standing committee, and for the member nominated as Deputy Chair to act as Chair when the Chair was absent
- for the Chair, Deputy Chair or other member acting as Chair to have a deliberative vote and, in the event of an equality of votes, a casting vote.[131]

SO 211(1) is a general provision which codifies practice followed since 1988.

SO 211(2) and (3) readopt provisions contained in 1895 SO 242 in amended terms.

SO 211(4) is consistent with the 1988 resolution which modified 1895 SO 242 to provide that the Chair, Deputy Chair or member acting as Chair have a deliberative and a casting vote.

212. PRIORITY OF REFERENCES

The priority to be accorded to a reference received by a committee may be determined by the Chair of the committee, unless the committee decides otherwise.

Development summary		
1988-2003	Resolution	Standing Committees
1997-2003	Resolution	General Purpose Standing Committees
2003	Sessional order 212	Priority of references
2004	Standing order 212	Priority of references

130 General Purpose Standing Committee No. 4, NSW Legislative Council, *Pacific Highway upgrades interim report Ewingsdale – Tintenbar and Ballina – Woodburn* (2005), pp 168-169, 199 and 215.

131 *Minutes*, NSW Legislative Council, 9 June 1988, p 183.

The purpose of the standing order is to authorise a Committee Chair to determine the priority of inquiries, while enabling the committee to exercise its authority over this decision, should it choose to do so.

Operation

If a committee has more than one inquiry running concurrently, the Chair determines the priority of references in consultation with the committee, taking into account factors such as whether the House has ordered the committee to report by a certain date. The priority accorded to each reference is implicit in the timeline adopted by the committee at the start of each inquiry, which may be amended by resolution of the committee at any time, although the committee would need to seek the agreement of the House, by notice of motion, if the committee wished to change a reporting date ordered by the House.

For example, in June 2015, GPSC No. 3 adopted terms of reference for an inquiry into registered nurses in NSW nursing homes, after another inquiry into reparations for the Stolen Generations in NSW was referred to it by the House earlier that same day. Neither terms of reference included a reporting date. The committee resolved that the inquiry into reparations for the Stolen Generations take place after the inquiry into registered nurses in nursing homes, and adopted an inquiry timeline to reflect this decision.

Under SO 182, in keeping with the principle that the House determines the powers of its committees and the scope of any inquiries they undertake, the House may give an instruction to a select or standing committee to extend or restrict its terms of reference, including determining the commencement of an inquiry. In 2005, the House gave an instruction to the Standing Committee on Social Issues that it not commence its inquiry into public disturbances in Macquarie Fields until the conclusion of certain reviews.[132] An instruction to alter the terms of a reference of a joint committee must be agreed to by both Houses.

Background and development

This provision was first adopted in the 1988 resolution appointing the first subject standing committees. Initially, it was solely the power of the Chair to determine the priority of references.[133] This was changed in 2003 to the current wording where the Chair is to determine the priority unless the committee decides otherwise.[134]

132 *Minutes*, NSW Legislative Council, 23 March 2005, pp 1297-1298 (Inquiry into public disturbances in Macquarie Fields).

133 *Minutes*, NSW Legislative Council, 9 June 1988, p 184.

134 *Minutes*, NSW Legislative Council, 3 July 2003, p 231.

213. FIRST MEETING

(1) The Clerk is to fix the time and place for the first meeting of each committee in such a manner as the Clerk thinks fit.

(2) At the first meeting, before proceeding to any other business the Chair and Deputy Chair are to be elected, unless the resolution of the House appointing the committee provides otherwise.

Development summary		
1856	Standing order 52	Electing a Chairman
1859	Standing order 61	First meetings
1870	Standing order 61 Standing order 64	First meetings Electing a Chairman
1895	Standing order 240 Standing order 242	First meeting Chairman
2003	Sessional order 213	First meeting
2004	Standing order 213	First meeting

This standing order sets out the procedures for calling the first meeting of a new committee and for the election of the Chair and Deputy Chair, if required. The standing order requires the Clerk to call the first meeting of each committee. While the calling of meetings is usually the prerogative of the Committee Chair, the arrangements for the first meeting of a new committee are made by the Clerk because, in many cases, there is no Committee Chair until so elected at the first meeting.

Operation

While the standing order requires the Clerk of the Parliaments to call the first meeting of a committee and conduct the election of the Chair, in practice these responsibilities are delegated to the Clerk of the committee.

Under SO 213(1), the Clerk will suggest a time for holding the first meeting, endeavouring to ensure that it is convenient for as many members as possible. If a Chair has been appointed by the House in the resolution establishing the committee, the Clerk will liaise with the Chair to determine when the meeting should be held. This applies to any committee where the resolution appointing the committee specifies that the Chair and Deputy Chair are nominated by the Leaders of the Government and Opposition respectively (e.g. the subject standing committees).

If a Chair and Deputy Chair have not been appointed in the resolution establishing the committee, SO 213(2) requires the Clerk to conduct the election for the position of Chair as the first item of business. This reflects practice in the House, where the Clerk of the Parliaments acts as Chair of the House for the election of the President (SO 12(1)).

The Chair is elected following nominations being called by the Clerk. A member may nominate themselves[135] or may decline a nomination.[136] A member may also speak in support of his or her nomination.[137]

If only one nomination is received, the Clerk declares the nominee elected.[138]

If more than one nomination is received, a ballot is conducted, consistent with SO 13 regarding the election of the President. Ballot papers are distributed to each member, on which they write the name of their preferred candidate. All members present must vote, including members nominated for the position of Chair. The ballot papers are deposited in a ballot box and counted by the Clerk, who then declares the result.

If two members are nominated, the member with the greatest number of votes is elected Chair.[139] If three or more members are nominated, the member who has the greatest number of votes is elected, as long as that member also has an absolute majority of the votes of the members present (that is, more than one half of the votes). If no member has an absolute majority, then the name of the candidate with the fewest votes is withdrawn and a fresh ballot is conducted. This process is repeated until one candidate is elected with an absolute majority. For example, in the 1999 election for Chair of GPSC No. 3, after the three nominated members had addressed the committee in support of their nomination, the first ballot resulted in two members receiving three votes each and the other member receiving one vote. The name of the candidate with only one vote was withdrawn and a fresh ballot conducted which resulted in the candidate receiving four of the seven votes being declared elected.[140]

If there is an equality of votes, the ballot is conducted again. Different colour ballot papers are used to distinguish between different rounds of voting. If there is an equality of votes again, the Clerk withdraws by lot the name of one candidate, and the Clerk declares that candidate withdrawn from the election. The remaining candidate is declared elected.[141]

135 See, for example, *Minutes No. 1,* General Purpose Standing Committee No. 2, NSW Legislative Council (27 May 2015).

136 See, for example, *Minutes No. 1,* General Purpose Standing Committee No. 2, NSW Legislative Council (27 May 2015).

137 See, for example, General Purpose Standing Committee No. 3, NSW Legislative Council, *Report on Budget Estimates 1999-2000* (1999), pp 1.1-1.2.

138 See, for example, *Minutes No. 1,* General Purpose Standing Committee No. 1, NSW Legislative Council (28 May 2015).

139 See, for example, *Minutes No. 1,* General Purpose Standing Committee No. 3, NSW Legislative Council (3 June 2015).

140 General Purpose Standing Committee No. 3, NSW Legislative Council, *Report on Budget Estimates 1999-2000* (1999), pp 1.1-1.2.

141 See, for example, *Minutes No. 1,* General Purpose Standing Committee No. 4, NSW Legislative Council (25 August 2003).

The election of the Deputy Chair is conducted by the newly elected Chair in the same manner as the election of the Chair, consistent with SO 15 regarding the election of the Deputy President, except that in the event of an equality of votes the Chair exercises a casting vote.[142]

While SO 213 requires a Chair and Deputy Chair to be elected at the first meeting of a committee, in 2014, members of the inquiry into Newcastle planning deferred the election of the Deputy Chair until its second meeting when all members could be present, given that the resolution establishing the committee had already appointed the Chair.[143]

Background and development

The 1856 standing orders initially made no mention of how the first meeting of a select committee was to be called. In 1857, the Standing Orders Committee reported on whether committees had the power to hold their first meetings without obtaining an order from the House.[144] It recommended that the standing orders be amended to state that committees should be able to set their first meeting without any specific authority from the House.[145] In 1859, the House adopted this recommendation and amended the standing orders.[146]

This provision continued until the adoption in 1895 of SO 240, which provided that the date and time for the first meeting be at the direction of the mover of the motion to establish the select committee, or, in the absence of such direction, by the President. However, until the changes brought about by the 1988 election, it was practice for the Clerk to arrange the first meeting of the committee in consultation with the mover of the motion, and to notify members of the time and place for the first meeting.

The provision under SO 213(1) for the Clerk to call the first meeting of a committee was first adopted in 2003. Although the Australian Senate and Legislative Assembly standing orders also provide for the secretary or Clerk to set the first meeting, in those standing orders the secretary or Clerk only does so if the mover is not a member of the committee.

Since 1856, the Chair of a committee has been elected at the first meeting under 1856 SO 52 and later 1895 SO 242. Deputy Chairs were first provided for in 1988, when their role was established by the resolution appointing the subject standing committees. This resolution provided that Deputy Chairs be nominated by the Leader of the Opposition.[147]

142 See, for example, *Minutes No. 1,* General Purpose Standing Committee No. 4, NSW Legislative Council (25 August 2003).

143 Select Committee on the Planning Process in Newcastle and the Broader Hunter Region, NSW Legislative Council, *Inquiry into the planning process in Newcastle and the broader Hunter Region* (2014), pp 133-135.

144 *Minutes*, NSW Legislative Council, 30 October 1857, p 18.

145 *Minutes*, NSW Legislative Council, 13 November 1857, p 22.

146 *Sydney Morning Herald*, 15 December 1859, p 3. Note: This became the new standing order 61.

147 *Minutes*, NSW Legislative Council, 9 June 1988, p 183.

Sessional order 213 adopted in 2003 as a precursor to the new standing order did not include a provision for the election of the Chair and Deputy Chair at the first meeting.[148] Following a recommendation of the Procedure Committee in its second report on the proposed new standing orders,[149] SO 213(2) was added to provide for the election of the Chair and Deputy Chair.[150]

The 2004 standing order made an additional change to require that Chairs and Deputy Chairs be appointed at the first meeting if they have not already been appointed by the resolution establishing the committee.

214. QUORUM

(1) Unless otherwise ordered, the quorum of a committee is three members.

(2) If, after 15 minutes from the time appointed for the meeting of a committee, a quorum is not present, the meeting is adjourned and the Chair of the committee will fix the next meeting of the committee.

(3) The clerk of the committee is to record the names of the members present.

Development summary		
1856	Standing order 51	Quorum on Committees
1870	Standing order 63	Quorum of Committees
1895	Standing order 241	Quorum
1988-2003	Resolution	Standing Committees
1997-2003	Resolution	General Purpose Standing Committees
2003	Sessional order 214	Quorum
2004	Standing order 214	Quorum

SO 214 is intended to ensure that a committee does not meet and transact business without a quorum, which is three members unless otherwise ordered. In some cases, the resolution establishing the committee is more specific about the composition of the quorum, such as for the subject standing committees where the resolution specifies that the quorum is to be comprised of two government members and one non-government member.

Operation

In accordance with SO 214, the quorum for the subject standing committees and portfolio committees is three members. However, the resolution establishing the subject standing committees specifies that the quorum must comprise two government

148 *Minutes*, NSW Legislative Council, 14 October 2003, p 324.

149 Procedure Committee, *NSW Legislative Council*, 'Report on Proposed New Standing Rules and Orders', Second Report, Report No. 2 (May 2004), p iii.

150 *Minutes*, NSW Legislative Council, 5 May 2004, p 676.

members and one non-government member. See SO 217 for a discussion of examples of subject standing committees appointing sub-committees to meet quorum requirements.

The quorum for a select committee is usually specified in the resolution appointing the committee and in recent years has commonly been any four members of the committee. For example, of the 14 Legislative Council select committees established during the 55th Parliament (2011-2015), ten specified a quorum of four of the seven members of the committee. Of the remaining four committees, two had a quorum of three of six committee members,[151] one had a quorum of three of seven committee members,[152] and one had a quorum of three of eight committee members.[153]

Unless otherwise ordered, the quorum for joint standing or statutory committees is provided by SO 220, which specifies that at least three members of the Council must be present at any meeting. In the case of joint select committees, the resolution establishing the committee usually specifies that to form a quorum at least one member of each House is to be present at all times. As with Legislative Council select committees, the quorum requirements for joint select committees are usually specified in the resolution appointing the committee.[154]

The resolutions establishing the portfolio committees and the subject standing committees provide that substitute members as well as any members participating electronically, such as by teleconference, have full voting rights and are counted for the purposes of any quorum or division. In recent years, this provision has also been contained in resolutions establishing select committees.[155] However, under SO 218, participating members cannot be counted for the purposes of any quorum or division.

SO 214(2) requires a meeting to be adjourned if a quorum is not present after 15 minutes from the time appointed for the meeting. The adjournment of a committee in these circumstances has not occurred in recent years. Prior to the establishment of the modern committee system it was not uncommon for committee meetings to be adjourned due to a lack of a quorum.[156] SO 214(3) requires the Clerk to record the names of members present at each meeting. Further, SO 234(5) requires the minutes to be included in the

151 Select Committee on Ministerial Propriety in New South Wales, Select Committee on the Planning Process in Newcastle and the Broader Hunter Region.

152 Select Committee on the Impact of Gambling.

153 Select Committee on the Closure of Public Schools in New South Wales.

154 For example, the quorum for the Joint Select Committee on Companion Animal Breeding Practices in New South Wales was five members of the committee, provided that at least one member of each House was present at all times. *Minutes*, NSW Legislative Council, 13 May 2015, pp 99-102.

155 For example, Select Committee on the Legislative Council Committee System, NSW Legislative Council, *Minutes* (24 June 2015), pp 218-219; Select Committee on the Kooragang Island Orica Chemical Leak, NSW Legislative Council, *Minutes* (25 August 2011), pp 374-376.

156 For example, in November 1919, a meeting of the newly appointed Select Committee on Land Development under Western Lands Commission Administration lapsed for want of a quorum. *Minutes*, NSW Legislative Council, 25 November 1919, p 136.

committee's report to the House and the Clerk to the committee to record the names of the members attending each meeting.

Background and development

Since 1856, the quorum for all committees has been three members (1856 SO 51, 1895 SO 241). However, the quorum requirements were modified in the resolutions establishing the subject standing committees to introduce requirements around the composition of the quorum. When the first standing committees were established in 1988, the resolution specified that the quorum was to be comprised of three members, of whom two were to be government members.[157] In other words, a meeting could proceed with three government members and no non-government members. Since 1999, the resolution establishing the subject standing committees has specified that the quorum is to comprise two government members and one non-government member.[158] However, there is no such requirement in the resolution establishing portfolio committees, and therefore the quorum is any three members of the committee as provided for by SO 220.

The provision in the 2004 standing orders regarding the absence of a quorum (SO 214(2)) was introduced in SO 244 of 1895.[159] The requirement for the Clerk to record the names of the members present (SO 214(3)) was also introduced in 1895, by SO 243. However, 1895 SO 243 did not specify that the Clerk was to record the names of members if a quorum had not been formed.

215. Loss of a quorum during a meeting

If, during the sitting of a committee, the loss of a quorum is brought to the attention of the Chair by another committee member, after ten minutes has elapsed the Chair will suspend the proceedings of the committee to a later hour. If a quorum is not then present, the committee will be adjourned to another day, to be fixed by the Chair.

Development summary		
1856	Standing order 51	Quorum on Committees
1870	Standing order 63	Quorum on Committees
1881	Standing order 63	Quorum on Committees
1895	Standing order 245	If no Quorum during Sitting
1922	Standing order 245	If no Quorum during Sitting
2003	Sessional order 215	Loss of a quorum during meeting
2004	Standing order 215	Loss of a quorum during meeting

157 See, for example, the resolution establishing the Social Issues and State Development Committees; *Minutes*, NSW Legislative Council, 9 June 1988, pp 182-186; and the resolution establishing the Law and Justice Committee, *Minutes*, NSW Legislative Council, 24 May 1995, pp 36-42.

158 *Minutes*, NSW Legislative Council, 25 May 1999, pp 76-82.

159 1895 SO 244.

This standing order is intended to ensure that a quorum is maintained during a meeting of the committee and sets out the procedure for dealing with the loss of a quorum.

Operation

SO 215 outlines the procedure to apply when there is a loss of a quorum. If a member brings the loss of a quorum to the attention of the Chair, and after 10 minutes a quorum is not formed, the Chair is required to suspend the committee's proceedings. During the intervening 10 minutes the committee can continue to meet and transact business, as if a quorum was present, although it would be advisable to avoid dealing with any controversial matters during this period. It is particularly important for a quorum to be maintained during public hearings of the committee, to ensure that there is no doubt as to whether any evidence given by witnesses is protected by parliamentary privilege.[160]

As with the practice in the House under SO 30, it is not the responsibility of the Chair (or the Clerk) to call attention to the absence of a quorum. Maintaining a quorum is the responsibility of the committee collectively.

There have not been any occurrences in recent years where the want of a quorum during a meeting has been brought to the attention of the Chair. When members leave meetings for short periods of time, in particular during hearings that last for many hours, there is no obligation on members during those periods to bring this to the attention of the Chair.

Background and development

The origin of this standing order stems from a debate in the House in 1881 regarding whether the Clerk of the committee had the power to call attention to the loss of a quorum. On 23 February 1881, Mr Joseph Docker raised this issue as a matter of privilege following a meeting of the Refreshment Room Committee where the Clerk had drawn the Chair's attention to the absence of a quorum. The Chair suspended the proceedings of the committee and a discussion ensued as to the power of the Clerk to interfere with the conduct of the committee's business. The Clerk, in justification of his conduct, read an extract from *Erskine May* citing a rule empowering the Clerk to this effect. Mr Docker argued that this was a serious power to afford the committee Clerk, as no such power could be exercised in the House itself.[161]

The following day, on the motion of Mr Docker, the House referred the issue to the Standing Orders Committee.[162] The committee recommended that words be inserted at the end of 1870 SO 63 to provide that, if at any time during the sitting of a select committee a quorum was not present, the Clerk of the committee would call the attention of the Chair to the fact. The Chair would then suspend the proceedings of the committee

160 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, pp 553-554.
161 *Hansard*, NSW Legislative Council, 23 February 1881, pp 550-551 (Joseph Docker).
162 *Minutes*, NSW Legislative Council, 24 February 1881, p 32.

until a quorum was present, or adjourn the committee to a future day.[163] The amended standing order was agreed to without amendment, adopted by the House and sent to the Governor for approval.[164]

1895 SO 245 modified this provision to state that if a quorum was not present during the sitting of the committee the Chair would suspend proceedings until a stated hour, and if a quorum was not then present, proceedings would be set down for a future day.

This provision was maintained until amended in 1922.[165] The amendment provided, first, that if a quorum was still not present after the time set following the loss of the quorum, the Chair would adjourn the committee until a later time instead of a future day, and second, the provision for the Clerk of the committee to call attention to the loss of a quorum was omitted. The Leader of the Government in the Legislative Council, in moving the amendment, stated:

> It is rather an invidious thing to put on the Clerk of a select committee the duty of calling attention when no quorum is present just as if it would be if we put on the Clerk sitting at the table of the House the invidious task of calling attention to the state of the Chamber. As hon. members know that state is called attention to by a member of the House. On some occasions the Clerk of a select committee has felt it to be his duty to call attention to the want of a quorum, when a member may have been away only for a few minutes. A member may be called out to answer the telephone. If the Clerk calls attention to the fact that only two members of the committee are present the whole of the proceedings are suspended. The new standing order gives discretionary power to the chairman. He takes the responsibility and he has to answer for his responsibility on the floor of the House should he be called upon to do so.[166]

The procedures in the 2004 standing order were initially introduced in the 2003 resolutions appointing the subject standing[167] and general purpose standing committees.[168]

The 2004 procedure is similar to Australian Senate SO 29(2), the only difference being that 15 minutes is provided for a quorum to be re-established and if a quorum is not then present the Clerk is to convene a meeting for another time.

216. MEMBER ATTENDANCE

(1) A member must seek leave of the committee in order to be absent from four or more consecutive committee meetings.

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163 *Minutes*, NSW Legislative Council, 9 March 1881, p 35.
164 *Minutes*, NSW Legislative Council, 16 March 1881, p 43.
165 *Minutes*, NSW Legislative Council, 3 August 1922, p 37.
166 *Hansard*, NSW Legislative Council, 3 August 1922, p 796 (Joseph Carruthers).
167 *Minutes*, NSW Legislative Council, 21 May 2003, p 101.
168 *Minutes*, NSW Legislative Council, 3 July 2003, p 230. General purpose standing committees were renamed 'portfolio committees' on 7 March 2017.

(2) If a member fails to attend four consecutive meetings of a committee without leave of the committee, the absence is to be reported by the Chair to the House.

(3) If the member fails to attend the next meeting without leave of the committee, the Chair is to again inform the House. This procedure is to continue until the member attends a committee meeting.

(4) These requirements do not apply to those committees for which the House has made provision for substitute members.

Development summary		
1991-2003	Resolution	Standing Committees
2003	Sessional order 216	Member attendance
2004	Standing order 216	Members attendance

SO 216 outlines the action to be taken if a member of a committee is absent from four or more consecutive meetings. The procedure does not apply in circumstances where the House has made provision for substitute members (SO 216(4)). A member granted leave of absence by the House under SO 63 would also be exempt from the provisions of SO 216(1) to (3).

Operation

The provisions under SO 216 are rarely required to be invoked. One instance occurred in 2007, during the State Development Committee's inquiry into aspects of agriculture, when a member was unable to attend a number of committee meetings. After being noted as an apology for two consecutive meetings the member wrote to the committee seeking leave of absence from three further meetings for medical reasons. At its next meeting the committee granted the member leave of absence under SO 216.[169]

There have been no instances of a member's absence from committee meetings being reported to the House.

SO 216 only applies if a substitute member is not appointed in place of the absent member. It is commonplace for substitute members to be appointed in place of a substantive member who is unable to attend a meeting, or in circumstances where the substitute member has a particular interest in the inquiry currently before a committee. In 2015, the provision for substitute members was extended from the general purpose standing committees[170] and most select committees to include all subject standing committees, making it even less likely for this standing order to be activated.

169 Standing Committee on State Development, NSW Legislative Council, *Aspects of agriculture* (2007), p 154.

170 General purpose standing committees were renamed 'portfolio committees' on 7 March 2017.

Background and development

The provisions of SO 216 were first adopted in the resolution appointing standing committees in 1991, which provided that 'Where a Member fails to attend four consecutive meetings of a Standing Committee such absence shall be reported to the House'.[171]

This procedure was broadened in the 2003 resolution appointing the subject standing committees. The resolution included the provisions of SO 216(1) and (3) and included a provision that an absent member must, at the earliest opportunity, explain to the House their reason for non-attendance.[172]

When SO 216 was adopted in 2004, the provision that an absent member must, at the earliest opportunity, explain to the House their reason for non-attendance was omitted. The new standing order also included a new provision that the requirements under SO 216(1) to (3) do not apply to those committees for which the House has made provision for substitute members.

Since the standing order was adopted, the substitution provisions have been extended from the general purpose standing committees to also cover subject standing[173] and select committees.[174]

217. SUB-COMMITTEES

(1) Where the resolution appointing a committee makes provision for sub-committees, a committee has power to appoint sub-committees consisting of two or more of its members:

(a) to assist the committee in the exercise of any of its functions, or

(b) to investigate and report on any matter referred to the committee.

(2) A sub-committee has the same powers as the committee appointing it.

(3) The committee is to appoint one of its members to act as Chair of any sub-committee and the member appointed has a deliberative vote and, in the event of an equality of votes, a casting vote.

(4) Unless otherwise ordered, the quorum of a sub-committee is two, of whom one must be a government member and one a non-government member.

(5) A sub-committee is to report to the committee on any matter referred to it by the committee. The committee may adopt the report, reject the report, or adopt the report with variations.

(6) A sub-committee is to conduct its meetings and business in the same manner as the committee appointing it.

171 *Minutes*, NSW Legislative Council, 2 July 1991, p 25.

172 *Minutes*, NSW Legislative Council, 21 May 2003, p 102.

173 *Minutes*, NSW Legislative Council, 6 May 2015, p 64.

174 *Minutes*, NSW Legislative Council, 6 May 2015, pp 75-81. Note: The first instance of this occurring was for the Select Committee on the leasing of electricity infrastructure.

Development summary		
1991-2003	Resolution	Standing Committees
2003	Resolution	Standing Committees
2003	Sessional order 217	Sub-committees
2004	Standing order 217	Sub-committees

Standing order 217 provides a committee with the flexibility to appoint a sub-committee with the same powers. A sub-committee may be appointed where a committee would otherwise be unable to form a quorum and would therefore be unable to meet and transact business (SOs 215 and 216).

Operation

When a committee resolves to appoint a sub-committee, the resolution identifies the members of the sub-committee and names a committee member to act as Chair (SO 217(3)). Where the Committee Chair is serving on the sub-committee, it is usual practice that they be appointed to Chair the sub-committee. The Chair of a sub-committee has a deliberative and casting vote.

Since 1991, the resolutions establishing the subject standing committees have made provision for the appointment of sub-committees.

On a small number of occasions, the subject standing committees have appointed sub-committees when unable to meet the quorum requirements of a committee of two government members and one non-government member. For example, during the inquiry into regional aviation services by the State Development Committee, exceptional circumstances unavoidably prevented two government members from attending the first day of the committee's three-day regional site visit. The committee held a meeting on the morning of departure, with the two members who could not attend in person participating via teleconference. The committee appointed a sub-committee of four members, comprising one government and three non-government members, and appointed the Chair of the committee to chair the sub-committee.[175] At a subsequent meeting, the committee resolved to adopt the report of the sub-committee, which comprised the minutes of the sub-committee meeting and the transcript of the hearing.[176]

The resolutions appointing the general purpose standing committees,[177] on the other hand, have never made provision for the appointment of sub-committees. Sub-committees have nonetheless been appointed following a resolution of the House. For example, in May 2005, the House resolved that GPSC No. 2 be authorised to appoint sub-committees for the purpose of its inquiry into post school disability

175 Standing Committee on State Development, NSW Legislative Council, *Inquiry into regional aviation services* (2014), p 142.

176 Standing Committee on State Development, NSW Legislative Council, *Inquiry into regional aviation services* (2014), p 146.

177 General purpose standing committees were renamed 'portfolio committees' on 7 March 2017.

programs.[178] This action was taken to allow the committee to form two sub-committees, one of which conducted a site visit while the other simultaneously conducted a small group discussion.[179] The Chair of the committee was appointed as Chair of one of the sub-committees, as per usual practice, while another member was elected as Chair of the second sub-committee.[180]The committee subsequently adopted the reports of both sub-committees, which comprised the minutes of the site visit and the consultation.[181]

Background and development

Although there was no express provision for sub-committees under the 1895 standing orders, there are examples of committees being proposed with the power to appoint sub-committees.

On 11 July 1956, the Council received a message from the Assembly proposing a joint committee consisting of eight members of the Legislative Assembly and four members of the Legislative Council to review aspects of the working of the Commonwealth of Australia Constitution.[182] On 19 July, the Council agreed to appoint the committee, appointed its four members of the committee, resolved that the Attorney General, Minister of Justice and Vice-President of the Executive Council be the Chair of the committee as proposed by the Legislative Assembly and agreed, for that occasion only, to waive its claim to equal representation on the joint committee and that its action in so doing should not be drawn into a precedent.[183] The appointment of the committee included a provision that any six members of the joint committee should constitute a quorum of the committee and any two members of a sub-committee should constitute a quorum of the sub-committee.

In October 1984, the Opposition moved, on notice, that four standing committees, on Resources; Health, Welfare and Education; Law and Justice; and Statutory Bodies, be appointed.[184] In speaking to the motion, the mover stated that there was no doubt that had his motion not been on the Notice Paper for that day, the Leader of the Government would not have made the statement of his intention to establish a select committee on standing committees, the subsequent appointment of which would commence the establishment of the current committee system in the Legislative Council.[185]

178 *Minutes*, NSW Legislative Council, 25 May 2005, p 1396.

179 General Purpose Standing Committee No. 2, NSW Legislative Council, *Inquiry into changes to post school programs for young adults with a disability: Getting a fair go* (2005), p 2.

180 General Purpose Standing Committee No. 2, NSW Legislative Council, *Inquiry into changes to post school programs for young adults with a disability: Getting a fair go* (2005), p 143.

181 General Purpose Standing Committee No. 2, NSW Legislative Council, *Inquiry into changes to post school programs for young adults with a disability: Getting a fair go* (2005), p 150.

182 *Minutes*, NSW Legislative Council, 11 July 1956, pp 45-46.

183 *Minutes*, NSW Legislative Council, 19 July 1956, p 66.

184 *Minutes*, NSW Legislative Council, 11 October 1984, pp 134-137.

185 *Minutes,* NSW Legislative Council, 11 October 1984, pp 134-137; *Hansard*, NSW Legislative Council, 11 October 1984, pp 1762.

The Opposition's motion included a power for the proposed standing committees to appoint sub-committees consisting of three or more of its members; to refer to a sub-committee any matters which the committee was empowered to consider; and to provide that the quorum of a sub-committee was a majority of the members appointed to the sub-committee. The motion also proposed that sub-committees have the power to send for and examine persons, papers and records, to adjourn from place to place, and to make visits of inspection within the state of New South Wales and other states and territories of Australia. Debate on the motion was interrupted for adjournment, and subsequently lapsed on prorogation.

In 1986, the Select Committee on Standing Committees recommended that, if circumstances dictate, committees should have the power to form sub-committees, but stressed that it did not encourage this practice. The committee noted that sub-committees could provide flexibility to committees and that other Houses, such as the Australian Senate and Victorian Legislative Council, made use of the process.[186]

The 1991 resolution appointing subject standing committees included the provision to form a sub-committee in similar terms as SO 217(1) and (4) and identical terms as SO 217(3), (5) and (6).[187]

Paragraph 1 of the 1991 resolution stated that a sub-committee should consist of three or more members.[188] In the resolution appointing the standing committees in May 2003, this provision was amended to the current requirement of two or more members.[189] This change followed on from the number of members on standing committees being reduced to six members in 1999.

Standing order 217(2) was included for the first time in the 2003 resolution appointing the subject standing committees.[190]

The 1991 resolution stated that a quorum of a sub-committee was to be a majority of the members appointed to the sub-committee. This provision was amended in 1999 to provide that a quorum be two members.[191] The 2003 resolution further amended the provision to provide that one member must be a government member and another must be a non-government member. When SO 217 was adopted in 2004 the provision was further modified to provide that 'Unless otherwise ordered' the quorum be two members, one being a government member and the other a non-government member, thereby providing the House with the flexibility to adopt a different quorum when necessary.

186 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), pp 32-33.
187 *Minutes*, NSW Legislative Council, 2 July 1991, pp 25-26.
188 *Minutes*, NSW Legislative Council, 2 July 1991, p 25.
189 *Minutes*, NSW Legislative Council, 21 May 2003, p 102.
190 *Minutes*, NSW Legislative Council, 21 May 2003, p 102.
191 *Minutes*, NSW Legislative Council, 25 May 1999, p 79.

218. PARTICIPATION BY MEMBERS OF THE HOUSE AND OTHERS

(1) Unless a committee decides otherwise, a member of the House who is not a member of the relevant committee may take part in the public proceedings of a committee and question witnesses but may not vote, move any motion or be counted for the purpose of any quorum or division.

(2) Persons other than members of the House and officers of a committee may attend a public meeting of a committee, but will not attend a private meeting except by express invitation of the committee, and will always be excluded when the committee is deliberating.

Development summary		
1895	Standing order 250 Standing order 251	Admission of Strangers Admission of Members
2003	Sessional order 218	Participation by members of the House and others
2004	Standing order 218	Participation by members of the House and others

Standing order 218 regulates the attendance and participation of members and non-members in the public and private proceedings of a committee. The standing order provides flexibility by allowing members with a particular interest in a portfolio area or issue to attend and take part in relevant hearings, including *in camera* hearings, or meetings. It also allows committees to invite a non-committee member to their private meetings, such as site visits or briefings.

Operation

Committee proceedings can be held in public or in private. Most hearings are conducted in public, but may also be held *in camera*. Only members of the committee and the secretariat are present when the committee deliberates.

Under SO 218(1), if the committee so decides, members who are not members of the committee can be excluded from participating in hearings.

SO 218(2) concerns private meetings of a committee and the circumstances in which a person who is not a member of the House or an officer of the committee can attend such meetings. Under SO 218(2), a person who is not a member or officer of the Legislative Council can only attend a private meeting at the express invitation of the committee, but will be excluded when the committee is deliberating in private. This provision allows the committee to invite experts or key stakeholders to private meetings of the committee.[192]

192 For example: during the GPSC 5 No. inquiry into coal seam gas, Dr John Whitehouse, Partner, Minter Ellison Lawyers and Visiting Fellow, Graduate School of Environment, Macquarie University, provided a private briefing on the legal issues surrounding coal seam gas activities, General Purpose Standing Committee No. 5, NSW Legislative Council, *Coal seam gas*, Report No. 35 (May 2012), p 283. In addition, during this inquiry, Mr Dayne Pratzky, a resident of an area affected by coal seam gas developments, accompanied the committee on an aerial tour of

SO 218 is silent as to whether a member of the House who is not a member of the committee can, with the permission of the committee, attend private meetings of the committee. However, the 2007 and 2011 resolutions appointing the subject standing and general purpose standing committees[193] provided that a non-committee member may take part in the private proceedings of a committee, unless the committee decides otherwise.[194] This provides committees with the flexibility to include non-committee members in their deliberations if desired, but also to exclude a member when appropriate.[195] In 2015, this provision was adopted by way of a sessional order which also varied SO 218(2) to clarify the wording and remove the superfluous statement that members of the public can attend public meetings.[196]

Members who are not members of a committee regularly participate in the annual budget estimates hearings under SO 218(1). In 2015, an issue arose during the budget estimates inquiry as to the allocation of time given to a participating member to ask questions of a witness. While there are no rules about the amount of time that should be allocated to a participating member, convention dictates that a participating member is allocated time by agreement of the committee.[197]

Other instances of the use of SO 218(1) include the Standing Committee on Law and Justice's inquiry into the family response to the murders in Bowraville and the GPSC No. 6 inquiry into local government in New South Wales. These examples have also included non-committee members participating in private meetings, in accordance with the resolution appointing the committee or the sessional order.

In 2014, an interested member participated in the inquiry into the family response to the murders in Bowraville.[198] The participating member attended committee hearings, site visits, roundtable discussions, private meetings and received confidential committee documents, including a copy of the Chair's draft report.[199] The member also attended the private report deliberative meeting.

In 2015, two non-committee members participated in the GPSC No. 6 inquiry into local government in New South Wales.[200] The committee resolved that participating members be provided with unpublished submissions and meeting papers during the

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coal seam gas activity in the surrounding area, General Purpose Standing Committee No. 5, NSW Legislative Council, *Coal seam gas* (2012), p 277.

193 General purpose standing committees were renamed 'portfolio committees' on 7 March 2017.

194 *Minutes*, NSW Legislative Council, 10 May 2007, p 59; 9 May 2011, p 77.

195 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, p 545.

196 *Minutes*, NSW Legislative Council, 6 May 2015, p 60.

197 The Hon Robert Brown MLC, Chair, General Purpose Standing Committee No. 5, NSW Legislative Council, Inquiry into budget estimates 2015-2016, Evidence, 4 September 2015, p 37.

198 *Minutes*, Standing Committee on Law and Justice, NSW Legislative Council, 21 March 2014, Item 5.4.

199 The confidential documents were issued to the member without requiring a resolution from the committee.

200 The terms of reference for the inquiry provided for participating members' travel costs to be covered with the agreement of the committee. This is the first and only time that such a provision has been included in a committee's terms of reference. *Minutes,* NSW Legislative Council, 27 May 2015, pp 131-132.

inquiry.[201] One of the participating members also attended the committee's private report deliberative meeting.[202]

There has been one occasion when a non-committee member has been excluded from participating in a site visit.[203]

Background and development

Standing order 218(1) originates from 1895 SO 251, which provided that any members of the House may be present when a committee is examining witnesses, but shall withdraw when the committee is deliberating, if requested. The current provisions were first included in the 1988 resolution appointing the first subject standing committees.[204] This varied the 1895 standing order to specify that Legislative Council members who are not members of the relevant committee may not vote, move any motion or be counted as part of a quorum or division. It is likely the current wording was partially adopted from the Australian Senate SO 19(8).

SO 218(2) originates from 1895 SO 250, which provided that members of the public may be excluded at the request of any committee member or the Chair when the committee is examining witnesses or deliberating.

219. MEETING OR JOINING WITH OTHER COMMITTEES

A committee or any sub-committee may:

(a) join together with any other committee of the House or the Legislative Assembly to take evidence, deliberate and make joint reports on matters of mutual concern, and

(b) meet with any other State or Commonwealth parliamentary committees to inquire into matters of mutual concern.

Development summary		
1856	Standing orders 84-87	Communications between the two Houses
1870	Standing orders 96-99	Communications between the two Houses
1895	Standing orders 158-161	By Select Committees communicating with each other
2003	Sessional order 219	Meeting or joining with other committees
2004	Standing order 219	Meeting or joining with other committees

201 *Minutes,* General Purpose Standing Committee No. 6, NSW Legislative Council, 27 July 2015, Item 3.3.

202 *Minutes,* General Purpose Standing Committee No. 6, NSW Legislative Council, 22 October 2015, Item 1.

203 General Purpose Standing Committee No. 3, NSW Legislative Council, *Issues relating to the operations and management of the Department of Corrective Services* (2006), pp 155 and 161.

204 *Minutes*, NSW Legislative Council, 9 June 1988, p 184.

This standing order authorises a Council committee or sub-committee to join together with another committee of the Council or the Legislative Assembly and to meet with another state or Commonwealth parliamentary committee to inquire into matters of mutual concern.

Operation

The provision that a Council committee can join with another committee of the Council or the Legislative Assembly, or with a state or Commonwealth parliamentary committee on matters of mutual concern, has been used infrequently. It is more common for a joint committee to be established comprising members of both Houses to inquire into and report on matters of mutual concern (SO 220), or for a committee to meet informally with another committee to discuss matters of common interest.[205]

Until the adoption of SO 219 in 2004, a Council committee could only meet with an Assembly committee by order of the House. Once such an order was made, a message was forwarded to the Assembly with a request that leave be given to a select committee of that House to confer with the select committee of the Council. As the Assembly has no equivalent to SO 219, Assembly committees continue to require a resolution of that House. This occurred in 2014 when the Legislative Council Privileges Committee and the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics conducted concurrent inquiries into the recommendations of ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator.[206] On 30 January 2014, a message was received from the Assembly advising that the Standing Committee on Parliamentary Privilege and Ethics had been granted leave to meet together with the Legislative Council Privileges Committee 'during the current Parliament'.[207] The two committees jointly sought submissions and met to discuss the outcomes of their respective inquiries.[208]

The Privileges Committee (at that time known as the Standing Committee on Parliamentary Privilege and Ethics) also met with the Assembly Privilege and Ethics Committee during the 1995-96 inquiry into the establishment of the draft Code of Conduct for Members, as the resolution of the House establishing the committee

205 For example, in 2015, GPSC No. 4 met with the ACT Legislative Assembly Standing Committee on Health, Ageing, Community and Social Services to discuss the findings of the Council committee's inquiry into the use of cannabis for medical purposes, as part of a similar inquiry that the ACT committee was conducting. *Minutes No. 32,* General Purpose Standing Committee No. 4, NSW Legislative Council (5 February 2015).

206 See Standing Committee on Privileges, NSW Legislative Council, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator* (2014).

207 *Minutes,* NSW Legislative Council, 30 January 2014, pp 2290-2291.

208 Standing Committee on Privileges, NSW Legislative Council, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator* (2014), p 16.

provided for the committee to confer with any similar committee appointed by the Assembly.[209] During the inquiry into the draft Code of Conduct for Members, the committees moved their own resolutions to conduct joint hearings, hold informal meetings and confer on a draft code of conduct.[210]

A Council committee has never met with a committee of another jurisdiction to jointly inquire into a matter.

Background and development

This standing order originates directly from recommendations made in 1986 by the Select Committee on Standing Committees. The committee recognised that there may be times when multiple committees or sub-committees have an interest in the same issue and recommended that committees 'should be given power to form together to take evidence, deliberate and make joint reports'.[211] Further, the committee saw the benefit in facilitating a process where a committee could join with another state or Commonwealth committee on an issue of mutual interest, such as one that relates to intergovernmental affairs. The select committee observed that this 'mechanism was largely unexplored in the Australian context', but could be of value in the future.[212]

These recommendations were implemented in the initial 1988 resolution appointing the first subject standing committees.[213] General purpose standing committees[214] and select committees were not granted such a power until the adoption of the 2004 standing order, which extended the power to all committees.

Prior to the adoption of these provisions, the 1856[215] and 1895[216] standing orders provided that a Council committee could only meet with an Assembly committee by order of the House. Once such an order was made, a message was to be forwarded to the Assembly with a request that leave be given to an Assembly select committee to confer with the select committee of the Council. Once this order had been given, these select committees could confer by word of mouth,[217] unless the Council ordered otherwise. The proceedings of a meeting between select committees were to be reported in writing to the Council, by its own select committee.

209 *Minutes*, NSW Legislative Council, 19 September 1995, p 163; 20 September 1995, p 172.
210 Standing Committee on Parliamentary Privilege and Ethics, NSW Legislative Assembly, *Report on Inquiry into the Establishment of Draft Code of Conduct for Members* (1996), pp 11-12, 14, 18 and 22.
211 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), pp 34.
212 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), pp 33-34.
213 *Minutes*, NSW Legislative Council, 9 June 1988, p 184.
214 General purpose standing committees were renamed 'portfolio committees' on 7 March 2017.
215 1856 SOs 84-87.
216 1895 SOs 158-161.
217 1856 SO 86.

220. JOINT COMMITTEES

(1) A proposal for a joint committee of the House and Legislative Assembly must contain the names of the members of the House appointed to serve on the committee.

(2) Any such proposal agreed to by the House will be forwarded to the Legislative Assembly by message.

(3) The proceedings of a joint committee will be reported to the House by one of the members appointed to serve on the committee.

(4) At least three members of the House must be present at any meeting of a joint committee.

(5) If the House agrees to a proposal from the Legislative Assembly to appoint a joint committee, the House will determine the time and place of the first meeting of the committee.

Development summary		
1856	Standing order 88 Standing order 89 Standing order 90 Standing order 91 Standing order 92 Standing order 93 Standing order 94 Standing order 95	Conferring by Joint Committee Message for appointing Members when names Number of. Time and Place for holding Quorum of such Committee Chairman Report from Committee
1870	Standing order 100 Standing order 101 Standing order 102 Standing order 103 Standing order 104 Standing order 105 Standing order 106 Standing order 107	Conferring by Joint Committee Message for appointing Members when names Number of. Time and Place for holding Quorum of such Committee Chairman Report from Committee
1895	Standing orders 154-157	By Joint Committee
2003	Sessional order 220	Joint committees
2004	Standing order 220	Joint committees

This standing order provides for the establishment of joint standing[218] or select committees comprising members of the Legislative Council and Legislative Assembly. The Assembly has complementary standing orders regarding joint committees.[219]

218 There are two types of joint standing committees: those that are established by statute (e.g. the Committee on the Independent Commission Against Corruption) and those that are not (e.g. the Joint Standing Committee on Electoral Matters).

219 NSW Legislative Assembly, 2006, SOs 319-322.

Operation

Either House can initiate the motion for a joint standing or select committee. When the Council proposes such a committee, the motion must also propose the members of the House to serve on the committee (SO 220(1)).

When the resolution is agreed to, it is forwarded to the Assembly by message (SO 220(2)) informing the Assembly of the Council members of the committee and requesting that the Legislative Assembly agree to a similar resolution and name the time and place for the first meeting.[220] The message from the Assembly in response is reported to the House.[221]

When the Assembly initiates a joint committee, a message is received by the Council advising of the Assembly members appointed to the committee and requesting that the Legislative Council agree to a similar resolution and name the time and place for the first meeting (SO 220(5)).[222]

Once established, joint committees operate under the standing orders of the House in which the motion to establish the committee originated, and are staffed by officers of that House.[223]

The establishment of joint statutory committees may differ from the establishment of other joint standing and joint select committees depending on the provisions of the relevant Act. For example, the Acts requiring the appointment of the committees on Children and Young People and the Independent Commission Against Corruption provide for the committees to have 7 and 11 members respectively.[224] However, both Houses still resolve to appoint the committees.[225]

Membership

Standing order 220(1) requires that a proposal to establish a joint committee include the names of the committee members. In contrast, SO 210 in relation to the appointment of Council committees requires that the membership be determined by the House in accordance with the resolution establishing the committee; that government and opposition members be appointed by the leaders of those parties and crossbench members be nominated by the crossbench, and includes a process for the House to determine the representation on a committee in the absence of any agreement.

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220 See, for example, Joint Select Committee on Loose Fill Asbestos Insulation: *Minutes,* NSW Legislative Council, 18 September 2014, pp 105-108.

221 See, for example, Joint Select Committee on Loose Fill Asbestos Insulation: *Minutes,* NSW Legislative Council, 18 September 2016, pp 109-110.

222 See, for example, Joint Standing Committee on Road Safety: *Minutes*, NSW Legislative Council, 28 May 2015, pp 147-152; 2 June 2015, pp 159-163.

223 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, p 531.

224 *Advocate for Children and Young People Act 2014*, Pt 7; *Independent Commission Against Corruption Act 1988*, Pt 7.

225 For example, *Minutes*, NSW Legislative Council, 22 June 2011, pp 249-251 and 259-263; 28 May 2015, pp 147-151; 2 June 2015, pp 159-163.

In practice, there have been occasions on which the House has proposed that a joint committee be comprised of a certain number of government, opposition and crossbench members, as occurs for Council committees, rather than nominating the committee members by name. For example, the resolution proposing the Joint Select Committee on the Cross City Tunnel specified the number of members from the government, opposition and crossbench, but only nominated one member by name.[226]

In 2002, the House received a message from the Assembly for the establishment of a Joint Select Committee on Bushfires which included a proposal that the committee be comprised of government, opposition and crossbench members from both Houses, who were to be nominated in writing to the Clerk of the Legislative Assembly and Clerk of the Legislative Council by the relevant party leaders and the independent and crossbench members respectively.[227] On consideration of the message, a minister in the Council moved that the resolution of the Assembly be agreed to with an amendment to omit the provision for the Council members to be nominated and instead to propose the members by name.[228] During debate it was argued that the crossbench should be allowed to choose its representative on the committee[229] and that it was 'inappropriate' for the Government to 'dictate to the House' who should serve on the committee.[230] The motion of the Minister was amended to omit the crossbench member's name and to insert instead that the crossbench member be chosen by ballot and that the paragraph be amended to reflect the outcome of the ballot. On the motion of the Minister being agreed to as amended, a ballot was conducted, in which all crossbench members were included, for the crossbench member on the committee.[231] The member originally proposed by the Minister was elected by ballot to be the crossbench member on the committee.

Members have sought to amend the motion for a joint select committee to change the proposed membership. For example, a crossbench member was unsuccessful in amending the composition of the Joint Select Committee on Companion Animal Breeding Practices in New South Wales to include two crossbench members rather than one.[232]

There have also been instances where members have sought to increase the number of Council members represented on a joint select committee. For example, the motion for the establishment of the Joint Select Committee on Fixed Term Parliaments Bills was amended to increase the number of members of the Council from five to nine members, so as to ensure that the committee was composed of an equal number of members of each House.[233]

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226 *Minutes,* NSW Legislative Council, 15 November 2005, pp 1722-1729.
227 *Minutes,* NSW Legislative Council, 13 March 2002, pp 48-49.
228 *Minutes,* NSW Legislative Council, 19 March 2002, p 71.
229 See, for example, *Hansard*, NSW Legislative Council, 19 March 2002, p 622.
230 *Hansard*, NSW Legislative Council, 19 March 2002, p 625 (Lee Rhiannon).
231 *Minutes,* NSW Legislative Council, 19 March 2002, p 71.
232 *Minutes,* NSW Legislative Council, 13 May 2015, pp 99-102.
233 *Minutes,* NSW Legislative Council, 13 November 1991, pp 260-262.

Quorum

Under SO 220(4), at least three members of the House must be present at any meeting of a joint committee. The Assembly has a standing order in the same terms.[234]

The intention of SO 220(4) is to ensure that the Council is adequately represented whenever a joint committee meets. However, in practice, this standing order is often overridden by the quorum requirements set out in the resolution establishing the committee. In most cases, these resolutions do not require that the quorum be comprised of three members of the Council but rather that the committee meet as a joint committee at all times. These resolutions often stipulate a quorum of four members.[235] For example, the resolution appointing the Joint Select Committee into Royal North Shore Hospital stated that: 'notwithstanding anything in the standing orders of either House, at any meeting of the committee, any four members of the committee will constitute a quorum, provided that the committee meets as a joint committee at all times'.[236]

Tabling

Under SO 220(3), the proceedings of a joint committee will be reported to the House by one of the members appointed to serve on the committee.

Joint committee reports are usually tabled in each House on the same day, either during the sitting of the House, or with the Clerk when the House is not sitting.[237]

When the Chair of the committee is in the other House, any Council member on the committee can table the report in the Council (SO 220(3)).[238]

Background and development

The 1856 standing orders provided comprehensive procedures for the establishment and operation of joint committees and are different in a number of ways to the 2004 standing orders. Differences under the 1856 provisions included that Council members could only be appointed once the Assembly had agreed to the Council's request to establish the joint committee (1856 SO 89), when agreeing to establish a joint committee the Council was

234 NSW Legislative Assembly, 2006, SO 321**.** At least three members of the House must be present at every meeting of a joint committee.

235 For example, the Joint Select Committee on the Royal North Shore Hospital: *Minutes*, NSW Legislative Council, 16 October 2007, pp 263-264; Joint Select Committee on Sentencing of Child Sexual Assault Offenders: *Minutes,* NSW Legislative Council, 9 September 2014, pp 17-18.

236 *Minutes*, NSW Legislative Council, 16 October 2007, p 264. See also Joint Select Committee into Companion Breeding Animals: *Minutes*, NSW Legislative Council, 13 May 2015, p 100.

237 See, for example, tabling of report of Joint Select Committee on the Cross City Tunnel: *Minutes*, NSW Legislative Council, 28 February 2006, p 1837; and *Votes of Proceedings,* NSW Legislative Assembly, 28 February 2006, p 1858; see also, *Minutes*, NSW Legislative Council, 6 May 2015, p 46; *Votes of Proceedings,* NSW Legislative Assembly, 5 May 2015, p 26.

238 See, for example, tabling of Legislation Review Committee digests: for example, *Minutes,* NSW Legislative Council, 21 March 2016, p 776; 15 March 2016, p 729.

to forthwith name the Council members to serve (1856 SO 90), there were to be equal numbers of Council and Assembly members on any joint committee (1856 SO 91), and the Chair could be appointed at any meeting of the committee (1856 SO 94).

The House in which the proposal for a joint committee originates does not set the time and place for the first meeting. This is the responsibility of the other House and this has been the case since 1856 (SO 92), and was readopted in 1895 (SO 155) as follows:

> Whenever the Assembly shall agree to a proposal from the Council for the appointment of a Joint Committee, the first meeting of such Committee shall be held at such time and place as shall be named by the Assembly; and in every Message agreeing to a proposal by the Assembly for the appointment of a Joint Committee, the Council will name the time and place for the first meeting of such Committee.

Corresponding Assembly SO 237 adopted in 1894 was in similar terms. However, in 1994, the Assembly adopted new standing orders which omitted any reference to the Council which could be interpreted as the Assembly directing the Council how to act in a matter.

Similarly, Council SO 220 adopted in 2004 was revised to omit the provision that 'Whenever the Assembly shall agree to a proposal from the Council for the appointment of a Joint Committee, the first meeting of such Committee shall be held at such time and place as shall be named by the Assembly'.

It is unclear where the practice in the New South Wales Parliament for setting the time and place of the first meeting originated. In the United Kingdom Parliament, it was customary for the House of Lords to propose the time and place for the first meeting, regardless of which House originally proposed the joint committee.[239] At the time the 1856 standing orders were drafted in New South Wales this custom had been untested for many years as the United Kingdom Parliament had not established a joint committee since 1695. This 1695 committee originated in the House of Commons and the House of Lords agreed to establish the committee and set the time and place for the first meetings.[240]

The UK practice has changed on a number of occasions in recent years. In the 1990s, it became practice for the House which originally proposed the appointment of a joint

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239 Sir T Lonsdale Webster (ed), *A treatise on the Law, Privileges, Proceedings, and Usages of Parliament* (Butterworth & Co. Ltd, 13th ed, 1924), p 491; Sir Gilbert Campion (ed), *A treatise on the Law, Privileges, Proceedings, and Usages of Parliament* (Butterworth & Co. Ltd, 14th ed, 1946), p 629; The Lord Campion (ed), *Sir Thomas Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Butterworth & Co. Ltd, 15th ed, 1950), pp 644-645; Sir Edward Fellowes, T G B Cocks and The Lord Campion (editor consultant), *Sir Thomas Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Butterworth & Co. Ltd, 16th ed, 1957), p 663; Sir Barnett Cocks (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Butterworth & Co. Ltd, 17th ed, 1964), p 691; Sir Charles Gordon (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Butterworth & Co. Ltd, 20th ed, 1983), pp 733-734; C J Boulton (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Butterworth & Co. Ltd, 21st ed, 1989), p 666.

240 *Erskine May*, 13th ed, pp 488-489; *Journal of the House of Lords*, vol 15, 1691-1696, pp 561-563.

committee to send the message to propose a time and place for the first meeting.[241] By 2004 this changed so that 'one House (usually the Lords) must propose a time and place for its first meeting'[242] and as of 2011 the practice is for the first meeting 'to be fixed by agreement among members'.[243]

221. SUBMISSIONS

Any person or body may make written or recorded submissions to a committee with respect to any inquiry being conducted by the committee.

Development summary		
1988-2003	Resolution	Standing Committees
1997-2003	Resolution	General Purpose Standing Committees
2003	Sessional order 221	Submissions
2004	Standing order 221	Submissions

The receipt of evidence to an inquiry by way of submissions from stakeholders is a fundamental means by which the community can engage in the parliamentary process and by which a committee is informed of community views on the subject of its inquiry. Submissions also inform committees of expert opinion on an issue.

Operation

Members of the public, academics, government and non-government organisations and other stakeholders make submissions to inquiries. Submissions can take almost any form such as a letter, a substantial research paper, a handwritten note, or a video or audio recording. For example, an audio file which was accepted and published as a submission by a committee on its website as a downloadable audio file,[244] and an audio file containing a song was accepted as a submission to the inquiry into coal seam gas.[245]

Committees also receive form letters, which may be considered as either submissions or correspondence depending on individual inquiry circumstances. On some occasions form letters which include additional comments by the signatories may be treated

241 Sir Donald Limon, W R McKay (eds), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Butterworths, 22nd ed, 1997), p 724.

242 *Erskine May*, 23rd ed, p 841.

243 Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011), p 914.

244 General Purpose Standing Committee No. 6, NSW Legislative Council, *Inquiry into local government in New South Wales* (2015), Submission 206.

245 General Purpose Standing Committee No. 5, NSW Legislative Council, *Inquiry into coal seam gas* (2012).

as submissions.[246] For example, the Select Committee on Recreational Fishing in New South Wales treated approximately 500 proforma letters as individual submissions, whereas the GPSC No. 6 inquiry into local government in New South Wales did not treat 200 proforma responses as submissions.[247]

Submitters may also include attachments to their submissions, such as maps, surveys, research papers, journal or media articles and submissions they have made to other parliamentary committees. These are not published as a matter of course, but only as required.

While a committee may reject and return a submission if it is not relevant or contains defamatory material, this happens very rarely. In such cases, the document may be accepted as a submission but not published by the committee, or the committee may resolve to remove adverse material from the submission before it is published (see SO 223 for further discussion). Responses that are not within the terms of reference can be considered as correspondence to the committee and not be published.

There is no prohibition on a member of a committee making a submission to an inquiry. However, apart from inquiries dealing with parliamentary matters,[248] this is not a desirable practice as the purpose of submissions is to give the community access to the parliamentary process and for the committee to receive evidence from experts in the subject matter of the inquiry.[249]

Background and development

The provision under SO 221 was first introduced in the 1988 resolution appointing the first subject standing committees and was likely adopted from the now-repealed Victorian *Parliamentary Committees Act 1968*, which provided that 'any person or body may make written submissions' to a committee.[250] Similar to Victoria, Legislative Council subject standing committees could initially only receive written submissions.[251] The provision for receiving 'recorded' submissions was included for the first time in the 2003 resolution appointing the subject standing committees.[252]

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246 See, for example, Select Committee on the Planning Process in Newcastle and the Broader Hunter Region, *Planning process in Newcastle and the Broader Hunter Region* (2015); Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect', *The conduct and progress of 'Operation Prospect'* (2015).

247 Select Committee on Recreational Fishing in NSW, NSW Legislative Council, *Inquiry into Recreational Fishing in NSW* (2010); General Purpose Standing Committee No. 6, NSW Legislative Council, *Inquiry into local government in New South Wales* (2015).

248 For example, the select committee inquiry into the Legislative Council committee system; the Standing Committee on Law and Justice inquiry into the eligibility of members of Parliament to serve on juries; and Procedure Committee inquiries.

249 Advice of the Clerk of the Parliaments, '*Section 2: Submissions of committee inquiries by Members*', 11 February 2004.

250 Victorian *Parliamentary Committees Act 1968* (repealed), s 4J.

251 *Minutes*, NSW Legislative Council, 9 June 1988, p 184.

252 *Minutes*, NSW Legislative Council, 21 May 2003, p 103.

From 1997, the resolution appointing general purpose standing committees provided for the publication of submissions,[253] but did not overtly provide for the making of submissions until 2003.[254] The 1997 resolution was consistent with Senate and Legislative Assembly standing orders, which do not specifically provide for the making of submissions by persons or bodies but do provide that documents presented can only be disclosed by authority of the committee or the House.[255]

222. EVIDENCE

(1) A committee is to take all evidence in public unless the committee decides otherwise.

(2) A witness before a committee is to be given the opportunity of correcting their transcript of evidence, but corrections must be confined to verbal inaccuracies or explanations of answers. Corrections in substance can only be made by further giving of evidence.

Development summary		
1895	Standing order 249	Revision of Evidence
1988-2003	Resolution	Standing Committees
1997-2003	Resolution	General Purpose Standing Committees
2003	Sessional order 222	Evidence
2004	Standing order 222	Evidence

Under SO 222(1), all evidence is to be taken in public unless the committee decides otherwise. This reflects the principle that committees should be as transparent and accessible to the public as possible. The standing order also provides for a witness to be given the opportunity to make non-substantive corrections to their transcript of evidence to ensure the transcript is an accurate reflection of what was said at the hearing.

Operation

While most Legislative Council committee hearings are held in public (indeed, budget estimates hearings must be held in public),[256] on occasion a committee considers it appropriate to hear evidence of a sensitive or defamatory nature in private session.[257]

253 *Minutes*, NSW Legislative Council, 7 May 1997, p 679.

254 *Minutes*, NSW Legislative Council, 3 July 2003, p 231.

255 Australian Senate SO 37; NSW Legislative Assembly SO 297.

256 Since 1998, the resolution of the House referring the annual budget estimates to the general purpose standing committees for inquiry and report has instructed the committees to hear all evidence in public. *Minutes*, NSW Legislative Council, 4 June 1998, pp 543-549.

257 For example, a number of hearings were held *in camera* during the GPSC No. 3 inquiry into *Reparations for the Stolen Generations in NSW* (2016), the GPSC No. 1 inquiry into *Allegations of bullying in WorkCover NSW* (2014), and the GPSC No. 2 inquiry into *The management and operations of the Ambulance Service of NSW* (2008).

Witnesses must be given the opportunity to correct the transcript of their evidence. This is achieved by providing a proof copy of the Hansard transcript to the witness and requesting that it be returned to the secretariat within a stated timeframe, with their corrections marked.

It is practice for the secretariat to make minor corrections identified by the witness to the transcript but for corrections of substance or explanations of answers the transcript must be taken to the committee. Such corrections are footnoted in the transcript or the correspondence requesting the correction is published with the transcript.[258] Members of a committee may also seek to correct the transcript of their verbal contributions during a hearing.[259]

On occasions a committee may hold an event for which a transcript is not produced, for example a private roundtable hearing or briefing.[260]

Background and development

SO 222(1) stems from 1895 SO 250, which states that strangers may be excluded by a select committee at the request of any member or the discretion of the Chair. This was refined as part of the 1988 resolution appointing the first subject standing committees by stating that a committee shall take evidence in public unless it orders otherwise. This provision has been replicated in SO 222. Although both the 1895 and 2004 standing orders essentially have the same effect, the change in wording reflects the importance of the principle that evidence should be taken in public rather than focusing on the committee's right to exclude the public if it so desires.

SO 222(2) originates from 1895 SO 249, which is the same in substance.

223. PUBLISHING SUBMISSIONS AND EVIDENCE

(1) A committee has power to authorise publication, before presentation to the House, of submissions received and evidence taken.

(2) Evidence taken in camera may be published by resolution of the committee where it is in the public interest to do so.

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258 See, for example, transcripts for General Purpose Standing Committee No. 5: *Hansard,* NSW Legislative Council, 4 September 2015, p 5 (Barry Desmond Buffier) and the Select Committee on Greyhound Racing in NSW: *Hansard,* NSW Legislative Council, 5 February 2014, p 2 (Ross Magin).

259 Correction from the Hon Mick Veitch, to p 15 of the transcript from General Purpose Standing Committee No. 4 hearing for the portfolio of Trade and Investment, 21 August 2014.

260 On 30 May 2016, the Select Committee on the Legislative Council Committee System held a private roundtable meeting to which it invited the Clerk of the Parliaments and the President. This meeting was not transcribed. Select Committee on the Legislative Council Committee System, NSW Legislative Council, *Options Paper* (May 2016), p 1; on 7 October 2011, GPSC No. 5 conducted a private briefing with Mr John Whitehouse, Solicitor and Fellow in Environmental Studies at Macquarie University in relation to its inquiry into coal seam gas which was also not transcribed. General Purpose Standing Committee No. 5, NSW Legislative Council, *Coal Seam Gas* (2012), p 3.

(3) A committee:

(a) may make available to any member of the public a copy of:

(i) any written submissions made to it,

(ii) the report of any inquiry carried out by it, or

(iii) the record of any evidence taken in public, and

(b) may charge a reasonable sum for making copies available.

(4) A committee or sub-committee may authorise the tape recording of its public hearings.

Development summary		
1895	Standing order 252	Evidence not to be disclosed
1922	Standing order 252	Evident not to be disclosed
1988-2003	Resolution	Standing Committees
2003	Sessional order 223	Publishing submissions and evidence
2004	Standing order 223	Publishing submissions and evidence

This standing order authorises committees to publish submissions and evidence before presentation to the House.

Operation

Under SO 223, Council committees are authorised to publish submissions and evidence without the need for a specific order of the House. This authority is also statutorily expressed in section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975*.

The power to publish documents is an inherent right of the House. Once published, the documents are afforded the protection of absolute privilege under section 27 of the *Defamation Act 2005*, and immunity from civil and criminal proceedings (other than proceedings for defamation) under section 7 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*.

In 2015, the resolutions appointing most committees required that unless the committee decides otherwise, submissions and answers to questions on notice and supplementary questions are to be published, subject to the Committee Clerk checking for confidentiality and adverse mention, and where those issues arise, bringing them to the attention of the committee for consideration.[261] The resolutions also required that transcripts of evidence taken at public hearings be published.

The resolutions allow for the expeditious publication of publishing non-controversial evidence.

Publishing evidence assists inquiries by facilitating further comment and discussion, and accords with the principle that committees should be as open and transparent and

261 *Minutes*, NSW Legislative Council, 6 May 2015, pp 65 and 68.

accessible to the public as possible. In line with this principle, committees now publish the majority of submissions as they are received and make them available on the internet.

When considerations of confidentiality or adverse mention arise, the committee considers whether it is in the public interest to publish the submission. The public interest in publication is determined by reference to the value of the evidence to the committee's inquiry and the potential harm or consequences of publishing the material.

A committee may determine that a submission should not be published in whole or in part, even when the author requests that it be published. Committees usually agree to a request from a submission author that their submission remain confidential, or that their name or other identifying information be withheld from the public.

Submission authors sometimes provide a number of attachments to support their submission. Many of these attachments are already public documents. Those that are not are generally not published unless the committee is of the view that the attachment is relevant to the outcome of the inquiry and will form part of the committee's report.

Standing order 223(2) provides that evidence taken *in camera* may be published by the committee if it considers it in the public interest to do so. This provides committees with the flexibility to take evidence *in camera*, but then to publish the evidence in whole or in part after a hearing if considered necessary.

In practice, numerous hearings are conducted *in camera* to protect an individual's privacy, rather than due to the evidence being of a confidential or controversial nature. This evidence is often published, with the witness' consent, with the witness' name and identifying information omitted.

While it is not uncommon for *in camera* evidence to be published with the agreement of the witness, it is less common that this occurs against the wishes of the witness. In 2015, a section of an *in camera* transcript was published against the wishes of a witness during the select committee inquiry into the conduct and progress of the Ombudsman's inquiry 'Operation Prospect'.[262]

When evidence is taken at a public hearing which adversely reflects on a person, or is sensitive in some way, the committee can resolve to remove the material from the transcript before it is published. There are two key ways by which a committee may remove sensitive material from a transcript – expunging or redacting.

Expunging removes all traces of the evidence as if it were never said. Such action is only used in extremely serious and rare circumstances, such as when a police informant or a person in witness protection has been named. If a committee is to expunge material, it does so immediately after the offending statement by the Chair directing Hansard to expunge the information from the record, the media not to report the evidence, and the public gallery not to repeat it. For example, evidence was expunged during the

262 Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect', NSW Legislative Council, *Conduct and progress of the Ombudsman's inquiry 'Operation Prospect'* (2015), p 174.

GPSC No. 3 review of the inquiry into Cabramatta policing, when an underage witness who claimed to be a gang member involved in drug dealing was accidentally named at a public hearing.[263] Similarly, during the select committee inquiry into Operation Prospect, the committee expunged from the transcript the name of a police informant accidently disclosed during a public hearing.[264]

Alternatively, a committee can resolve that certain words be redacted from the published version of a transcript but to retain it in an unpublished version. This practice is relatively common.

The committee's decision on which option to follow is informed by the principle that a transcript should be as complete and accurate a record as practicable, and that it is undesirable to alter the record such that it does not reflect what was actually said. The committee's decision must balance the need to maintain an accurate record with the imperative to protect persons from unnecessary or irrelevant defamatory comment.

Standing order 223(4) makes it clear that a committee or sub-committee may authorise the tape recording of its public hearings; however, this provision is superfluous given that all public hearings are open to the public and media, the transcripts are published, and those held in the Macquarie or Jubilee Rooms at Parliament House are broadcast live to the press gallery and usually webcast on the internet.

Background and development

There were no provisions in the 1856 standing orders which provided for the publication of submissions and evidence.

In 1895, the House adopted SO 253, later renumbered as SO 252, which provided:

> Evidence taken by any Select Committee of the House, and documents presented to such Committee which have not been reported to the House, shall not be disclosed or published by any Member of such Committee, or by any other person.

In 1922, SO 252 was amended to omit 'shall not' and to insert instead 'may not, except with the permission of the committee'. This provision authorised committees to publish submissions and evidence presented to it without an order of the House, thus allowing the media to legally publish evidence from hearings (see SO 224 for further discussion).

Following an inquiry into the committee system in the Legislative Council in 1988, the House appointed two standing committees by resolution which provided that:

263 General Purpose Standing Committee No. 3, NSW Legislative Council, *Review of the Inquiry into Cabramatta policing* (2002), p 145.

264 Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect', NSW Legislative Council, *Conduct and progress of the Ombudsman's inquiry 'Operation Prospect'* (2015), p 168.

(1) A Standing Committee shall have power to publish, before presentation to the Legislative Council, such papers and evidence taken in public as may be ordered by it.

(2) A Standing Committee may-

(a) make available to any member of the public a copy of
(i) any written submissions made to it;
(ii) the report of any inquiry carried out by it; or
(iii) the record of any evidence taken in public; and
(b) charge a reasonable sum for making such copies available.

(3) A copy of all evidence taken in public by a Standing Committee shall be placed in the Parliamentary Library. [265]

These provisions were adopted in every resolution establishing the subject standing committees[266] until 2003, when the provision for a copy of all public evidence of a committee to be placed in the New South Wales Parliamentary Library was omitted. The likely reason for this omission is that committees began publishing inquiry documents to the newly established New South Wales Parliament website. Once this occurred, the practice of providing a copy of evidence to the library became less important as members of Parliament, their staff and the public could access this information online.

Prior to 2008, submissions and answers to questions on notice could only be published by committee resolution. In July 2008, during the General Purpose Standing Committee No. 2 inquiry into the management and operations of the Ambulance Service of New South Wales, the committee resolved to publish 'any additional submissions received before the next deliberative meeting', subject to the Chair and Deputy Chair considering the requests of individual witnesses and submission makers regarding the publication of their evidence or submission, and the removal of identifying information or adverse mention.[267] This practice gradually evolved so that during the 55th Parliament, commencing in 2011, most Council committees resolved at the start of inquiries to authorise the publication of all submissions to the inquiry, subject to the secretariat checking for issues of confidentiality, adverse mention or other issues. The new practice also extended to answers to questions on notice.

The resolutions establishing committees in the 56th Parliament in 2015 continued this authorisation, but in modified terms which reflected the presumption that all submissions

265 *Minutes*, NSW Legislative Council, 9 June 1988, p 184. It is likely that the 1988 resolution was adopted from the Victorian *Parliamentary Committees Act 1968*. See SO 206 for the development of the modern committee system in the Legislative Council.

266 None of these provisions appeared in the resolutions establishing the general purpose standing committees until 2003, when only provisions (1) and (2) appeared.

267 General Purpose Standing Committee No. 2, NSW Legislative Council, *The management and operations of the Ambulance Service of New South Wales* (2008), p 200.

would be made public unless the committee considered that part or all of the submission should not be published on grounds of confidentiality or adverse mention.[268]

The provision of SO 223(2) that evidence taken *in camera* may be published by resolution of the committee where it is in the public interest to do so was first adopted in the resolutions appointing subject standing[269] and general purpose standing committees[270] in 2003. This provision is similar to the 1988 Australian Senate privilege resolutions which provide that committees may publish all or part of *in camera* evidence.

Standing order 223(4) adopted in 2004 is a new provision in the standing orders. The origin of this standing order is unclear.

224. UNAUTHORISED DISCLOSURE OF EVIDENCE AND DOCUMENTS

(1) The evidence taken by a committee and documents presented to it, which have not been reported to the House, may not, unless authorised by the House or committee, be disclosed to any person other than a member or officer of the committee.

(2) Paragraph (1) does not apply to:

(a) any proceedings of the committee that are open to the public and news media,

(b) any member of the committee or officers of the House or committee in the exercise or performance of their duties,

(c) press releases or statements made by a member of the committee on the authority of the committee,

(d) written submissions presented to a select committee and authorised to be published by the committee,

(e) any submission or document of the committee referred to any person for comment to assist the committee in its inquiry, and

(f) any document authorised to be published by the committee.

(3) Any person committing a breach of this standing order may be reported to the House.

Development summary		
1895	Standing order 252	Evidence not to be disclosed
1922	Standing order 252	Evidence not to be disclosed
2003	Sessional order 224	Unauthorised disclosure of evidence and documents
2004	Standing order 224	Unauthorised disclosure of evidence and documents

268 *Minutes*, NSW Legislative Council, 6 May 2015, pp 65 and 68. Previously, at the first meeting of each committee resolutions of this nature were generally agreed to.

269 *Minutes*, NSW Legislative Council, 21 May 2003, p 103.

270 *Minutes*, NSW Legislative Council, 3 July 2003, p 231.

This standing order prohibits the disclosure of committee information which has not been reported to the House or published by a committee. The disclosure of committee information without appropriate authorisation has the potential to damage individual committee participants and the integrity of the committee system.

Operation

SO 224(2) sets out the documents or circumstances for which SO 224(1) does not apply. For example, disclosing a submission or a media release published by or made under the authority of a committee does not constitute an unauthorised disclosure. SO 224(3) provides that any person committing a breach of the standing order may be reported to the House. There are no instances of a person being reported to the House under this paragraph.

Committees have responded to instances of unauthorised disclosure of committee information in various ways. In several instances, the committee has decided not to pursue the matter other than recording its concerns in its report, most commonly in the minutes of its proceedings.[271] In 2001, prior to the introduction of the 2004 standing orders, General Purpose Standing Committee No. 3 made a special report to the House in relation to a disclosure concerning the Cabramatta police inquiry, one of only two occasions such a report has been made in relation to an unauthorised disclosure.[272]

In response to an unauthorised disclosure during a General Purpose Standing Committee No. 1 deliberative meeting for the 2012-13 budget estimates inquiry, the committee resolved to implement the 2002 guidelines recommended by the Standing Committee on Privilege and Ethics regarding unauthorised disclosures (see below).[273] In keeping with these guidelines, the Committee Clerk wrote to all committee members, staff of the committee secretariat and journalists who reported the committee deliberations to ask whether they were responsible for the disclosure or were able to provide any information that could assist the committee in determining

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271 General Purpose Standing Committee No. 3, NSW Legislative Council, *Registered nurses in New South Wales nursing homes* (2015) p 121; Standing Committee on Social Issues, NSW Legislative Council, *Inquiry into Issues Relating to Redfern/Waterloo* (2004), p 1. In its report, the committee emphasised that unauthorised disclosure of documents can impede the effectiveness of inquiries and lower confidence in the Parliament, and that any person who discloses confidential committee documents may be deemed guilty of contempt of Parliament. However, no further action was taken. See also, General Purpose Standing Committee No. 1, NSW Legislative Council, *Budget Estimates 2012-2013*, Report No. 38 (February 2013), pp 20-21 and 23.

272 General Purpose Standing Committee No. 3, NSW Legislative Council, *Special report on possible breaches of privilege arising from the inquiry into Cabramatta policing* (2001), p 4. In the first instance, the Joint Select Committee Upon Police Administration made a special report in relation to the unauthorised publication in the *Sun Herald*, dated 3 January 1993, of *in camera* evidence given before the committee by the Hon E P Pickering MLC. See Standing Committee Upon Parliamentary Privilege, Legislative Council, *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence* (October 1993).

273 General Purpose Standing Committee No. 1, NSW Legislative Council, *Budget Estimates 2012-2013*, Report No. 38 (February 2013), pp 20-21 and 23.

the source of the disclosure. Unable to determine the source of the leak, the committee agreed to the following resolution:

> That the unauthorised disclosure of committee proceedings be noted and as the significance of the disclosure does not justify further inquiry, no further action be taken.
>
> That the Chair on behalf of the Committee write to the Clerk recommending that educational material be circulated to remind all members of the Council of the guidelines concerning unauthorised disclosures and their responsibilities regarding the importance of maintaining the confidentiality of committee proceedings.

The committee further resolved that: 'This Committee notes that one member is aggrieved by the unauthorised disclosure of the committee's proceedings and regrets any hurt caused to the member, or damage to their reputation'.[274]

Background and developments

SO 224(1) originates from a 1922 amendment to 1895 SO 252. Initially, SO 252 stated that committee evidence and documents which had not been reported to the House shall not be disclosed or published by a committee member, or by any other person. The 1922 amendment authorised the committee to give permission for its evidence and documents to be disclosed or published.[275] In speaking to the amendment, the Leader of the Government in the Legislative Council stated that the amendment would allow the media to legally publish evidence from hearings:

> Select committees have very often passed a resolution to admit the press, and the press has published the evidence taken by the committees, it is really not lawful to do it. The amendments I intend to propose will legalise the publication of evidence when it is done with the permission of the committee. If a committee decides to admit the press it will be equivalent to giving permission for the publication of evidence.[276]

Paragraphs (2) and (3) were adopted in 2004. These provisions stemmed from a 2002 inquiry by the Standing Committee on Parliamentary Privileges and Ethics on appropriate guidelines for dealing with unauthorised disclosure of debates, reports or proceedings of Legislative Council committees.[277] The committee recommended that

274 General Purpose Standing Committee No. 1, NSW Legislative Council, *Budget Estimates 2012-2013*, Report No. 38 (February 2013), p 23.

275 *Minutes*, NSW Legislative Council, 3 August 1922, p 37. In July 1922, the Legislative Assembly amended their SO 367 in a similar manner.

276 *Hansard*, NSW Legislative Council, 3 August 1922, p 797 (Joseph Carruthers).

277 Standing Committee on Parliamentary Privilege and Ethics, NSW Legislative Council, *Report on guidelines concerning unauthorised disclosure of committee proceedings* (2002). The inquiry followed a special report to the House during the 2001 GPSC No. 3 inquiry into Cabramatta policing on the disclosure of a committee document without the authority of the committee. General Purpose Standing Committee No. 3, NSW Legislative Council, *Special report on possible breaches of privilege arising from the inquiry into Cabramatta policing* (2001), p 4. The guidelines, which have not been

the House adopt guidelines concerning unauthorised disclosure which provided that the following procedures should apply in the event of an unauthorised disclosure of committee information:

(a) The committee concerned seeks to identify all possible sources of the disclosure.

(b) The committee decides whether the disclosure is significant enough to justify further inquiry.

(c) If the committee considers that further inquiry is warranted, the Chair of the committee writes to all persons who had access to the proceedings, requesting an indication as to whether the person was responsible for the disclosure or is able to provide any information that could be of assistance in determining the source of the disclosure.

(d) The committee comes to a conclusion as to whether the leak is of sufficient seriousness as to constitute a substantial interference with the work of the committee, the Legislative Council committee system, or the functions of the House. This occurs whether or not the source of the disclosure is discovered.

(e) If the committee concludes that the leak is of sufficient seriousness, it makes a special report to the House, describing the circumstances and the investigations it has made, and recommending that the matter be referred to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report.

(f) Following tabling of the Special Report, the House may refer the matter to the Standing Committee on Parliamentary Privilege and Ethics.

The guidelines proposed by the Privileges Committee require a committee to decide whether a leak is of sufficient seriousness as to constitute a *substantial interference* with the work of the committee, the committee system or the functions of the House (whether or not the source of the leak is discovered). In deciding whether a leak constitutes a substantial interference with the work of the committee, the Legislative Council is informed by developments in the Senate, which since 2005 has proposed a different (and arguably stricter) test of the seriousness of an unauthorised disclosure, based on the question of whether a leak *makes impossible the continuation of an inquiry*.[278]

Unauthorised disclosures are notoriously difficult to address: it is often impossible to establish the source of a leak and even if this can be done, a committee would most likely need to demonstrate that the disclosure constitutes a *substantial interference* with its work before the House would take any action in relation to a possible contempt, noting of course, that the leak of *in camera* evidence would *prima facie* be a contempt.

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formally adopted by the House, also cover the sanctions that apply if a person responsible for an unauthorised disclosure is found guilty of committing contempt.

278 Committee of Privileges, The Senate, *Parliamentary privilege – Unauthorised disclosure of committee proceedings* (2005), pp 37-51.

While SO 224(1) specifically deals with evidence and submissions, unauthorised disclosure also includes the deliberations of a committee not yet published, such as the deliberations of a committee meeting before the minutes are tabled.

225. NO REPRESENTATION OF WITNESSES

A person or body is not entitled or permitted to be represented by counsel or a solicitor at a hearing of a committee unless the committee decides otherwise.

Development summary		
2003	Sessional order 225	No representation of witnesses
2004	Standing order 225	No representation of witnesses

This standing order precludes a witness from being legally represented at a committee hearing unless the committee decides otherwise. A committee hearing is not the equivalent of a court proceeding, and witnesses are afforded protection under parliamentary privilege and statutory provisions. Therefore, the default position is that witnesses need not be legally represented.

Operation

Since the establishment of the modern committee system, there have been no precedents of a committee allowing a witness to be legally represented at a committee hearing.[279]

However, it is not uncommon for a committee to agree by resolution to a request that a witness be accompanied by legal counsel in an advisory capacity. In such cases, the adviser cannot give evidence on behalf of the witness, object to procedure or lines of questioning, cross-examine another witness or intervene during the committee's examination of another witness.[280]

During the 2015 select committee inquiry into the conduct and progress of the Ombudsman's inquiry 'Operation Prospect', almost all witnesses were accompanied by legal advisers, who were permitted to attend with the witness but were not sworn or allowed to address the committee. The committee agreed by resolution to all requests in this regard. This was a consequence of the sensitive nature of the inquiry and the

279 There are early examples of counsel being heard before select committees on behalf of petitioners on private bills, see, for example, Select Committee on the George's Hill Estate Bill, *Report from the Select Committee on the George's Hill Estate Bill* (*Journal of the Legislative Council,* 1894-95, vol 53, Part 1, p 392) and *Minutes*, NSW Legislative Council, 2 May 1860, pp 78-79. This generally occurred following a request to the House by petition.

280 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, p 507.

fact that many of the witnesses had been legally represented at a related inquiry being undertaken by the Ombudsman.[281]

During the 2001 GPSC 3 inquiry into Cabramatta policing, the Counsel for the NSW Police sought but was refused the right to appear with the Deputy Police Commissioner as counsel. The Counsel was subsequently granted permission to sit at the witness table and advise the Deputy Commissioner but did not provide evidence to the committee.[282]

Proceedings conducted by Privileges Committees can be slightly different due to the nature of their inquiries. For example, the Senate Standing Committee on Privileges affords the right to legal representation of witnesses in relation to allegations of contempt.[283] While this is not the case for the Legislative Council Privileges Committee, there has been an occasion when a witness has been permitted to have lawyers attend hearings in an advisory capacity. During the 1998 inquiry into the conduct of the Hon Franca Arena by the Standing Committee on Parliamentary Privilege and Ethics, and following advice from the Clerk of the Parliaments, lawyers acting for Mrs Arena were permitted by resolution of the committee to attend hearings in an advisory capacity and:

- submit written questions to be put to other witnesses by committee members on Mrs Arena's behalf
- make submissions in relation to the committee's proposed editing of Mrs Arena's evidence before its publication
- make submissions in relation to Mrs Arena's conduct before the committee commenced its final deliberations.[284]

Counsel have been engaged to assist committees in other jurisdictions. For example, the Parliamentary Crime and Misconduct Committee engaged two senior counsel to assist in an inquiry into the release of documents by the Crime and Misconduct Commission. The counsel examined various witnesses in the first instance prior to committee members

281 Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect', NSW Legislative Council, *The conduct and progress of the Ombudsman's inquiry 'Operation Prospect'* (2015), p 5.

282 GPSC No. 3, NSW Legislative Council, *Cabramatta Policing* (2001), pp 2-3. Also see, GPSC No. 4, NSW Legislative Council, *The Designer Outlets Centre, Liverpool* (2004), p 171.

283 *Parliamentary privilege resolutions agreed to by the Senate on 25 February 1988*, Resolution 2, paragraph 3. The reason for additional protections in these circumstances is that if a finding of contempt is adopted by the Senate, the consequences for the person or persons concerned are very serious. A finding of contempt may in itself damage a person's reputation or professional standing, and it is open to the Senate to impose a penalty of imprisonment or a fine and therefore witnesses are given all the rights of persons involved in legal proceedings.

284 Standing Committee on Parliamentary Privilege and Ethics, NSW Legislative Council, *Report on the inquiry into the conduct of the Honourable Franca Arena MLC* (1998), pp 9-10. The inquiry arose following a speech given by the Hon Franca Arena in the NSW Legislative Council on 17 September 1997 in relation to an alleged 'cover-up' of high-profile paedophiles.

asking clarifying questions.[285] However, such inquiries are exceptional in nature and the NSW Legislative Council experience since 1988 suggests legal representation is rarely needed or of any benefit to witnesses or members at an inquiry.

Background and development

The 1856 and 1895 standing orders do not refer to legal representation of committee witnesses.

The 1988 resolution appointing the first subject standing committees includes a provision in similar terms to SO 225.[286] The 1988 resolution, which became the 2004 standing order, reflected the approach of the Senate as captured in its 1988 Privilege Resolutions.[287] It was not included in the resolution appointing general purpose standing committees until 2003.[288]

226. REPORTS

(1) A committee has leave to report to the House from time to time its proceedings, evidence taken in public, and recommendations as it deems fit.

(2) A committee may include in any report made to the House a draft bill to give effect to the recommendations of the committee.

(3) For the purposes of preparing a draft bill for incorporation in a report to the House, a committee may, with the consent of the relevant Minister, make use of the services of any staff of the Parliamentary Counsel's Office.

(4) A committee may publish discussion papers for the purpose of any inquiry.

Development summary		
1856	Standing order 95	Report from Committee
1895	Standing order 255	Report brought up
1988-2003	Resolution	Standing Committees
1997-2003	Resolution	General Purpose Standing Committees
2003	Sessional order 226	Reports
2004	Standing order 226	Reports

285 Queensland Parliament, Parliamentary Crime and Misconduct Committee, *Inquiry into the Crime and Misconduct Committee's release and destruction of Fitzgerald Inquiry documents*, Report No. 90, April 2013, p viii.

286 *Minutes*, NSW Legislative Council, 9 June 1988, p 184.

287 *Parliamentary privilege resolutions agreed to by the Senate on 25 February 1988*, Resolution 1, paragraphs 14 and 15.

288 *Minutes*, NSW Legislative Council, 3 July 2003, p 231.

This standing order provides that a committee can report to the House on its proceedings and progress throughout an inquiry, including evidence taken and recommendations. It allows committees to incorporate a draft bill in a report and to use, with the consent of the relevant minister, the services of the Parliamentary Counsel's Office to prepare the draft. This standing order also provides for a committee to publish discussion papers for the purpose of an inquiry.

Operation

SO 226(1) provides committees with the authority to make interim reports without seeking the leave of the House. Prior to the establishment of standing committees this was important as select committees did not have the power to report from time to time.[289] Under SO 207(1) select committees now only cease to exist once they have tabled their *final* report.

SO 226(2) and (3) provide for the inclusion of a draft bill in any report and for a committee to make use of the services of the Parliamentary Counsel's Office. An attempt to utilise these provisions was made in 2013. In that instance, the Select Committee on the Partial Defence of Provocation sought the Premier's approval to ask the Parliamentary Counsel's Office to draft a bill,[290] however, the Premier declined the committee's request.[291] The committee subsequently referred the 'efficacy' of the standing order to the Chairs' Committee.[292]

Shortly before the end of the 55th Parliament, the Chairs' Committee requested that the President refer the efficacy of SO 226(3) to the Procedure Committee for consideration,[293] however, the Procedure Committee was not able to report before the expiration of the Parliament.

289 In 1977, a select committee was established to examine a bill which provided for the reduction in membership of the Council from 60 to 45 (the Constitution and Parliamentary Electorates and Elections (Amendment) Bill). In August 1977, the committee presented an interim report to the House. Since the committee did not have leave to report from time to time (the Chair's attempt to seek this leave was objected to), in presenting an interim report without leave and thus fulfilling its reporting requirements, the committee extinguished itself. See Lovelock and Evans, *New South Wales Legislative Council Practice,* 2008, Appendix 2 a, p 626, and David Clune, *Connecting with the People: The 1978 reconstitution of the Legislative Council – Part Two of the Legislative Council's Oral History Project* (The Legislative Council, 2017), p 18.

290 Select Committee on the Partial Defence of Provocation, NSW Legislative Council, *The partial defence of provocation* (April 2013), p 237.

291 Select Committee on the Partial Defence of Provocation, NSW Legislative Council, *The partial defence of provocation* (April 2013), p 238.

292 Select Committee on the Partial Defence of Provocation, NSW Legislative Council, *The partial defence of provocation* (April 2013), p 243.

293 *Minutes*, Chairs' Committee, 18 June 2014. See also, *Briefing paper, Chairs' Committee*, 16 July 2013.

Under SO 226(4), a committee can publish a discussion paper without the requirement for it to be tabled in the House. Discussion papers must be adopted by the committee and authorised to be published and are included in the documents tabled with the final report.

Prior to the 2004 standing order, discussion papers[294] were tabled and/or published in a variety of ways. Several papers were tabled in the House or received out of session by the Clerk,[295] while others were not tabled, and instead published by the committee according to sessional order (now SO 226(4)).[296] In addition, only some of those papers tabled in the House were ordered to be printed.[297]

In 2015, the Select Committee on the Legislative Council Committee System published its discussion paper under SO 226(4) but also tabled it in the House to draw members' attention to this matter of particular significance to the Legislative Council.[298]

Background and development

The 1856 standing orders merely provided for the members of the committee to report, in writing, to the Council the proceedings of the committee and that the report be signed by the Chair on behalf of the committee.[299]

SO 226(1) stems from 1895 SO 255, which provided that a committee may, by leave of the House, report from time to time its opinions or observations, evidence and minutes. This allowed select committees to continue to exist after they had tabled an interim report. For example, in 1920 the House granted leave to the Select Committee on Conditions and Prospects of the Agricultural Industry, and Methods of Improving

294 While the standing order refers to 'discussion papers', these documents have also been referred to as 'issues papers'.

295 *Minutes*, NSW Legislative Council, 23 May 1989, p 734; Standing Committee on State Development, *Public Sector Tendering and Contracting in New South Wales, A Survey*; *Minutes*, NSW Legislative Council (21 November 1989), p 1091; Standing Committee on State Development, Discussion Paper No. 2, *Coastal Development in New South Wales, Public Concerns and Government Processes; Minutes*, NSW Legislative Council, 12 June 1990, p 305; Standing Committee on State Development, *Public Sector Tendering and Contracting in New South Wales – Capital Works Tendering and Contracting: Management Options; Minutes*, NSW Legislative Council, 26 May 1998, p 459; Standing Committee on State Development, *The International Competitiveness of Agriculture in New South Wales* (May 1998); *Minutes*, NSW Legislative Council, 12 March 2002, p 29; Standing Committee on Social Issues, *Foundations for Learning: A new vision for New South Wales?* (March 2002).

296 Standing Committee on State Development, *Regional business development in New South Wales: Trends policies and issues*, Discussion paper, 1993; Standing Committee on Social Issues, *Youth violence*, Discussion paper, 1993; Standing Committee on Social Issues, *Violence in society*, Discussion paper, 1993; Standing Committee on Social Issues, *Aboriginal representation in Parliament*, Discussion paper, 1997.

297 *Minutes*, NSW Legislative Council, 23 May 1989, p 734; 26 May 1998, p 459; 12 March 2002, p 29.

298 Select Committee on the Legislative Council Committee System, *Legislative Council committee system: Discussion paper* (2015).

299 SO 53 and SO 95.

Same to report from time to time.[300] The committee then proceeded to table six interim reports[301] before tabling its final report in a series of 10 parts over the course of two months.[302]

Until 1978, resolutions for the appointment of select committees included either the phrase 'for consideration and report'[303] or 'to inquire into and report upon'.[304] In 1978, the phrase that a 'committee have leave … to report from time to time' was used for the first time in a notice of motion.[305] This followed directly from the experience in 1977 with the select committee on the bill to reconstitute the Legislative Council. This wording was adopted in the 1988 resolution appointing the first standing committees which stated that 'a standing committee shall have leave to report' and also allowed committees to report recommendations.[306]

SO 226(2), (3) and (4) were all introduced in the 1988 resolution appointing the subject standing committees and are in almost identical form – the only difference being that the 1988 resolution initially stated that the Attorney General must give consent for a committee to use the services of the Parliamentary Counsel's Office.[307] This was changed in 1995 to the current wording where the consent of the relevant minister is required.[308] These provisions were not included in the resolution appointing general purpose standing committees until 2003.[309]

227. CONSIDERATION OF REPORTS

(1) The Chair, on the request of the committee, is to prepare a draft report and submit it to the committee.

(2) The draft report is to be considered at a meeting convened for that purpose and may be amended as the committee thinks fit. A report may be reconsidered and amended.

(3) The report of a committee, as agreed to by the committee, must be signed by the Chair, or in the event of the Chair refusing, any other member appointed by the committee.

300 *Minutes*, NSW Legislative Council, 27 October 1920, p 78.
301 *Minutes*, NSW Legislative Council, 30 August 1921, p 10.
302 *Minutes*, NSW Legislative Council, 19 October 1921, p 32; 1 December 1921, p 81.
303 See, for example, *Minutes*, NSW Legislative Council, 25 October 1955, p 40.
304 See, for example, *Minutes*, NSW Legislative Council, 25 November 1936, p 50.
305 *Minutes*, NSW Legislative Council, 26 January 1978, p 765.
306 *Minutes*, NSW Legislative Council, 9 June 1988, p 185.
307 *Minutes*, NSW Legislative Council, 9 June 1988, p 185.
308 *Minutes*, NSW Legislative Council, 24 May 1995, p 41.
309 *Minutes*, NSW Legislative Council, 3 July 2003, p 231.

Development summary		
1856	Standing order 53	Report how signed
1870	Standing order 63	Report how signed
1895	Standing order 253 Standing order 254	Consideration of draft report Chairman to sign report
2003	Sessional order 227	Consideration of reports
2004	Standing order 227	Consideration of reports

This standing order provides for the preparation of a draft report by a Committee Chair, and the procedure for the consideration, amendment and adoption of that report by committee members.

Operation

Committee reports are generally drafted by the committee secretariat according to instructions from the Chair. The draft report is approved by the Chair, before being circulated to members for consideration prior to the committee meeting to deliberate on the content of the Chair's draft report.

A committee will usually agree on the method of considering the report, for example, paragraph by paragraph, page by page or chapter by chapter, at the outset of a report deliberative. A Chair cannot move an amendment to their own report, but may seek the cooperation of another member to move an amendment at their suggestion. This rule is consistent with the practice in the House where the President or Chair of committee of the whole does not move motions or propose amendments to questions before the House or committee.

Any member of the committee may, following a vote on the voices, call for a division on a motion to amend the report. Divisions during deliberation of a report are common, particularly when the inquiry is examining a contentious or highly political issue. Divisions are recorded in the minutes, as they are in the House. Unlike the practice in committee of the whole, during consideration of a committee report, sections may be amended more than once and decisions reversed without the need to recommit the report.

A committee will usually adopt the report after considering its chapters and recommendations. Subsequently, the Chair is to sign the report (SO 227(3)). If the Chair refuses to sign the report, it may be signed by any other member appointed by the committee. There are no known precedents of a Chair refusing to sign a report, although there have been inquiries where a Chair has had their report substantially amended against their wishes.[310]

310 See, for example, Standing Committee on Parliamentary Privilege and Ethics, NSW Legislative Council, *Report on inquiry into the Pecuniary Interests Register* (2002); Select Committee on Home Schooling, NSW Legislative Council, *Home Schooling in New South Wales* (2014).

A committee member other than the Chair can submit an alternative report to the committee for its consideration, although this is extremely rare.[311] According to *Erskine May*, if more than one report is submitted, a decision must be made on motion that one of them, usually the one submitted by the Chair, is to be the one considered by the committee.[312]

Background and development

Standing order 227(1) and (2) stem from 1895 SO 253, which provided that a Chair, on the request of the committee, submit a draft report to the committee. If requested by a member, the draft report was to be printed, circulated to the committee and a subsequent day fixed for its consideration. The 1895 standing order did not explicitly provide for a report to be reconsidered and amended. Standing order 227(2) is similar to Australian Senate SO 38(4) which provides that: 'After a draft report has been considered the whole or any part of it may be reconsidered and amended'.

The requirement since 1856 for the Chair to sign a report on behalf of the committee was modified in 1895 SO 254 to provide that if the Chair refuses to sign a report the committee can appoint another member to sign it.

228. MEMBERS' OPINIONS TO BE REFLECTED

(1) The report of a committee is, as far as practicable, to reflect a unanimity of opinion within a committee.

(2) It is the responsibility of a committee Chair and all members of a committee to seek to achieve unanimity of opinion.

(3) Where unanimity is not practicable, a committee's report should be prepared so as to reflect the views of all members of the committee.

(4) Where unanimity is not practicable, any member may append to the report a brief statement of dissent, provided that:

(a) the member has sought to have their opinions included in the report agreed to by the committee,

(b) the statement of dissent is relevant to the committee's report and the terms of reference of the inquiry,

311 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, p 570. An example of this occurred in 1865 with the Select Committee on Question of Vacancy, when a committee member who was not the Chair submitted a draft report for the committee's consideration. The Chair's draft report was negatived on division, and the draft report of the other committee member was adopted on division (see 'Reports from the Select Committee on Question of Vacancy', *Journal of the Legislative Council*, 1865, vol 12, pp 165, 169 and 173-174).

312 *Erskine May*, 24th ed, p 831. May also notes that this motion can be amended to omit the Chair and insert the name of the member who submitted the alternative report.

(c) the statement does not contain any matter which would unreasonably adversely affect or injure a person, or unreasonably invade a person's privacy,

(d) the statement of dissent is signed by the member or members making it,

(e) the statement of dissent is no more than 1,000 words in length.

Development summary		
1988-2003	Resolution	Standing Committees
1997-2003	Resolution	General Purpose Standing Committees
2003	Sessional order 228	Members' opinions to be reflected
2004	Standing order 228	Members' opinions to be reflected

Standing order 228 is designed to facilitate a bipartisan approach to committee reports, but in the event agreement cannot be reached, to provide a process for members to include a statement of their reasons for disagreeing with aspects of the committee's report.

Operation

In referring a matter to a committee for inquiry and report, the House is seeking the opinion of the committee as a whole and not the opinions of individual members.

However, the standing order also recognises that members may fail to reach unanimity and provides under SO 228(3) that, where unanimity is not practicable, a committee's report should be prepared so as to reflect the views of all members of the committee. Members may propose amendments to the report and vote for or against those amendments with divisions recorded in the minutes.

Where unanimity is not practicable and a member has been unsuccessful in having their opinion included in the report, that member may append to the report a brief statement of dissent.[313] A minority of committee reports include dissenting statements.

Committee Clerks do not assist members with the drafting of dissenting statements,[314] but when a dissenting statement is received the secretariat will review it for compliance with the standing order and, should it not conform, the member will be advised to amend the statement.

Statements of dissent are appended to the report and, if there is more than one, are usually appended in the order in which they are received by the Committee Clerk.

313 See, for example, General Purpose Standing Committee No. 6, NSW Legislative Council, *Local Government in New South Wales* (2015), p 247; Select Committee on the Planning Process in Newcastle and the Broader Hunter Region, NSW Legislative Council, *The Planning Process in Newcastle and the Broader Hunter Region*, interim report (December 2014), p 178, and final report (March 2015), p 177.

314 However, the secretariat would assist a request, for instance, to locate a particular submission or evidence which a member may wish to quote in their dissenting statement.

Any committee member may submit a dissenting statement and individual members of a political party on the committee may provide separate dissenting statements.[315]

Committee members, including the Chair, have no right to view a dissenting statement before the tabling of the report, although the member making the dissenting statement may circulate it to other members if they so wish.

Background and development

Before the 1980s there was no provision for dissenting statements. However, there is an example of a joint committee providing for dissenting reports. In 1956, a Legislative Assembly-initiated joint committee into the Commonwealth of Australia Constitution provided that any member of the committee had the power to 'add a protest or dissent to any report'.[316]

In 1986, the Select Committee on Standing Committees recommended that dissenting reports be permitted for all committee reports. The committee challenged the traditional parliamentary view that the final report should be the report of the whole committee by noting that 'it ignores the reality that on many important issues synthesis is not possible, and that total agreement would be reached only after contentious points have been excised'.[317] The committee also stated that a number of other Houses, including the Senate, allow for dissenting reports.[318]

The 1988 resolution appointing the first subject standing committees incorporated this recommendation, allowing committee members to append a dissenting statement to a report, but provided no detail about the statement's form or content.[319] A similar provision was contained in the 1997 resolutions that established the first general purpose standing committees.[320]

This provision was readopted each Parliament[321] until 2003, when the resolution appointing the subject standing committees omitted the provision altogether.[322]

315 See, for example, Select Committee on New South Wales Workers Compensation Scheme, NSW Legislative Council, *New South Wales Workers Compensation Scheme* (2012), pp 280-283, and General Purpose Standing Committee No. 1, NSW Legislative Council, *The Gentrader transactions* (2011), pp 349-353.

316 *Minutes*, NSW Legislative Council, 11 July 1956, p 46; 19 July 1956, p 66.

317 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), pp 43-44.

318 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), p 43.

319 *Minutes*, NSW Legislative Council, 9 June 1988, p 185.

320 *Minutes,* NSW Legislative Council, 7 May 1997, p 679.

321 *Minutes*, NSW Legislative Council, 2 July 1991, p 28; 24 May 1995, p 41; 25 May 1999, p 81; 13 May 1999, pp 62-65 (for general purpose standing committees).

322 *Minutes*, NSW Legislative Council, 21 May 2003, pp 98-104.

One month later, a Government amendment to the resolution was agreed to, which adopted the detailed procedure now in place under the 2004 standing order.[323]

It is presumed that the current detailed provision was developed following a 2002 Standing Committee on Social Issues inquiry where a member of the Opposition raised little or no objection to the draft report during the deliberative meeting but proceeded to submit a detailed 11-page dissenting statement that was highly critical of the committee's process and final report.[324] In addition, during the General Purpose Standing Committee No. 3 inquiry into police resources in Cabramatta, a member submitted a dissenting statement relating to drug law reform issues that were not dealt with in the report and were not the subject of proposed amendments to the report.[325]

While the resolutions establishing the subject and general purpose standing committees made provision for dissenting statements, prior to the introduction of SO 228 there was no such provision in relation to a report of the Privileges Committee.[326]

229. CHAIR'S FOREWORD

A committee Chair's foreword must be approved by the committee prior to the tabling of the committee's report in the House, if the committee so resolves.

Development summary		
2003	Resolution	Standing Committees
2003	Resolution	General Purpose Standing Committees
2003	Sessional order 229	Chair's foreword
2004	Standing order 229	Chair's foreword

This standing order enables a committee, by motion, to agree to the content of the Chair's foreword.

323 *Minutes*, NSW Legislative Council, 25 June 2003, pp 165-166. The motion to establish the general purpose standing committees on 3 July 2003 was amended by the Government, by leave, to include the same detailed provision for dissenting statements; *Minutes*, NSW Legislative Council, 3 July 2003, pp 220-233.

324 Standing Committee on Social Issues, NSW Legislative Council, *Care and Support: Final Report on Child Protection Services* (2002), pp 188-198.

325 General Purpose Standing Committee No. 3, NSW Legislative Council, *Cabramatta Policing* (2001), pp 285-289.

326 *Minutes*, NSW Legislative Council, 25 May 1999, pp 83-85. See also, Standing Committee on Parliamentary Privilege and Ethics, NSW Legislative Council, *Report on inquiry into the Pecuniary Interests Register* (2002), p 119, and Standing Committee on Parliamentary Privilege and Ethics, NSW Legislative Council, *Report on inquiry into the Pecuniary Interests Register – Supplementary Returns* (2002), pp 17-18.

Operation

The Chair's foreword is generally regarded as an opportunity for the Chair to outline the conduct of the inquiry and significant highlights as well as to thank members, witnesses and staff for their contribution to the inquiry. A Chair's foreword, by tradition, is expected to be non-controversial, to avoid referring to matters which were not canvassed by the committee, and to not criticise the report or inquiry process.

Committee members generally do not see the Chair's foreword until the report is tabled, although a Chair may choose to circulate their foreword in advance of the report being tabled for the information of other members.

SO 229 allows a committee to insist, by resolution, on approving the Chair's foreword before the report is tabled. This standing order is not commonly used. In March 2006, during the deliberative meeting on the interim report for the inquiry into the Pacific Highway upgrades, a motion moved under SO 229 that the Chair's foreword be approved by the committee prior to the report being tabled in the House was defeated.[327] Advice sought from the Clerk confirmed that the committee had acted within its power under SO 229 to reject the motion that the committee approve the Chair's foreword but noted that '[i]t is undesirable for a Chair's foreword in committee reports to be used to advance controversial opinions'.[328]

Background and development

Prior to 2003, there was no provision for a committee to approve a Chair's foreword. The current provision was adopted following a 2002 inquiry by the Standing Committee on Parliamentary Privilege and Ethics. The committee's report was substantially amended against the wishes of the Chair and the Chair then used the foreword to criticise the report, even though it had been agreed to by a majority of the committee.[329]

The provisions of SO 229 were subsequently included in the 2003 resolutions appointing the subject[330] and general purpose standing committees,[331] and later adopted as SO 229.

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327 General Purpose Standing Committee No. 4, NSW Legislative Council, *Pacific Highway upgrades: interim report* (2005), p 229.

328 Clerk's advice, *Chair's Foreword – Advice of the Clerk of the Parliaments to the Hon Jan Burnswoods*, 5 May 2006, p 1.

329 See Clerk's advice, *Report on Inquiry into Pecuniary Interest Register; Advice in relation to tabling of Report 20 of the Standing Committee on Parliamentary Privilege and Ethics on Thursday 31 October 2002*, 1 November 2002. At that time, there was no provision for a member to make a statement of dissent in relation to a Privilege Committee report.

330 *Minutes*, NSW Legislative Council, 21 May 2003, p 103.

331 *Minutes*, NSW Legislative Council, 3 July 2003, p 232.

230. TABLING REPORTS

The report of a committee, with accompanying documents, is to be tabled in the House by the member signing the report, or in the absence of the member, by some other member of the committee, within ten calendar days of the report being adopted by the committee.

Development summary		
1856	Standing order 53	Report how signed
1895	Standing order 255	Report brought up
1988-2003	Resolution	Standing Committees
1997-2003	Resolution	General Purpose Standing Committees
2003	Sessional order 230	Tabling reports
2004	Standing order 230	Tabling reports

This standing order provides for the authentication of a committee report and for its publication within a reasonable timeframe after its adoption by the committee.

Operation

The standing order applies not only to reports tabled in the House but also to reports tabled out of session with the Clerk under SO 231.

The standing order requires that reports are to be tabled with accompanying documents. This ensures that evidence received by a committee is provided to the House and is available to all members of the Legislative Council and may be accessed by the public. Even documents which have not been made public by the committee, or the House, are available for inspection by members of the Legislative Council once they have been tabled.

The standing order also seeks to ensure that the report tabled is indeed the report agreed to by the committee. SO 230 refers to a 'member' signing the report rather than the 'Chair', as standing order 227(3) provides that if a Chair refuses to sign a report another member can be appointed by the committee.

In signing and tabling the report, the member takes responsibility for the authenticity of the report. In keeping with modern technology, Chairs routinely give approval for their electronic signature to be inserted in the report before printing and it is one of these printed copies which is tabled by the Chair. The tabled report becomes a parliamentary paper and is the official version of the committee's report.

Reports of Council committees are almost always tabled by the Chair, however, there are instances where reports are tabled by a committee member on behalf of the Chair. For example, in 2010, the Deputy Chair of the Standing Committee on Parliamentary Privilege and Ethics signed and tabled two reports entitled 'Citizen's Right of Reply (Church of Scientology, Australia)' and 'Citizen's Right of Reply (Mr D Kennedy)

(No. 2)'[332] on behalf of the Chair who was on leave. In the case of joint committees where the Chair is not a member of the Legislative Council, reports are always tabled by a Council member on the Chair's behalf.[333]

The third provision is that reports are to be tabled within 10 calendar days of being adopted by the committee. This provision is intended to prevent unnecessary delay in providing a report to the House while allowing sufficient time for a report to be reconsidered by the committee if required.

Committees usually table their reports within a few days of the report being adopted. On occasion, a committee will delay passing a resolution to adopt the report in order to comply with the requirements of the standing order, for example, to enable a particularly significant but not time-constrained report to be tabled in the House rather than with the Clerk when the House is not sitting.

Background and development

SO 53 adopted in 1856 provided that every report of a select committee was to be signed by the Chair on behalf of the committee.

From 1895, standing order 255 provided for the tabling of committee reports with accompanying documents and also stated that in tabling the report, the mover may, without debate, move that the report be printed. The 1988 resolution appointing the subject standing committees added to this standing order by stating that reports were to be tabled within 10 days of being adopted by the committee.[334] This was clarified in 1995 to mean 10 *calendar* days.[335]

231. TABLING OUT OF SESSION

(1) If the House is not sitting when a committee wishes to report to the House, the committee is to present copies of its report to the Clerk.

(2) A report presented to the Clerk is:

(a) on presentation, and for all purposes, deemed to have been laid before the House,

(b) to be printed by authority of the Clerk,

(c) for all purposes, deemed to be a document published by order or under the authority of the House, and

(d) to be recorded in the Minutes of the Proceedings of the House.

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332 *Minutes*, NSW Legislative Council, 18 March 2010, p 1725.

333 For example, the tabling of the Legislative Review Committee reports; *Minutes*, NSW Legislative Council, 15 March 2016, p 729.

334 *Minutes*, NSW Legislative Council, 9 June 1988, p 185.

335 *Minutes*, NSW Legislative Council, 24 May 1995, p 41.

Development summary		
1988-2003	Resolution	Standing Committees
1997-2003	Resolution	General Purpose Standing Committees
2003	Sessional order 231	Tabling out of session
2004	Standing order 231	Tabling out of session

This standing order allows committees to table their reports with the Clerk when the Legislative Council is not sitting.

Operation

SO 231 authorises the Clerk to receive committee reports when the House is not sitting. On receipt, the report is deemed to have been laid before the House and is for all purposes considered to be a document published by order or under the authority of the House. The Clerk authorises that the report be printed and on the next sitting day, reports receipt of the report to the House.

In practice, reports tabled under this standing order are presented by the Committee Clerk to the Clerk of the Parliaments. While the correspondence provided with the report is signed by the Chair, it is not usual for the Chair to be present when a report is tabled with the Clerk. A report tabled with the Clerk is reported to the House on the next sitting day.

Background and development

The provision for a committee to table out of session did not exist until 1988 when the resolution appointing the first subject standing committees was adopted. The 1988 resolution contained identical procedures to the 2004 standing order.[336] A similar procedure is contained in both the Australian Senate[337] and Legislative Assembly standing orders.[338] The standing order is very similar in terms to SO 55.

232. DEBATE ON COMMITTEE REPORTS

(1) On tabling of a report from a committee a motion may be moved without notice "That the House take note of the report".

(2) At the conclusion of the speech of the mover, the debate is to be adjourned to the next day on which committee reports have been given precedence.

(3) Unless otherwise ordered, the order of the day for the resumption of debates on committee reports is to be set down on the Notice Paper in the order in which the reports were presented.

336 *Minutes*, NSW Legislative Council, 9 June 1988, p 185.
337 Australian Senate, SO 38(7).
338 Legislative Assembly, 2006, SO 305.

(4) The debate on committee reports on any day on which the debate has precedence is to be interrupted after one hour. The interrupted debate is to stand adjourned and be set down on the business paper for the next day on which it has precedence.

(5) Each speaker in the debate on committee reports is to be limited to 10 minutes, except the committee Chair who is allowed 15 minutes and a further 10 minutes in reply.

Development summary		
1988-2003	Resolution	Standing committees
2003	Sessional order	Standing committees
2003	Sessional order 213	First meeting
2004	Standing order 213	First meeting
2010-2015	Sessional order	Debate on committee reports

Under SO 232, on the tabling of a report from a committee, a motion may be moved without notice for the House to 'take note' of the report. The standing order regulates the adjournment and resumption of the debate and sets time limits on speeches.

Operation

When a committee report is tabled in the House, a motion 'That the House take note of the report' may be moved without notice. In the majority of cases, a take note motion is moved under this provision. However, there are occasions where a take note motion is moved by separate motion.

The take note debate is usually moved by the member who tables the report, but there is nothing to prevent another member moving the motion if the member who tabled the report does not do so. If a report is tabled out of session, following the Clerk announcing receipt of it in the House, the Chair (or other member) may then move for the House to take note of the report.

Under SO 232, the mover of the take note motion may commence their speech immediately and, at the conclusion of their speech, debate is adjourned to the next sitting day on which committee reports have been given precedence. Notwithstanding this, it is more common for the member who has moved the motion to immediately move that the debate be adjourned,[339] or to make only a brief contribution before adjourning the debate, then resuming their speech when that item of business resumes, for example, the next sitting day on which committee reports have been given precedence.[340]

339 See, for example, the tabling of the *Budget Estimates 2015-2016* reports by General Purpose Standing Committee Nos 2, 3, 4 and 5, where debate on the motion was immediately adjourned; *Minutes*, NSW Legislative Council, 17 November 2015, pp 589-90.

340 See, for example, the tabling of the General Purpose Standing Committee No. 6 report *Budget Estimates 2015-2016*, where the Chair made a brief contribution on tabling; *Hansard*, NSW Legislative Council, 17 November 2015, p 5895.

Under SO 232(4), debate on committee reports is to be interrupted after one hour. Under a sessional order adopted in 2010[341] and again in 2011[342] and 2015,[343] the time for committee debates was extended to one hour and 30 minutes. However, in 2014, a different procedure for debate on a committee report was agreed to by the House. The House resolved that on the Chair moving the motion to take note of the Standing Committee on Law and Justice's report on the family response to the murders in Bowraville, debate be given precedence over all other business on the Notice Paper for a stated day until adjourned or concluded.[344] On the next day, the Chair tabled the report and moved the take note motion, and debate ensued for two hours.[345]

Background and development

From 1856 (SO 31) to 1870 (SO 41), the standing orders provided that 'it shall be in order, on the presentation of any document, except a petition, to move, without Notice, that it be printed, and to appoint a day for its consideration.' There are very few precedents of documents that have been considered by the House under these standing orders, of which all have been reports of the Standing Orders Committee.[346] See SO 57 for further discussion on the consideration of documents.

In 1986, the Select Committee on Standing Committees recommended that committee reports be considered as business of the House and debated on a procedural motion such as 'That the House take note of the Report'.[347] The committee also considered that it would be beneficial to provide for a regular time and day each sitting week for such a debate, but stressed that it should not displace time available for debate on private members' business.[348] The 1988 resolution appointing the first subject standing committees reflected this recommendation.[349]

These provisions were readopted in the resolution establishing the standing committees each session until 1995, when debate on committee reports was given precedence on Wednesdays after Question Time.[350] In 1999, the resolution establishing

341 *Minutes*, NSW Legislative Council, 9 March 2010, p 1682.
342 *Minutes*, NSW Legislative Council, 9 May 2011, p 72.
343 *Minutes*, NSW Legislative Council 6 May 2015, p 56.
344 *Minutes*, NSW Legislative Council, 5 November 2014, p 234.
345 *Minutes*, NSW Legislative Council, 6 November 2014, p 245; *Hansard,* NSW Legislative Council, 6 November 2014, pp 2208-2225.
346 *Minutes*, NSW Legislative Council, 21 May 1858, p 28; 4 June 1858, p 35; 16 June 1858, pp 37-38; 25 June 1858, p 43; 29 July 1858, p 58; 27 January 1859, p 11; 14 December 1859, p 41; 7 July 1897, p 70; 3 November 1909, pp 102-103; 3 August 1922, p 36; 22 November 1927, p 41.
347 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), p 38.
348 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), p 38.
349 *Minutes*, NSW Legislative Council, 9 June 1988, p 185.
350 *Minutes*, NSW Legislative Council, 24 May 1995, p 41.

the committees was further modified to limit the time for speakers to not more than 20 minutes.[351]

In May 2003, the take note procedure was adopted as a separate sessional order for the first time, rather than being included in the resolution establishing standing committees. The only change to the substance of the resolution was to limit each speaker to 10 minutes, apart from the Chair, who was allowed 15 minutes and a further 10 minutes in reply.[352]

In 2004, SO 232 was adopted in similar terms as the sessional order adopted earlier in the year, but did not specify which day committee reports were to have precedence. The provision for precedence of committee debates was included in SO 41.[353]

Following the adoption of the 2004 standing orders, the previous practice of committee report debate occurring on Wednesdays after Questions for one hour continued under sessional order[354] until 2010, when a sessional order was agreed to that extended debate time to one and a half hours.[355]

In 2011, a new sessional order was adopted that set debate on committee reports down for the first sitting day of the week after Question Time. The sessional order reflected a modified sitting pattern by which the House sat Tuesday to Friday of one week and Monday to Thursday the following week. The one and a half hour time limit for debate was readopted.[356] When the House reverted to a more usual sitting pattern, the words 'first sitting day of the week' were omitted and 'Tuesday' inserted instead.[357] This amended sessional order was readopted in 2015.[358]

The provision regarding committee debates was not included in the resolution appointing general purpose standing committees, therefore, until the adoption of the 2004 standing orders, Chairs of general purpose standing committees had to give notice to take note of a report and then rely on the contingent notice to 'take note of paper' in order to debate the committee report.[359]

SO 232 now applies to all committees, making it convenient for the Chair (or other member) of the subject standing, portfolio, select, and even joint select committees, to move a take note motion on a report if they so desire.

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351 *Minutes*, NSW Legislative Council, 25 May 1999, p 81.

352 *Minutes*, NSW Legislative Council, 21 May 2003, p 98.

353 SO 41 provides precedence for motions relating to the adoption of committee reports and the consideration of government responses, however, there has not yet been a debate on a government response.

354 *Minutes,* NSW Legislative Council, 1 June 2004, p 809.

355 *Minutes*, NSW Legislative Council, 9 March 2010, p 1682.

356 *Minutes*, NSW Legislative Council, 9 May 2011, p 72.

357 *Minutes*, NSW Legislative Council, 23 November 2011, p 611.

358 *Minutes*, NSW Legislative Council, 6 May 2015, p 56.

359 See, for example, *Minutes*, NSW Legislative Council, 9 September 1998, p 682.

233. GOVERNMENT RESPONSE

(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 Leader of the Government in the House who must within six months of a report being tabled report to the 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 government 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 laid before the House,

(b) to be printed by authority of the Clerk,

(c) for all purposes, deemed to be a document published by order or under the authority of the House,

(d) to be recorded in the Minutes of the Proceedings of the House, and

(e) to be distributed by the clerk of the committee to inquiry participants.

(4) The President is to report to the House when any government response has not been received within the six month deadline.

Development summary		
1988-2003	Resolution	Standing Committees
1997-2003	Resolution	General Purpose Standing Committees
2003	Sessional order 233	Government response
2004	Standing order 233	Government response

This standing order requires government responses to be tabled, or provided out of session if the House is not sitting, within six months of a committee report being tabled. The standing order also provides for the distribution of government responses as well as reporting of late responses.

Operation

Under SO 233, any report which recommends that action be taken by the government is to be referred to the government for a response.

In most cases, the government provides a detailed response to each recommendation in a committee report. Responses usually state whether or not a recommendation is supported, and what the government is currently doing or is intending to do about the recommendation.

However, there are occasions where the requirements under SO 233 are not entirely addressed. Sometimes when a report has dealt with a particularly contentious aspect of public policy, the response received does not technically comply with the standing order in that it may consist of general statements rather than addressing each recommendation

in turn. This occurred in relation to the report on spent convictions for juvenile offenders by the Standing Committee on Law and Justice. The Government response referred to the 'complex issues' raised by the inquiry and concluded that:

> …the NSW Government will give further consideration to the recommendations contained in the Report, and where appropriate, will undertake further consultation with relevant agencies, before determining its final position on the recommendations.[360]

Some committee reports contain 'findings' in addition to or in lieu of recommendations. While the standing order does not require the government to respond to committee findings, the government will occasionally do so. For example, the Government responded to the findings of the Select Committee on the Agistment of Horses on the Yaralla Estate and the findings in the first report of the Select Committee on Greyhound Racing in NSW.[361]

Although the requirement for government responses to be provided within six months of a report being tabled is generally well complied with, there has been a trend in recent years for correspondence to be provided within that timeframe advising of various reasons for delays in the provision of a full response. This correspondence is tabled by the President in the House.

For example, following the inquiry by the Standing Committee on Law and Justice into the family response to the murders in Bowraville, the Attorney General wrote to the Clerk on 1 May 2015 to advise that due to the recent caretaker period and changes to Cabinet, the Government response to the committee's report would be provided shortly after its due date of 6 May 2015. The Government tabled its response on 2 June 2015.[362] In addition to this response, the Government subsequently provided an additional response after new information emerged relevant to the implementation of the report recommendations.[363]

On another occasion, correspondence was provided to the Clerk advising that the Government required additional time to prepare its response to the recommendations of the GPSC No. 3 inquiry into tourism in local communities and that the response would be provided in three weeks' time.[364]

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360 Government response to the report by the Standing Committee on Law and Justice entitled 'Spent convictions for juvenile offenders', 13 December 2011. The Government response was received 11 months late, following a change of government, in response to a resolution of the House of 13 October 2011 requiring the Government to provide the outstanding responses.

361 Government response to the Select Committee on the Agistment of Horses on the Yaralla Estate, 24 April 2014; Government response to the Select Committee on Greyhound Racing in NSW, September 2014.

362 *Minutes,* NSW Legislative Council, 2 June 2015, p 163.

363 The response was received out of session by the Clerk on 17 December 2015 under SO 233(3).

364 Correspondence from Hon Duncan Gay MLC, Leader of the Government in the Legislative Council, to Clerk of the Parliaments, 10 September 2014.

In another example, correspondence was received by the Clerk advising that, as a coronial process was considering many issues that were the subject of the recommendations of the inquiry into the Wambelong Fire, an interim response would be provided.[365] The Clerk subsequently received further correspondence advising that the Government would provide a response to the committee's recommendations, as well as a response to the coroner's report, once the coroner handed down his findings.[366] The Government's response was ultimately received seven months after it was due.[367]

In one instance, a Government response in relation to the report on the *Inebriates Act 1912* by the Standing Committee on Social Issues was delayed for almost two years. Shortly after the due date had passed, the Government advised that the response would be delayed 'due to the complex nature of the issues raised by the Committee and the need to coordinate consultation with various agencies on the development of a Government response'.[368] The Government sent two more letters advising of further delay for the same reasons,[369] finally providing a response almost two years after it was due.[370]

There is also a precedent for requesting an extension of time to provide a response. On one occasion, the Minister for Skills wrote to the Committee Chair two months before the Government response was due, to request a four-month extension to respond to the inquiry into vocational education and training in New South Wales 'in order to give the Inquiry's recommendations due consideration and comprehensively address the Inquiry's findings…'[371] In reply, the Chair informed the Minister that there is no provision under SO 233 for an extension of time to be granted for the provision of a government response, and further requested that any further correspondence in relation to this matter be directed to the Clerk, not the Committee Chair.[372]

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365 Correspondence from Hon David Elliott MP, Minister for Emergency Services, to Clerk of the Parliaments, 25 August 2015. Despite the Government's stated intention, no interim response was submitted.

366 Correspondence from Hon David Elliott MP, Minister for Emergency Services, to Clerk of the Parliaments, 11 September 2015; *Minutes*, NSW Legislative Council, 15 September 2015, p 396.

367 Correspondence from Hon David Elliott MP, Minister for Emergency Services, to the Clerk of the Parliaments, providing government response to the inquiry into the Wambelong Fire, 31 March 2016.

368 Correspondence from Hon John Della Bosca MLC, Special Minister of State, to Hon Jan Burnswoods MLC, Chair of the Social Issues Committee, 22 March 2005.

369 Correspondence from Hon John Della Bosca MLC, Special Minister of State, to Hon Jan Burnswoods MLC, Chair of the Social Issues Committee, 5 April 2005; Correspondence from Hon John Della Bosca MLC, Special Minister of State, to Hon Meredith Burgmann MP, President of the Legislative Council, 7 June 2005.

370 Government response to the Social Issues Committee's Report on the *Inebriates Act 1912*, 3 January 2007.

371 Correspondence from Hon John Barilaro MP, Minister for Skills, to Hon Paul Green MLC, Chair of General Purpose Standing Committee No. 6, 22 April 2016.

372 Correspondence from Hon Paul Green MLC, Chair of General Purpose Standing Committee No. 6, to Hon John Barilaro MP, Minister for Skills, 10 May 2016.

There has only been one occasion on which the President has reported to the House under SO 233(4) that a number of government responses had not been received by the due date.[373] This matter is detailed below.

Responses following the prorogation of a parliament and an election

In recent years, there have been a number of occasions on which government responses have become overdue when reports are tabled towards the end of one parliament and the response is due in the next parliament. The Government has asserted that in such instances there is no obligation under SO 233 to provide a response.

In 2011, following a change of government, at the commencement of the 55th Parliament, the Clerk received correspondence from the Leader of the Government in the Council advising that the Government would not respond to various committee reports tabled in the last six months of the 54th Parliament, on the basis of Crown Solicitor's advice that the newly elected Government was not obliged to respond to reports which were tabled during the tenure of the previous Government.[374] In reply, the Clerk indicated that the application of SO 233 is not limited to individual parliaments and, as such, the Government was bound by its provisions. The Clerk also observed that the Council received a number of Government responses in the 54th Parliament to reports which were tabled in the 53rd Parliament.[375] On 11 October 2011, the President, under SO 233(4), informed the House that Government responses had not been received to nine committee reports tabled during the 54th Parliament (2011-2014).[376] The House subsequently agreed to a resolution requiring the Government to respond to all nine reports.[377] During debate on the motion, the Leader of the Government referred to the Crown Solicitor's advice that it was inappropriate and unnecessary for the Government to reply to the reports of the previous parliament.[378] The Government responses were subsequently received on the first sitting day in 2012.[379]

Following the 2015 election, the Government indicated its intention to table responses to several reports tabled in the preceding Parliament,[380] but that it would not provide responses to the reports of the select committees into ministerial propriety and Operation Prospect (although the Government did respond to other select committee reports).

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373 *Minutes,* NSW Legislative Council, 11 October 2011, pp 458-459.

374 Correspondence from the Leader of the House, the Hon Duncan Gay, to the Clerk of the Parliaments, 7 September 2011; *Minutes,* NSW Legislative Council, 11 October 2011, p 459. This correspondence retracted previous correspondence dated 20 June 2011, as tabled in the House; *Minutes,* NSW Legislative Council, 20 June 2011, p 225.

375 Correspondence from the Clerk of the Parliaments to the Leader of the House, the Hon Duncan Gay, 9 September 2011; *Minutes,* NSW Legislative Council, 11 October 2011, p 459.

376 *Minutes,* NSW Legislative Council, 11 October 2011, pp 458-459.

377 *Minutes,* NSW Legislative Council, 13 October 2011, pp 492-494.

378 *Hansard,* NSW Legislative Council, 13 October 2011, p 6124.

379 *Minutes,* NSW Legislative Council, 14 February 2012, pp 668-669.

380 See, for example, General Purpose Standing Committee No. 5, NSW Legislative Council, *Wambelong Fire* (2015).

In correspondence to the Clerk, the Premier noted that 'the [Operation Prospect] select committee ceased to exist after it tabled its report on 25 February 2015 and Parliament was prorogued on 2 March 2015'.[381] However, the letter also included a commitment to respond to the recommendations when the Government provided a response to a subsequent GPSC No. 4 inquiry also examining Operation Prospect. The report of the GPSC No. 4 inquiry was tabled in August 2015,[382] and the response, which included a response to the earlier inquiry, was provided in February 2016.[383]

There have also been occasions where the government asserted that it was not required to respond to reports tabled in the previous parliament, but nevertheless provided detailed correspondence in relation to report recommendations. In 2015, correspondence was received from the Minister for Social Housing in relation to the Select Committee on Social, Public and Affordable Housing which stated that '[a]lthough the Government is not obliged to respond to committee inquiries from the previous Parliament, the attached is provided as advice as a courtesy rather than a formal government response to the Inquiry'. The attachment to the correspondence was in the form of a typical government response addressing each committee recommendation and was treated as such, including being distributed to inquiry stakeholders.[384]

Background and development

The 1986 Select Committee on Standing Committees recommended that the government be invited to respond to report recommendations within six months of a report being tabled and that the President table a list from time to time of these responses. Based on evidence received from other jurisdictions, the committee considered it impractical to make the government response process compulsory as it would encourage either 'shallow responses' or risk the requirement being ignored.[385]

This recommendation was reflected in the 1988 resolution appointing the first subject standing committees which stated that the government 'shall' respond to report recommendations within six months of a report being tabled.[386] This remained unchanged until 1995, when the resolution appointing subject standing committees was strengthened to state that the government 'must' provide a response within six months. The resolution also made provision for the Clerk to receive responses out of session.[387]

381 Correspondence from Hon Mike Baird MP, Premier, to Clerk of the Parliaments, 26 August 2015.
382 *Minutes,* NSW Legislative Council, 25 August 2015, p 312.
383 *Minutes,* NSW Legislative Council, 23 February 2016, p 642 (Government response to report of General Purpose Standing Committee No. 4 entitled 'The progress of the Ombudsman's investigation "Operation Prospect"', 22 February 2016).
384 Correspondence from Hon Brad Hazzard, Minister for Social Housing, to Committee Director, 7 December 2015.
385 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), p 39.
386 *Minutes*, NSW Legislative Council, 9 June 1988, p 186.
387 *Minutes*, NSW Legislative Council, 24 May 1995, p 41.

In 1999, the resolution was further modified to provide that the President report to the House if any government response was not received by the six-month deadline.[388]

The resolution establishing the standing committees in 2003 provided that government responses presented to the Clerk out of session are deemed to have been laid before the House, and are to be distributed to inquiry participants.[389] The 2003 resolution formed the basis of the 2004 standing order.

The government response provision was not included in the resolution appointing general purpose standing committees until 2003.[390] Prior to this, Committee Chairs moved notices of motions in the House if they required the government to respond to the report recommendations.[391] SO 233 now applies to all committees, meaning that the Chairs of portfolio committees are no longer required to move notices of motion to require a government response.

234. RESOURCES

(1) A committee is to be provided with the resources necessary to carry out its functions.

(2) A committee may, with the consent of the appropriate Minister, make use of the services of any staff or facilities of a government department, administrative office or public body.

(3) A Chair of a committee may report to the President on any matter relating to the administration, functioning or operation of the committee.

(4) The Clerk is to appoint an officer of the Council to act as clerk to the committee.

(5) The clerk to a committee must record and include in the committee's report to the House:

(a) the names of the members attending each meeting of a committee,

(b) the proceedings of the committee and every motion or amendment moved and the name of the mover, and

(c) the names of the members voting on each side in a division.

388 *Minutes*, NSW Legislative Council, 25 May 1999, p 82.

389 *Minutes*, NSW Legislative Council, 21 May 2003, p 104.

390 *Minutes*, NSW Legislative Council, 3 July 2003, p 233.

391 See, for example: *Minutes*, NSW Legislative Council, 4 June 2002, p 174; 17 September 2002, p 351.

Development summary		
1895	Standing order 243	Record of Proceedings and Divisions
1988-2003	Resolution	Standing Committees
1997-2003	Resolution	General Purpose Standing Committees
2003	Sessional order 234	Resources
2004	Standing order 234	Resources

This standing order seeks to ensure that committees are provided with appropriate resources to perform their functions. The standing order requires the Clerk to appoint an officer to act as Committee Clerk, who among other things, is responsible for preparing an accurate record of the minutes of committee activities.

Operation

Each committee is assigned secretariat support from within the Department of the Legislative Council. Under SO 234, the Clerk appoints a staff member to act as Committee Clerk, who is responsible for preparing minutes as required by the standing order, which are incorporated into committee reports. Support also includes organising site visits and hearings, providing procedural advice to committee members, preparing correspondence and other material, and drafting of the Chair's report. This is also the case notwithstanding prorogation of the Parliament, as it is the view of the Legislative Council that committees are able to meet and transact business (See SO 206).

In late 2010, General Purpose Standing Committee No. 1 established an inquiry into the sale of the state's electricity assets by the former Labor Government, one day after the prorogation of Parliament. The then President, the Hon Amanda Fazio, accepted the advice of the Clerk that the committee could continue to sit despite prorogation and, accordingly, did not withhold any of the resources of the Legislative Council from the committee undertaking the inquiry.

On occasion, it has become apparent that there are insufficient resources within the Department of the Legislative Council to allocate to a specific committee or inquiry and specific additional funding has been obtained.[392]

In accordance with SO 234(2), it is not uncommon for committees to request a briefing from public servants or subject experts at the commencement of an inquiry to assist

392 General Purpose Standing Committee No. 1, NSW Legislative Council, Inquiry into the NSW Workers Compensation Scheme, 2001-2002; Joint Select Committee on the Cross City Tunnel, 2005-2006; Select Committee on Recreational Fishing, 2009-2010; General Purpose Standing Committee No. 5, NSW Legislative Council, Inquiry into the management of public lands in New South Wales, 2012-2013.

the members and secretariat staff to understand complex matters before receiving evidence.[393]

Under SO 234(5), the Committee Clerk records the minutes relating to a committee inquiry, including the names of the members attending each meeting of a committee, the proceedings of the committee, every motion or amendment moved and the name of the mover, and the names of the members voting on each side in a division.

Consistent with SO 234(3), in March 2013, a Chairs' Committee was established by the President, and would be chaired by the President, to provide an informal forum for Legislative Council Committee Chairs to raise procedural and administrative issues relevant to the operation of committees in the Council. During the 55th Parliament (2011-2014) the Chairs' Committee considered the development of guidelines for the use of social media during committee hearings and the production of Legacy Reports by the subject standing committees, among other things. The committee was re-established in 2015 at the commencement of the 56th Parliament.

Background and development

Standing order 234(1) stems from recommendations made by the Select Committee on Standing Committees in 1986, which called for a committee secretariat, responsible to the Clerk of the Parliaments, to be established to support the work of committees.[394] This provision, as first adopted in the 1988 resolution appointing the first standing committees, stated that 'finance, staff, facilities and resources' are to be provided 'with the approval of the President'.[395]

Standing order 234(2) and (3) were also introduced as part of the 1988 resolution. It is likely that SO 234(2) originates from the Victorian *Parliamentary Committees Act 1968*, which contained a similar provision.

The provision under SO 234(3), that a Chair may report to the President regarding certain 'matters', initially only referred to the functions or operation of the committee.[396] However, this was broadened in 2003 to include the administration of the committee.[397]

The provision for the record of proceedings of a committee under SO 234(4) was first provided in the 2004 standing orders. This provision formalises the delegation of responsibilities from the Clerk of the Parliaments to the Committee Clerk.

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393 For example, the Standing Committee on Law and Justice receives a briefing at the start of each parliament from officers of the relevant government agencies involved in the committee's oversight reviews.

394 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), pp 51-56.

395 *Minutes*, NSW Legislative Council, 9 June 1988, p 184.

396 *Minutes*, NSW Legislative Council, 9 June 1988, p 183.

397 *Minutes*, NSW Legislative Council, 21 May 2003, p 99.

Standing order 234(5) originates from 1895 SO 243, that an entry be made in the minutes noting the members that attended meetings, all motions and amendments moved including the name of the mover, and the names of members voting in a division. The 2004 standing order continued this requirement with the additional provision that this information be appended to a report, which had occurred since 1998 as a matter of practice.

Prior to 1998, minutes would be tabled with the report along with evidence and tabled documents. General purpose standing committees began appending minutes to reports in 1998 and the subject standing committees adopted this practice in 2000.

APPENDIX

A CHRONOLOGY OF PROCEDURAL DEVELOPMENTS IN THE LEGISLATIVE COUNCIL SINCE 1823

THE LEGISLATIVE COUNCIL PRIOR TO RESPONSIBLE GOVERNMENT: 1823 TO 1856

The Legislative Council is the oldest legislature in Australia, being established by the *New South Wales Act 1823*. The Act was adopted in recognition that there would be circumstances in which it was necessary for laws to be made locally and expediently, but also that it was not practical to establish a representative legislative assembly in the colony. The Act provided for the constitution of a council and for the appointment of five to seven persons resident in the colony as members of the council to advise the Governor, the Governor retaining overall power. Proceedings were conducted in secret and members were required to take an oath declaring that they would not 'directly or indirectly communicate or reveal to any person or persons any matter which shall be so brought under my consideration or which shall become known to me as a member of the said council'.[1]

The Act also provided the first rules for the conduct of business in the Council. Under the Act, only the Governor could initiate laws and was to lay all proposed laws before the Council at a meeting convened for that purpose. If members dissented from the proposed law, reasons for so dissenting were required and were to be recorded in the Minutes of Proceedings.

The first Council met on 25 August 1824 in the Council Chambers at Government House, then on the corner of Bridge and Phillip Streets in Sydney.[2] Present at the meeting were His Excellency Sir Thomas Brisbane, Governor, Francis Forbes, Chief Justice, James Bowman, Principal colonial Surgeon, Major Frederick Goulburn, Colonial Secretary, and John Oxley, Surveyor General. The Governor read the Royal Warrant dated 1 December 1823 appointing William Stewart, Esquire, the Lieutenant Governor

1 *New South Wales Act 1823*, 4 Geo IV, c 96 (Imp), s 24. The Act also provided for the establishment of a Supreme Court of New South Wales and a Supreme Court of Van Diemen's Land and gave the colony limited powers to levy taxes.

2 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 610.

of New South Wales, and the above named persons as members of the Council, who were then sworn before the Governor as prescribed by the *New South Wales Act 1823.*

The Council operated under the rules provided under the 1823 Act until 1827, when the Governor requested that the Council consider rules of procedure. The report of the committee appointed to draft the rules and orders for the conduct of business[3] was agreed to by the Council on 31 December 1827.[4] While rudimentary in comparison to the Legislative Council standing orders today, they are nevertheless familiar. The 24 rules adopted in 1827 included the following provisions:

- that the 'Senior Member' preside and preserve order;
- that proceedings would begin as soon as four members were present;
- that the President had a casting vote in the case of an equality of votes;
- that on the Governor presenting a bill for the Council's consideration, the Clerk shall read the Titles a first time;
- that every bill was to be read three times at three separate meetings;
- that the earlier rules relating to dissent, referred to as a bill being negatived, and alteration of bills, would continue;
- that standing orders on bills could be suspended in the case of emergency or where there were no alterations proposed, so that a bill could be carried through all its stages at one sitting;
- for the precedence of questions of privilege and for rules of debate including that imputations of improper motives were highly disorderly;
- for the role of the Clerk; and
- for the establishment, reports and records of committees.

The standing orders were not considered to have ongoing effect and were readopted at the commencement of each new session of the second Council between 1825 and 1829.

At the commencement of the third Council in 1829, the House adopted 23 new standing orders, most of which were in much the same terms as the 1827 standing orders but with some modification.[5] Most significantly, the rules increased the number of members required to be present for the House to sit to 10. This provision reflected the *Imperial Act* of 1828 which increased the number of members of the Council to 'not exceeding 15, nor less than 10' and also removed the secrecy provision contained in the oath.[6] The new standing orders also required that the second reading of a bill could not commence within eight clear days of the first reading, introduced rules for divisions including that

3 *Votes and Proceedings of the Legislative Council,* 24 December 1827, p 38.
4 *Votes and Proceedings of the Legislative Council,* 31 December 1827, pp 39-40.
5 *Votes and Proceedings of the Legislative Council,* 25 August 1829, p 58.
6 9 Geo. 4 c 83.

the 'ayes' move to the right of the Chair and the 'noes' to the left, and a secret ballot for the election of committee members.

On 7 September 1829, a select committee was appointed to consider orders and regulations for receiving petitions and hearing from the petitioners, or counsel on their behalf, and for examining witnesses in relation to the petition. The rules were agreed to on 9 September 1829.[7]

On 12 September 1829, *The Sydney Gazette and New South Wales Advertiser* reported on the adoption of the rules and orders of the Legislative Council:

> HAVING been favoured with a copy of the Standing Orders adopted by the Legislative Council, for the regulation of their proceedings, we have much pleasure in laying them before our readers.
>
> The public will now be satisfied that their laws are not inconsiderately made.
>
> Every necessary precaution is taken to secure thorough deliberation and discussion on all Bills submitted to the Council, the stages through which they pass, before their final adoption as laws, being similar to those in the House of Commons. Regulations like these, coupled with the eight days' notification through the newspapers, give ample security for cautious legislation.
>
> The 24th and following articles, on the subject of Petitions, are highly satisfactory, throwing open as they do the doors of the Council Chamber to the community at large, and establishing, even at this early period of our history, that ancient constitutional right—a right which Englishmen have been taught so highly to value, and by the exercise of which the imperial legislature, in the greater part of its proceedings, is so considerably influenced.
>
> It happens to have come to our knowledge, that the members of our Council do, in fact, bestow the utmost pains upon the matters brought before them: their sittings are frequently long; their discussions anxious and protracted; their enquiries into all the circumstances connected with the propositions on their table, close and careful; and the probable consequences of each particular measure, as affecting individual rights or the general good, are anticipated and weighed in the spirit of earnest solicitude. Their post is indeed an arduous one. The duties pressing upon their attention are of the most anxious nature, and we rejoice to see the prudent, liberal, and patriotic manner in which they have commenced them.

Standing orders adopted in 1830 in the next session included new provisions for petitions, and 'sub committees', a term used until 1843 when it was replaced with 'select committees'.[8] In 1832, standing orders for private bills were adopted[9] and in June 1835 a rule for protests against the 'estimates of expenditure' was adopted.[10]

The Sydney Gazette published reports of proceedings of the Legislative Council between 1828 and 1843. Although the *Sydney Morning Herald* commenced in 1831, it did not

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7 *Votes and Proceedings of the Legislative Council,* 9 September 1829, p 61.

8 *Votes and Proceedings of the Legislative Council,* 7 April 1830, pp 77-78 (copies of the 1830 standing orders were agreed to on 26 April 1830).

9 *Votes and Proceedings of the Legislative Council,* 2 August 1832, pp 36-37.

10 *Votes and Proceedings of the Legislative Council,* 24 June 1835, p 245.

initially report proceedings of the Council, the Governor favouring *The Sydney Gazette*.[11] The press were not allowed into the Council chamber at the time and a formal summary of proceedings was provided to *The Sydney Gazette* for publication. In 1838, the Council agreed to admit strangers into the galleries, allowing reporters from the *Sydney Morning Herald* to be present, although all strangers were required to withdraw during a division.[12] Initial reports by the *Herald* were not comprehensive due to a lack of reporters in the colony, a matter which remained an issue in 1845 when it was raised during an inquiry by the Standing Orders Committee (see below). By 1843, however, coinciding with the reconstituted Legislative Council, the reports in the *Herald* had increased in volume and importance to the extent that they 'virtually constituted the "Hansard" of the Colony and were quoted and referred to, both inside and outside the Legislature, as completely authoritative'.[13] The record of debates continued to be recorded in the *Sydney Morning Herald* until Hansard was established in the NSW Parliament in 1879.[14]

1843 – A partially elected Council

The constitution of the Legislative Council – consisting of members appointed by the Governor to advise the Governor – only briefly satisfied the demands of the colony as it began to emerge from its penal origins.

In 1842, the *Australian Constitutions Act 1842*[15] established a Legislative Council consisting of 36 members, 12 of whom were appointed by the Crown, and the remainder elected by the voters in New South Wales. Eligibility to vote was based upon ownership or occupation of property set at a high value. The Act did not establish 'responsible government' as the Governor still had overriding authority and ministers of state were not Members of Parliament. The Act also provided that at the Council's first meeting it was to elect one of its members as its Speaker and to prepare and adopt standing rules and orders. The proposed standing orders were to be laid before the Governor for approval, at which time they would become binding and in force subject to the confirmation or disallowance of Her Majesty.

The new Council, and the fourth since 1824, met for the first time on 1 August 1843.

On 4 August 1843, in accordance with the Constitution, a Rules and Orders Committee was appointed to prepare standing orders 'as shall appear best adapted for the orderly conduct of the business of this Council in conformity to the 27th clause of the Act of Parliament, 5 and 6 Victoria, cap. 76, with instructions to report to the Council a copy of the Rules, as early as may be practicable'.[16]

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11 John Fairfax & Sons, *A Century of Journalism: The Sydney Morning Herald and its record of Australian life 1831-1931* (John Fairfax & Sons, 1931), p 46.

12 Fairfax & Sons, *A Century of Journalism,* p 47.

13 Fairfax & Sons, *A Century of Journalism,* p 92.

14 Correspondence respecting the proposed establishment of Hansard, tabled *Minutes*, NSW Legislative Council, 2 October 1878 p 19; first Hansard published on 28 October 1879.

15 5 & 6 Vic, c 76 (1842) (Imp).

16 *Votes and Proceedings of the Legislative Council,* 4 August 1843, p 9.

On 15 August 1843, the Chairman of the Rules and Orders Committee tabled a draft of the proposed rules and orders which the House resolved to consider in committee of the whole on the following Tuesday.[17] The proposed rules were considered in committee of the whole on 22 August and leave granted for the committee to sit again the following Thursday.[18] On 1 September 1843, the proposed standing orders were further considered in committee and leave again granted to sit again, but as the motion was agreed to without setting a time or date for further consideration, the order of the day lapsed.[19] The proposed standing orders were recommitted, on notice, on 12 September 1843.[20]

On 17 October 1843, before the new rules were adopted, the House agreed by resolution that the manner of appointing members to select committees would be by members submitting names they thought 'fit and proper' to serve on the committee to the Clerk who would report to the Speaker the five members who had the greatest number of votes and were thereby elected to the committee.[21] The proposed standing orders were finally agreed to on 27 October 1843 and, under the final standing order, were to have effect until the next general election.[22] The rules were significantly more detailed and comprehensive than earlier standing orders.

The *Sydney Morning Herald* reported the adoption of the standing orders on 28 October 1843, quoting the Chairman of Committees, Mr Hastings Elwin, as stating that:

> …a great deal of labour had been bestowed by the House in going through the standing orders, and he believed that as far as they went they were perfect, although several others would be required.[23]

As predicted by Mr Elwin, it was not long before amendments were made to the standing orders and additional rules adopted. Before the Governor approved the standing orders adopted on 27 October, the Council received a message from the Governor requesting that the Council reconsider SO 140 which provided for the repeal of a standing order by a simple vote of the Council, and not on the approval of the Governor.[24] The House ultimately agreed to the request, but not without some dissent. A 'this day six months' amendment moved to the motion that the House resolve into committee of the whole to consider the Governor's message was negatived on division and a motion that the message be considered early in the next session was also negatived on division.[25]

In addition to readopting earlier standing orders, the 1843 standing orders included provisions for the election and duties of the Speaker, the opening of a new session, rules for the conduct of members, including the provision for a member to be fined for

17 *Votes and Proceedings of the Legislative Council,* 15 August 1843, p 19.
18 *Votes and Proceedings of the Legislative Council,* 22 August 1843, p 35.
19 *Votes and Proceedings of the Legislative Council,* 1 September 1843, p 49.
20 *Votes and Proceedings of the Legislative Council,* 12 September 1843, p 61.
21 *Votes and Proceedings of the Legislative Council,* 17 October 1843, p 147.
22 *Votes and Proceedings of the Legislative Council,* 27 October 1843, p 164.
23 *Sydney Morning Herald,* 28 October 1843, p 3.
24 *Votes and Proceedings of the Legislative Council,* 22 November 1843, p 1.
25 *Votes and Proceedings of the Legislative Council,* 30 November 1843, pp 213-214.

failing to attend on a call of the House,[26] expanded provisions for the consideration of bills, provisions for members to move motions on notice, the requirement for motions to be seconded, and provisions for the transmittal of messages from the Governor and deputations to the Governor. The provision for the suspension of standing orders relating to bills in cases of urgency was expanded to apply to any standing order, so long as the motion was seconded. However, most importantly, the rules included a provision that in cases not otherwise provided for, resort was to be had to the rules, usages and forms of 'Parliament', which were to be followed until the House adopted its own rule.[27]

The 1842 Act introduced a form of representative government, with 24 of the 36 members elected on a limited franchise, but not responsible government. Power and control over finances and administration remained with the Governor who received instructions from the United Kingdom. The Executive Government, although made up of members of the Council, largely operated independently of, and without reference to, the Council. By 1844, opposition to the constitutional arrangements had grown. Heated disagreements between Governor Gipps and members of the Legislative Council[28] led by W C Wentworth over control of revenue, particularly from Crown land leases, dominated the political arena and the push for self-rule and the implementation of responsible government gained momentum.[29]

It was within this context that a new standing order was proposed, which would prohibit members from speaking disrespectfully of the Queen or any member of the Royal Family or person administering the government of the colony. The standing order had been in the original draft of the standing orders in 1843, but had been omitted during consideration in committee of the whole.[30] The member proposing the motion stated that members should extend to the head of the Executive Government the same courtesy which they extended towards each other and which they would extend to the Sovereign. Members opposing the motion considered it a censure on the House, stating that there could be occasions on which it was their duty to speak of the head of the Executive in terms which may be deemed disrespectful, such as an impeachment for malversation of office, although the power to impeach was itself a matter of disagreement among members.

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26 See, for example, *Votes and Proceedings of the Legislative Council*, 6 December 1844, pp 299 and 303. The absence of Mr Bland, Mr Darvall and Mr Icely was noted. On Mr Darvall and Mr Icely entering the chamber prior to the commencement of proceedings and having apologised for their absence, the fines imposed were remitted. Later that day, Dr Bland apologised for his earlier absence and, having given an apology, the fine for his absence was, on motion, also remitted.

27 *Votes and Proceedings of the Legislative Council,* 27 October 1843, pp 164 and 12.

28 In 1844, two select committees were appointed to look into these matters of disagreements. See Report of the Select Committee on Crown Land Grievances, *Votes and Proceedings of the Legislative Council*, 1844, Vol 2, pp 117-368 and Report of the Select Committee on General Grievances, *Votes and Proceedings of the Legislative Council*, 1844, Vol 2, 701-747.

29 For detail of this period, see ACV Melbourne, *Early Constitutional Development in Australia: New South Wales 1788-1856* (Oxford University Press, 1934) p 93, and P Cochrane, *Colonial Ambition: Foundations of Australian Democracy* (Melbourne University Press, 2006).

30 *Votes and Proceedings of the Legislative Council*, 11 September 1843, p 49 (as recorded by the Clerk in a marked-up copy of the standing orders).

An amendment was moved to refer the matter to the Standing Orders Committee, followed by another amendment to expunge the original motion from the records of the Council. The 'previous question' was then moved in the terms 'that the question be now put'. According to standing orders, the question on the last amendment was then put, and, being negatived on division, the original motion lapsed.[31] A rule prohibiting irreverent references to the Queen or the Governor was not adopted until 1895.

In 1845, the Council referred a number of standing orders and procedures to the Standing Orders Committee. The committee reported that:

- the standing orders relating to petitions should be repealed and new rules adopted in their place, including provisions limiting members to refer only to the parties from which the petition comes, the number of signatories, the material allegations and reading of the prayer; and that the standing order relating to printing of a petition be amended to provide for a notice of motion, to be given at the time of presentation, for the petition to be printed with the votes,
- the standing orders relating to select committees should be repealed and new rules adopted in their place, including, in particular, a provision for evidence to a committee to be printed only if that evidence had not already been printed by an order of the Council,
- a new standing order should be adopted for the resumption on the next sitting day of a question which lapsed due to an absence of quorum,
- a perceived error in a standing order which referred a private bill to a 'sub-committee' should be replaced with a provision for reference to a 'select committee' (other references to sub-committees had been omitted in 1843),
- in addition to the rule that if more than one amendment is proposed, the question first put is on the last amendment and so on until the question is disposed of, a rule in operation in the House of Commons should be adopted to provide that, in the case of Finance, questions between the greater and lesser sum, or the longer or shorter time, the question on the least sum and the longest time would be put first,
- after taking evidence from Mr Kemp, the proprietor of the *Sydney Morning Herald*, it was unable to determine any means for improving the record of debates published in public journals although Mr Kemp agreed to take on an additional shorthand writer,
- it had abstained from making any comment about the appointment of a professional advisor to the Council for the purpose of preparing bills on the recommendation of a select committee.[32]

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31 *Votes and Proceedings of the Legislative Council*, 11 September 1844 p 196; *Sydney Morning Herald*, 12 September 1844, p 2.

32 *Votes and Proceedings of the Legislative Council,* 22 October 1845, p 161; *Journal of the Legislative Council,* pp 831-836.

The recommendations of the committee appear not to have been adopted by the House.

In May 1849, following the next general election, the Select Committee on Standing Orders reviewed the 1843 standing orders. The committee concluded that some of the 1843 rules had become superfluous and proposed new rules, including some that had been recommended in 1845. According to the committee, the proposed new rules were intended to simplify and define the practice of the Council.[33] The committee reported:

> In thus reducing the number of Standing Orders, and providing for the simplification of some of the forms of proceeding, your Committee believe that increased facility and precision will be attained in the conduct of the business of the Council.

The proposed standing orders were adopted with amendments to the rules for contempt on 1 June 1849.[34] The following day, the *Sydney Morning Herald* reported that when considering the standing orders in committee of the whole, members expressed concern about the proposed rules which would have a member declared guilty of contempt for failing to attend on a call of the House and questioned the power of the House to impose punishment for contempt by imprisonment 'during the pleasure of the Council'.[35] Ultimately, the standing order was amended to provide for a fine of not less than one shilling and not more than £20. Standing orders declaring that the absence of a member for more than a fortnight without express leave, for wilfully disobeying orders or directions of the House or disrupting the conduct of the House would be deemed guilty of contempt were also agreed to.[36]

An additional standing order was adopted in June 1850, on the recommendation of the Select Committee of the Standing Orders of the Legislative Council, which provided that every bill 'for the paving, lighting, or cleansing of any city or town be deemed and taken to be a public bill',[37] presumably as such a bill would be for the benefit of the public as a whole, and not only for those promoting the a bill.

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33 *Votes and Proceedings of the Legislative Council,* 29 May 1849, p 23; Report from the Select Committee on Standing Orders, *Journal of the Legislative Council,* 1849, vol 2, p 3.

34 *Votes and Proceedings of the Legislative Council,* 1 June 1849, p 1.

35 During the 19th century, a series of cases decided by the Judicial Committee of the Privy Council held that the powers and privileges of the Houses of colonial legislatures were more limited in scope and content than those enjoyed by the Houses of the Westminster Parliament. The leading case was *Kielley v Carson* ((1842) 12 ER 225) which concerned the powers of the Newfoundland House of Assembly in Canada to arrest a person for a breach of privilege committed out of the House. The Privy Council decided that these local legislatures could not be said to possess at common law the same inherent punitive powers of fine or arrest and imprisonment for breach of privilege or contempt as those of the Houses of the Westminster Parliament, but only those powers of self-protection as were 'reasonably necessary for the proper exercise of their functions and duties'.

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

37 *Votes and Proceedings of the Legislative Council,* 27 June 1850, vol 1, p 39.

The final standing order adopted in 1849 provided that the standing orders of the House would continue in force until the expiration of one calendar month after the opening of the next Council.

Following the opening of the sixth Council in October 1851, the standing orders were again considered by the Standing Orders Committee and adopted with minor amendments in language as well as a number of more substantial changes including:

- the omission of the requirement for the names of members not present on a quorum call to be recorded;
- that during a division strangers were to withdraw from the body of the House but could remain in the galleries;
- a provision for a motion without notice to be moved for printing a tabled document, except for a petition;
- that amendments to bills of a 'verbal or formal' nature could be moved at any time during the progress of the bills whether in the House or in committee of the whole;
- a requirement for the Chair to certify that a bill was in accordance with the bill as passed by the Council;
- that when a ballot for membership of a committee resulted in an equality of votes the Speaker would have a casting vote;
- expanded rules for petitions, including for the member presenting the petition to affix his name to the front, for petitions to be in writing and not typed, and for the Clerk to prepare a weekly abstract of petitions;
- expanded rules for private bills including for private bills to be received within 30 days of the commencement of a session and for the proposer to make a payment of £25 to the Colonial Treasurer; and
- that standing orders could be suspended without notice in cases of urgency and pressing necessity.[38]

Between 1851 and 1856, the House referred four matters to the Standing Orders Committee, none of which resulted in amendments to the standing orders. The ringing of bells for one minute when a division was called was considered unnecessary,[39] and the repeal of the rule that petitions for private bills were to be received 30 days after the

38 *Votes and Proceedings of the Legislative Council*, 19 November 1851, vol 1, p 113.

39 Report from the Select Committee on Standing Orders on the *Instruction Committed to them on the 11th June 1852, in reference to the Division Bell in connection with the Refreshment Room,* dated 18 June 1852, *Votes and Proceedings of the Legislative Council*, 1852, vol 1, pp 417-419.

commencement of the sitting was not supported on the basis that the standing order could always be suspended.[40]

In August 1854, the Standing Orders Committee reported that the requirements for presentation of a petition and introduction of a private bill had not been complied with and recommended that the votes and proceedings relating to the bill be rescinded.[41] In 1855, the Standing Orders Committee considered the provisions for evidence to be taken by a select committee on a private bill and determined that such evidence must not be beyond the scope of the petition.[42]

1856 – RESPONSIBLE GOVERNMENT

The introduction of representative government in 1842 was a catalyst for increasing demands for self-government. Between 1843 and the early 1850s representations were made to the Colonial Office in London for plenary legislative power to be held by New South Wales and for a limitation on the Crown's power to obstruct legislation agreed to by the Council. Following the adoption of the *Australian Constitutions Act (No 2) 1850*,[43] which gave the colonies of NSW, Victoria, Van Diemen's Land, South Australia and Western Australia the power to amend their Constitutions, the passage of the *Constitution Act 1855*[44] introduced responsible government in New South Wales.

Under the new constitutional arrangements there was to be a bicameral legislature comprised of a nominated Legislative Council and a Legislative Assembly elected by male voters, subject to property qualifications. The Legislative Council was to consist of no less than 21 members appointed by the Governor on the advice of the government of the day and one of the members was to be appointed by the Governor as President.[45] When the Council met for the first time on 22 May 1856, 32 members had been appointed, all male and of the professional, landed or merchant classes, and Sir Alfred Stephen had been appointed President. Members were initially appointed for a five-year interregnum period, during which the reconstitution of the Council could be considered further, and would thereafter be appointed for life. The Council was given the same powers as the Assembly, except for the power to initiate taxation and appropriation. With the commencement of responsible government, the Assembly seamlessly assumed many of

40 Report from the Select Committee on Standing Orders on the *Instruction Committed to them on the 13th August 1852, in reference to the propriety of repealing the fiftieth Standing Order*, dated 3 September 1852, *Votes and Proceedings of the Legislative Council*, 1852, vol 1, pp 421-423.

41 *Votes and Proceedings of the Legislative Council*, 25 August 1854, p 181.

42 Report from the Select Committee on Standing Orders, *Questions of order touching on Private Bills*, dated 25 September 1855, *Votes and Proceedings of the Legislative Council*, vol 1, 1855, pp 651-654.

43 13 & 14 Vic, c 59 (Imp).

44 18 & 19 Vic, c 54 (Imp).

45 Section 7, *Constitution Act 1855*.

the practices and traditions of the pre-1856 Council, while the Upper House was starting anew in its role as a House of safeguard and review.[46]

Adoption of the 1856 standing orders

The *Constitution Act 1855* empowered both Houses of the newly reformed Parliament to adopt standing orders for the orderly conduct of business, and on 23 May 1856 the House resolved that, until further orders be made by the Council, the 'proceedings thereof be conducted in accordance with the practice of the English Parliament, as far as the same may be applicable'.[47]

The House moved quickly to develop its own rules and practices. On 27 May 1856, the first day of official business following the formalities of the opening of the new Parliament, a Standing Orders Committee, chaired by the President, Sir Alfred Stephen, was appointed to report on the rules to be adopted by the new House.[48] On 6 June 1856, the House instructed the committee to confer with the Standing Orders Committee of the Legislative Assembly on all matters 'in which the two Houses, or committees of the same, may have occasion to act jointly', namely communication between the two Houses by message or conference, select committees, and the titling and numbering of Acts.[49]

A motion considered later that day to set a quorum for the Standing Orders Committee at 5 of the 12 members of the committee, was agreed to with an amendment to reduce the number to 3, perhaps in anticipation of the difficulty the committee may encounter in forming a quorum given the seniority of its members.[50]

Despite the demands placed on its membership, the committee tabled a report recommending new rules and procedures in November of that year, and the new rules bore significant correlation with those in operation prior to responsible government. The report noted that the committees of both Houses had agreed that the procedures for bills and delivery of messages between the Houses ought to be identical, and the select committees of both Houses ought to possess equal powers. However, the committee went on to state that the Council would be unable to replicate the Assembly's power to

46 David Clune and Gareth Griffith, *Decision and Deliberation: The Parliament of New South Wales, 1856-2003* (Federation Press, 2006), p 66.

47 *Minutes*, NSW Legislative Council, 23 May 1856, p 6.

48 *Minutes*, NSW Legislative Council, 27 May 1856, p 7.

49 *Minutes*, NSW Legislative Council, 6 June 1856, p 8. While the resolution agreed to by the Assembly to establish its own Standing Orders Committee had included provision for that committee to consult with its Council counterpart (*Votes and Proceedings*, NSW Legislative Assembly, 3 June 1856, p 28), the Assembly committee was not tasked with recommending new standing orders for that House until August (*Votes and Proceedings*, NSW Legislative Assembly, 6 August 1856, p 45), several months after the respective committees began the process of considering rules governing joint proceedings.

50 *Minutes*, NSW Legislative Council, 6 June 1856, p 8 (Membership included the Chief Justice and Crown Prosecutor, a judge, the Colonial Treasurer, the Colonial Secretary, the Vice Chancellor of the University of Sydney, and various company chairs and directors).

remunerate witnesses without a legislative amendment, and therefore equal powers in all matters could ultimately only be conferred by statute.[51] The reimbursement of witnesses summonsed to appear before a committee was not addressed in statute until 1881.[52]

The report also noted that the committee had decided not to recommend a standing order to define or punish contempt of the House, given that 'the law affecting it is at present in a state so doubtful' and the matter would be better addressed by statute.[53] The committee did, however, recommend the adoption of a standing order setting out the House's power to deal with contempt committed by its own members. The standing order replicated provision for a fine, as adopted by the Council in 1849 and 1851.

The House considered the committee's report in committee of the whole over several days, agreeing to amendments that sought to:

- exempt both the President and Chairman of Committee from compulsory membership of a select committee;
- require that on the second reading of a bill being agreed to, consideration in committee of the whole be set down for a future day (contrary to the procedure suggested by the Standing Orders Committee, under which the House would either resolve into committee immediately or set consideration down for a future day);
- provide that the adoption of a report of committee of the whole may only take place immediately if the bill was reported without amendment; the report on an amended bill would be set down for a future day;
- provide for an Assembly bill to be dealt with in the same manner as a Council bill in all respects except that it may be immediately read a first time, on motion, without notice,
- provide that a member who was absent for more than three consecutive weeks without the leave of the House, and having no reasonable excuse, would be deemed guilty of contempt.[54]

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51 Standing Orders Committee, *Report from the select committee of the Legislative Council on standing rules and orders*, 21 November 1856, p 1.

52 In section 4 of the *Parliamentary Evidence Act 1881*. An earlier attempt to address the issue had been made in the Parliamentary Powers and Privileges Bill 1878, however, following disagreement between the two Houses the bill was not enacted.

53 Standing Orders Committee, *Report from the select committee of the Legislative Council on standing rules and orders*, 21 November 1856, p 2. Standing orders appended to the committee's report published in the *Journal of the Legislative Council*, 1856-57, vol 1, pp 149-162, are those as amended by the House. A copy of the standing orders as originally proposed by the committee is held by the Legislative Council.

54 *Minutes*, NSW Legislative Council, 27 November 1856, p 28; 28 November 1856, p 29; 3 December 1856, p 29; 4 December 1856, p 30; *Sydney Morning Herald*, 28 November 1856, p 4; 29 November 1856, p 3; 4 December 1856, p 4; 5 December 1856, p 4; *Journal of the Legislative Council*, 1856-57, vol 1, pp 149-162. The standing orders as amended by the House are appended to the report of

Key among the new standing orders adopted was SO 1. Unlike its antecedent prior to responsible government, which required that the Council refer to the rules, usages and forms of the Imperial 'Parliament' as a whole, the new standing order required that in all cases not provided for reference be had to the rules, forms and practice of the Upper House of the Imperial Parliament – that is, the House of Lords. The Assembly in turn had reference to the House of Commons. While the written rules of the Lords were less prescriptive than those of the House of Commons, providing some benefit to the Council, in time this came to be problematic as members and officers found that the rules of the Lords were, in fact, insufficiently comprehensive. This influenced subsequent developments in two ways: firstly, reference was infrequently had to the practice of the House of Commons, rather than the Lords (a practice later formalised in the 1895 standing orders), and secondly, the Council's standing orders had to be more detailed than the Assembly's as the Lords was such an uncertain guide.[55]

The new rules, as amended, were agreed to on 4 December 1856 and forwarded to the Governor for his approval.[56]

In addition to the references given to the Standing Orders Committee, in October 1856 a motion was moved to appoint a select committee to consider commencing each sitting day with a prayer. Owing to the divergence in religious views among members, reflecting the broader division between Catholics and Protestants evident throughout the colony, and knowing that agreement on a unified form of prayer was unlikely, the motion was not agreed to.[57] While the topic was revisited in 1887 and 1901 following the presentation of petitions to the Council calling on the House to open its sittings with a prayer, the proposal continued to divide members and neither the Council nor the Assembly included a prayer in their proceedings until 1934.[58]

Further developments: 1856 to 1870

Notwithstanding the adoption of a comprehensive new set of standing orders in 1856, the Council soon set about updating the rules and adopted new standing and sessional orders in fairly rapid succession. Many of these were at the instigation of Mr Deas Thomson, former Clerk of the First Council and now a member of the newly constituted Legislative Council, and most were on the recommendation of the Standing Orders Committee. This took place against the backdrop of an increasingly abrasive relationship with the Assembly, which resented the conservative Council.

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the select committee, *Journal of the Legislative Council*. A copy of the standing orders as originally proposed by the committee is held by the Legislative Council.

55 Clune and Griffith, *Decision and Deliberation*, p 89.

56 *Minutes*, NSW Legislative Council, 4 December 1856, p 30.

57 *Minutes*, NSW Legislative Council, 29 October 1856, p 18; *Sydney Morning Herald*, 30 October 1856, p 5.

58 *Minutes*, NSW Legislative Council, 27 April 1887, p 60; 30 October 1901, p 133; Standing Orders Committee, *Opening sittings of Parliament with prayer*, 29 June 1887, p 3; *Journal of the Legislative Council,* 1887, pp 179-81; *Minutes*, NSW Legislative Council, 31 May 1934, p 2.

Between 1856 and 1861, during the initial five-year interregnum period, the conservative Council of 32 members clashed repeatedly with the elected Assembly, preventing the passage of significant bills regarding Chinese immigration, electoral law, reform of land holdings and squatters' rights, and financial appropriations. This contributed to the fall of six Assembly ministries. The Forster, Robertson and Cowper ministries collectively made four attempts to reform the composition of the Council, based on proposals for popular elections of its members, but all failed.[59] The Houses argued over the powers afforded to the Council, and Assembly members also took out their frustrations on the Council through rather creative means, such as repeated efforts to reduce the salary of the Clerk of the Legislative Council (discussed further below). An attempt by the Cowper Ministry at the very end of the five-year interregnum period to secure the passage of legislation through the Council by 'swamping' the Council with the appointment of 21 new members failed when President Burton resigned in protest and the House was adjourned to the next regular sitting day, by which time the first five-year appointments to the Council had ended.

When the new Council met on 3 September 1861, it consisted of 23 members. While 12 members were reappointed from the previous Council, its most conservative members had not been reappointed. An understanding was also reached that the Council would not block government legislation that had the endorsement of the people, in exchange for which the Council would not again be unreasonably swamped. In the ensuing years to 1870, Sir Charles Cowper's Ministry continued in attempts to legislate for an elected Upper House, but was not successful. Surprisingly, the bulk of amendments made to the standing orders during this period were of an intrinsically practical nature rather than a political nature.

The first procedural change was made in 1857, when the House adopted a sessional order to require the Usher of the Black Rod to ring the bells for two minutes prior to the President counting out the House.[60] The *Sydney Morning Herald* observed that the rule was prompted by the adoption of a similar provision in the Assembly to prevent the House being adjourned where a quorum was lost 'by accident', causing undue delay to the business of the House.[61]

In 1858, on the recommendation of the Standing Orders Committee, the House adopted a standing order preventing the reading of newspapers in the chamber, the issue having been referred to the committee after a member had sought to read from a newspaper during a controversial debate in committee of the whole.[62] 1858 also saw the introduction of a suite of new standing orders to address proceedings on inquiries into charges against judges and other public officers. The need for clarity on the procedures to apply in such cases was recognised by Mr Deas Thomson, who had the foresight to refer the matter to the Standing Orders Committee with a view to ensuring that the manner in

59 See Clune and Griffith, *Decision and Deliberation*, pp 145-147, for further discussion of the attempted reforms.

60 *Minutes*, NSW Legislative Council, 12 August 1857, p 6.

61 *Sydney Morning Herald*, 13 August 1857, p 4.

62 *Minutes,* NSW Legislative Council, 29 October 1858, p 94.

which the House would determine the removal of a judge, and the powers afforded to the House to examine witnesses, be clarified prior to there being any specific case before the Council, as such questions were not addressed in the provisions of the *Constitution Act 1855*.[63] On the recommendation of the committee, the House adopted procedures addressing the mechanism for the commencement of an inquiry, the method of inquiry and procedural fairness measures.[64]

In 1859, a member having suggested that it would 'be very desirable that some record be kept, to which reference might be made' of questions asked by members and the answers given by ministers, the matter was referred to the Standing Orders Committee and a new standing order to that effect adopted by the House.[65] Also that year, the Standing Orders Committee inquired into the practice for meetings of select committees, in particular the power of select committees to sit during adjournments of the Council, and the practice, derived from the House of Lords, that the House must resolve the time and date of the first meeting of a select committee. This second matter had been the subject of an earlier report of the Standing Orders Committee in 1857, which had found that, while it would be preferable to dispense with the practice taken from the Lords, the introduction of a new standing order should be deferred until the standing orders were revised and, in the interim, each committee should obtain an order from the House to meet at its discretion.[66] Such orders were not obtained by the committees, and when the matter was revisited in 1859, the Standing Orders Committee reported that the continued adoption of the practice of the Lords had caused 'much inconvenience'. The committee recommended that a new standing order be adopted to provide that every select committee be at liberty to meet and adjourn proceedings from time to time as may be convenient, and that the first meeting of every select committee be held at a time appointed by order of the President, or by summons issued by the Clerk by direction of the member who moved for the appointment of the committee.[67]

The question of a select committee's power to sit during the adjournment of the House had arisen several months earlier, when the House adopted a resolution, without notice or debate, authorising select committees to sit during any adjournment of the

63 *Sydney Morning Herald*, 22 May 1858, p 5. The *Constitution Act* made provision for the general steps to be taken, such as a formal resolution of both Houses, but did not set out the steps by which the House should arrive at that resolution, which is what prompted the adoption of new rules. The rules were readopted in 1870 but were not readopted in the 1895 standing orders.

64 *Minutes*, NSW Legislative Council, 29 July 1858, p 58; Standing Orders Committee, *Report from the Standing Orders Committee of the Legislative Council in reference to the removal from office of the judges under the Constitution Act or of other public officers*, *Journal of the Legislative Council*,1858, vol 3, pp 151-154.

65 *Sydney Morning Herald,* 14 January 1859, p 4; *Minutes*, NSW Legislative Council, 13 January 1859, p 8; 18 January 1859, p 10; 27 January 1859, p 11.

66 Standing Orders Committee, *Report from the Standing Orders Committee of the Legislative Council on the power of select committees to hold their first meetings without obtaining an order of the Council to that effect*, *Journal of the Legislative Council*, 1857, vol 2, pp 93-95; *Minutes*, NSW Legislative Council, 13 November 1857, p 22.

67 Standing Orders Committee, *Report from the Standing Orders Committee on first meetings of select committees and sittings of select committees during adjournments of the House*, *Journal of the Legislative Council*, 1859-60, Part 1, pp 153-155.

House.[68] When the matter was then considered by the Standing Orders Committee, a recommendation was made that a new standing order be adopted to authorise every select committee to sit during any adjournment of the Council not extending beyond a period of five days and during any longer adjournment by leave of the Council.[69] The House agreed to both of the committee's recommendations, but amended the adjournment provision to instead provide that a committee could meet for up to one week after the adjournment of the House, instead of the five days proposed, after which it would require the leave of the House to meet.[70]

The final month of 1859 saw the departure of the first Clerk of the Legislative Council, Mr William MacPherson, and the appointment in his place of Mr Richard O'Connor. The appointment of Mr O'Connor, who had left his appointment as Clerk of the Legislative Assembly to take up his new post in the Council (later taking his Sergeant-at-Arms, H J T Shadforth with him to be Usher of the Black Rod), attracted much controversy and became the subject of several inquiries of the Standing Orders Committee and a motion in the Legislative Assembly. In February 1860, the committee was tasked with inquiring into the appointment of Mr O'Connor after the President had expressed alarm that the appointment, together with those of the Clerk Assistant and First Clerk, had been made by the Governor-General[71] without the President's prior knowledge at the suggestion of the Executive Council. The President only became aware of the appointments after they had been made. The President claimed the right to recommend officers to fill such vacancies and the Standing Orders Committee, having reference to the practice in the House of Lords, supported him, recommending that this alternative system be proposed to the Governor-General.[72]

In response, the Governor-General refused the committee's proposal, but did undertake to consult the President prior to making any similar appointment in the future.[73] The matter was referred back to the Standing Orders Committee by the House, which reported that, taking the system of the House of Lords, the Clerks and other officers of the House should remain independent of the Executive Government. The committee recommended that a bill be introduced to 'relieve His Excellency and the Executive Council of all responsibility... in the appointment and removal of the officers and Clerks

68 *Minutes,* NSW Legislative Council, 6 January 1859, p 21.

69 Standing Orders Committee, *Report from the Standing Orders Committee on first meetings of select committees and sittings of select committees during adjournments of the House*, *Journal of the Legislative Council*, 1859-60, Part 1, pp 153-155.

70 *Sydney Morning Herald,* 15 December 1859, p 3; *Minutes,* NSW Legislative Council, 14 December 1859, p 41.

71 Between 1851 and 1861, the Governor of New South Wales was also appointed as Governor-General of Australia, in an early attempt at federalism initiated by Earl Grey. The Governor of New South Wales was Governor-General over New South Wales, Van Diemen's Land, Victoria, South Australia and Western Australia (and likely Queensland from 1859).

72 Standing Orders Committee, *Report from the Standing Orders Committee of the Legislative Council on appointment and removal of officers and Clerks of the Legislative Council*, *Journal of the Legislative Council,* 1859-60, Part 1, pp 177-180.

73 *Minutes*, NSW Legislative Council, 25 August 1860, p 75.

of the Legislative Council'.[74] The designation of staff of the Parliament as distinct from officers of the public service continues today, as expressed in section 47B of the *Constitution Act 1902*.[75] The committee also recommended that, to ensure consistency with the Lords' practice, the Clerk of the Legislative Council be designated the 'Clerk of the Parliaments'.

In an occurrence not usually associated with Clerks, Mr O'Connor was the subject of debate in the House. In January 1860, a member of the Legislative Assembly moved a motion imploring the House to send an Address to the Governor to require that the additional sum of £100 be made available to make the salary of the Clerk of the Council equivalent to that of the Clerk of the Assembly, as Mr O'Connor had unknowingly been compelled to take a reduction in salary on his appointment to the Council.[76] It emerged that, as a means of causing annoyance to the Council, the Assembly was amending the Appropriation Bills to reduce the salary of the Council Clerk, knowing that the Council could not retaliate. The Assembly's attempts to aggravate the Council in this way can be understood within the broader context of the tussle between the two Houses that dominated much of the parliamentary discourse of the time. The Clerk's remuneration, and even that of the President, was the subject of amendments moved by the Council to the Appropriation Bills, a ministerial statement, and further inquiries of the Standing Orders Committee, but to little effect.[77] The feud was further evidenced in the introduction of bills to remedy the matter in the Council, and bills to counter those measures in the Assembly.[78] It is not known when the issue was finally resolved. (Mr O'Connor's contributions to the work of Parliament went beyond the matters discussed above. Following his resignation from office, members observed that he was a 'depository of that peculiar learning in parliamentary law' and had drafted the first Parliamentary Handbook as a reference guide on the rules for members.)[79]

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74 Standing Orders Committee, *Report from the Standing Orders Committee of the Legislative Council on appointment and removal of officers and Clerks of the Legislative Council*, *Journal of the Legislative Council,* 2nd report, 1859-60, vol 5, Part 1, pp 181-185.

75 Related to this, in 1867 the Standing Orders Committees of both Houses tabled a report recommending that other staff of the Parliament, such as messengers and servants, also be appointed and dismissed by the Presiding Officers. Standing Orders Committee, *Conference between the Standing Orders Committees: Messengers and servants – Mace*, *Journal of the Legislative Council*, 1867, pp 261-263.

76 *Sydney Morning Herald*, 28 January 1860, p 7.

77 See, for example, *Minutes*, NSW Legislative Council, 16 January 1862, p 123; *Sydney Morning Herald*, 21 January 1862, p 3; 27 November 1866, p 2; 5 May 1865, p 8; 16 June 1865, p 2; Report from the Standing Orders Committee, *Officers of the Legislative Council*, 4 April, *Journal of the Legislative Council*, 1865-66, pp 165-171; Standing Orders Committee, *Privilege – Estimates of the Legislative Council Department*, *Journal of the Legislative Council*, 1870, pp 145-150; Standing Orders Committee, *Privilege – Estimates of the Legislative Council Department*, *Journal of the Legislative Council*, 1872, pp 197-204; Standing Orders Committee, *Legislative Council Department*, *Journal of the Legislative Council*, 1873-74, pp 429-435; G N Hawker, *The Parliament of New South Wales 1856 – 1965*, Government Printing Office, 1965, pp 123-127.

78 See the introduction over subsequent sessions in the Council of the Official Salaries Bill and the Official Salaries Increase Bill, and in the Assembly of the Official Salaries Reduction Bill, *Consolidated Index to the Minutes of the Proceedings and Printed Papers*, 1856-1874, vol 1, pp 639-640.

79 *Sydney Morning Herald*, 29 June 1876, p 2.

Despite these distractions, the business of the House remained the focus of further procedural innovations. In 1860, the House adopted a new standing order providing for members to lodge a protest against the passing of a bill, requiring that such protest be forwarded to the Governor by the Clerk. Members had adopted the practice of lodging protests since 1857, however, a formal procedure was demanded following a complaint by the Governor that, on being asked to assent to the particularly controversial Pastoral Lands Assessment and Rent Bill, he had not been advised that several members had lodged protests against its passing.[80] Following inquiry into the matter, the Standing Orders Committee recommended that, although the practice in the House of Lords was for protests to be entered into the Clerk's book, it would be prudent that any protests received also be forwarded to the Governor.[81]

Several months later, the House also adopted new and simplified rules recommended by the Standing Orders Committee for the restoration of proceedings on private bills interrupted by prorogation.[82]

While questions as to the propriety of members voting in questions in which they had a personal interest had arisen on several occasions since responsible government,[83] the issue did not attract the attention of the Standing Orders Committee until 1862, when a member who was the proprietor and director of a company that enjoyed privileges that would be extended by a bill under consideration was advised by the President that he could speak to the bill but ought not vote on it, in conformity with the practice of the House of Lords.[84] The matter was referred to the committee, which reported that the practice of the Imperial Parliament varied, with the Lords leaving such matters to the discretion of the peers, while, in the Commons, members could not vote on questions in which they had a direct personal interest. The committee concluded that the member had been entitled to vote, but recommended that procedures be adopted to clarify the rules on giving and challenging votes on such matters.[85] The House was prorogued soon after but the matter was again referred to the committee the following year and, at the committee's recommendation, the House adopted a new standing order to provide that where a member's vote is challenged on the grounds of personal interest, the rules and practice of the House of Commons would apply.[86]

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80 *Journal of the Legislative Council,* 1859-60, Part 1, pp 171-172.

81 Standing Orders Committee, *Report from the Standing Orders Committee of the Legislative Council in reference to protests against the passing of any bill*, *Journal of the Legislative Council,* 1859-60, vol 5, Part 1, pp 169-172.

82 *Minutes,* NSW Legislative Council, 23 May 1860, pp 93-94; Standing Orders Committee, *Report from the Standing Orders Committee of the Legislative Council on the suspension and resumption of proceedings on private bills*, *Journal of the Legislative Council,* 1859-60, vol 5, Part 1, pp 161-163.

83 *Minutes*, NSW Legislative Council, 4 February 1857, p 58; 17 May 1860, p 127.

84 *Minutes*, NSW Legislative Council, 17 December 1862, p 178.

85 Standing Orders Committee, *Question of privilege: President's ruling relating to the challenge of Mr Mitchell's vote on the Life Assurance Encouragement Bill,* 1862, vol 9, Part 1, pp 227-230.

86 Standing Orders Committee, *Votes of members personally interested in questions before the House*, *Journal of the Legislative Council,* 1863-64, vol 10, Part 1, pp 223-225; *Minutes*, NSW Legislative Council, 12 August 1863, p 35.

In 1862 the House also adopted a sessional order to vary the practice for divisions. Since 1856, strangers had been required to withdraw from the body of the House within the Bar, but could remain below the Bar or in the galleries unless otherwise ordered. Under the new sessional order, which was readopted each session until 1870 when it was formalised as a standing order, strangers on the right and left of the Chair could remain, as well as those below the Bar or in the galleries, unless otherwise ordered.[87] According to a *Sydney Morning Herald* report, the object of the proposal was to prevent the recurrence of an inconvenience which occurred because of an arrangement between the Houses for seats to be provided for members of the other House on the right and left of the Speaker and President respectively. As there was no Bar in the Council at that time, the members of the other House had been obliged to withdraw during divisions.[88]

In 1863, the House revised the rules for receiving messages from the Governor after a message was conveyed 'under cover' by a member of the House and not by the Governor's messenger. On reporting the message, the President informed the House that he was unable to receive the message in that manner as it was contrary to SO 67 and the practice of the Imperial Parliament.[89] On the recommendation of the Standing Orders Committee, the standing orders were amended to allow a message to be delivered either by the official messenger or by a member.[90]

The final amendment to the 1856 standing orders was made in 1866, when the House rescinded the standing order requiring motions to be seconded with a view to simplifying the Council's procedures and bringing them into line with the practice in the House of Lords.[91]

Other matters the subject of reports of the Standing Orders Committee between 1856 and 1870 which did not result in amendment of the standing orders included: the Council's powers with regards to the Sydney Municipal Council Bill;[92] the power of the Presiding Officers to appoint and dismiss staff of the Parliament (conducted jointly with the Assembly committee);[93] the payment of witnesses before select committees;[94]

87 *Minutes,* NSW Legislative Council, 10 July 1862, p 27; 24 June 1863, p 8; 19 October 1864, p 8; 31 January 1865, p 16; 25 October 1865, p 8; 25 July 1866, p 8; 3 July 1867, p 8; 17 December 1868, p 22; 29 September 1869, p 8; 2 February 1870, p 12; 12 August 1870, p 8.

88 *Sydney Morning Herald*, 11 July 1862, p 3.

89 *Minutes,* NSW Legislative Council, 23 December 1863, p 81.

90 *Minutes,* NSW Legislative Council, 13 January 1864, p 102; Standing Orders Committee, *Mode of receiving messages from the Governor*, *Journal of the Legislative Council,* 1863-64, Part 1, pp 227-229

91 *Minutes,* NSW Legislative Council, 12 September 1866, p 51; Standing Orders Committee, *Seconding motions founded upon orders of the day*, *Journal of the Legislative Council*, 1866, Part 1, pp 215-217.

92 Standing Orders Committee, *Sydney Municipal Council Bill*, *Journal of the Legislative Council*, 1857, pp 781-783.

93 Standing Orders Committee, *Conference between the Standing Orders Committees: Messengers and servants – Mace, Journal of the Legislative Council*, 1867, pp 261-263.

94 Standing Orders Committee, *Payment of witnesses before select committees*, *Journal of the Legislative Council*, 1862, pp 225-226.

the obligation on members and officers of the House to comply with a court subpoena;[95] a proposed new parliamentary refreshment room;[96] comments made by the Secretary for Finance and Trade regarding the expenditure of public moneys;[97] and the marble busts featured along the walls of the chamber.[98]

THE REVIEW OF 1870

The first comprehensive review of the standing orders was referred to the Standing Orders Committee on 22 April 1870, requesting that the committee recommend any change to the rules deemed to be 'expedient and useful'.[99] No reference was made to the impetus for the review, though it was most likely seen as an opportunity to clarify the rules of the House and formalise the numerous new temporary rules adopted as standing orders, and such was the course taken.

The committee's report, tabled the following month,[100] revealed that the committee had taken a fairly restrained approach to its review, recommending only a limited number of new standing orders. However, when the amendments were later agreed to they in turn resulted in the wholesale renumbering of all of the standing orders. The committee recommended the following changes:

- SO 5 (relating to the President taking the chair), SO 6 (for counting the House) and SO 13 (regarding Strangers) be amended to adopt the terms of sessional orders in force in previous years,
- SO 7 be amended to require that when the House was adjourned owing to the absence of the President and Chairman of Committees, such adjournment would be declared by the Clerk,
- SO 7 for the 'Call of the House' be amended to reduce the notice required for a call of the House from 21 days to 10 days,
- SO 16 be amended to provide for a right of reply to the mover of a 'main' question (that is, a substantive motion),
- SO 16 be amended to limit the restriction on members referring to previous debates to only debates of the same session,

95 Standing Orders Committee, *Subpoenas to members and officers*, *Journal of the Legislative Council*, 1867-68, pp 265-267. The committee requested that the matter be again referred in the next session.

96 Standing Orders Committee, *Proposed new parliamentary refreshment room*, *Journal of the Legislative Council*, 1869, pp 131-133.

97 Standing Orders Committee, *Constitutional powers of the House*, *Journal of the Legislative Council*, 1869, pp 67-90.

98 Standing Orders Committee, *Bust of the late John Blaxland Esquire*, *Journal of the Legislative Council*, 1870, pp 141-144; and Standing Orders Committee, *Busts of the late James Macarthur and John Blaxland, Esquires*, *Journal of the Legislative Council*, 1870-71, pp 311-314.

99 *Minutes*, NSW Legislative Council, 22 April 1870, p 76.

100 *Minutes*, NSW Legislative Council, 4 May 1870, p 95.

- SO 27 be amended to make clear that a motion for the adjournment of the House did not require notice,
- SO 32 be amended to provide for notices of motions and orders of the day for the third reading of a bill to be called over by the President as 'formal business' and be put without amendment or debate,
- SO 34 be amended to change the form of the previous question and SO 35 be omitted, to the provision for the original question to be amended following the previous question being agreed to,
- a new standing order be adopted to provide that no member could be appointed Chairman of Committees unless notice of their name had been given at a previous meeting of the Council,
- SO 61 be amended to provide that the President could either present an Address to the Governor personally or transmit the Address by letter,
- a new standing order be adopted to provide that a petition could be read by the Clerk-at-the-Table, if required, and SO 104 be amended to prohibit debate on the motion 'That the petition be received',
- SO 114 be amended to provide that, following the second reading being agreed to, the House could resolve into committee of the whole immediately or on a future day,
- SO 117 be amended to provide that the motion for adoption of the report from committee of the whole could be moved immediately or on a future day, regardless of whether the bill had been amended,
- SO 133 be amended to omit the requirement that petitions for private bills be presented within 30 days of the commencement of a new session, and
- SO 154 be amended to provide that any sessional or standing order could be suspended by leave of the Council.[101]

The committee additionally recommended several amendments of a lesser consequence: the omission of a reference to 'Governor-General' in favour of 'Governor' to reflect the changing role of the office as the colonies became independent,[102] an amendment to SO 130 to note that Acts enrolled must also be 'recorded', and to renumber SO 19 'Questions of Privilege and Order' as SO 8 to cause the rule to follow the rules providing for the powers of the Chair.[103] The committee did not comment on any of the recommendations,

101 Standing Orders Committee, *Conduct of the Business of the House*, 4 May 1870, *Journal of the Legislative Council*, 1870, pp 151-157.

102 Between 1851 and 1861, the Governor of New South Wales was also appointed as Governor-General of Australia. By 1870 the office was simply that of Governor of New South Wales.

103 Standing Orders Committee, *Conduct of the Business of the House, Journal of the Legislative Council,* 1870, pp 151-157.

except to note that it had recommended the adoption of longstanding sessional orders as standing orders.[104]

As the Parliament was prorogued several days after the committee's report was tabled, the recommendations were not considered by the House until the following session, several months later. While the majority of the committee's recommendations were adopted with minimal debate, the standing order governing the absence of the President was the subject of extensive debate, causing consideration of the report in committee of the whole to proceed over three sitting days.[105] While the Standing Orders Committee had recommended that SO 7 be amended only to provide that in the absence of the President and Chair of Committees the Clerk would declare the House adjourned, following considerable debate in committee of the whole, members agreed to an additional provision for the House to elect one of its members to act as President for the time being with the question to be put to the House by the Clerk.[106]

The committee of the whole reported its recommendations to the House,[107] but the adoption of the new procedures was delayed when the Attorney General moved an amendment to the motion for the adoption of the report to recommit the resolutions with a view to the further consideration of proposed SO 117 relating to petitions.[108] President Murray had taken issue with the proposed restriction on debate on the motion 'That the petition be received', arguing that there was no such rule in the House of Lords and the right of petition might be neutralised if the House did not have the power to discuss the reception of petitions on their merits. The Chair of the Standing Orders Committee advised that the committee had been of the view that if an objectionable petition was received, and the motion to receive the petition was open to debate, the details of the objectionable matter would likely be spread through the colony. In response, those opposed argued that it was an acknowledged principle that members should be able to debate the merits of a motion put to the House. Ultimately, the amendment proposed by the Standing Orders Committee to restrict debate was rejected and the standing order agreed to as originally adopted in 1856.[109]

On the motion for the committee to again report to the House, there was a final attempt to revisit the previous debate on the procedure to apply in the absence of the President. However, the matter was put to rest and the procedures as amended by the committee of the whole were finally adopted.[110]

104 Ibid, p 157.
105 *Minutes*, NSW Legislative Council, 22 September 1870, p 36; 19 October 1870, p 52; 2 November 1870, p 62.
106 *Sydney Morning Herald*, 3 November 1870, p 2.
107 *Minutes*, NSW Legislative Council, 2 November 1870, pp 62-63.
108 *Minutes*, NSW Legislative Council, 10 November 1870, p 66.
109 *Sydney Morning Herald*, 11 November 1870, p 2.
110 Ibid., p2; *Minute*s, NSW Legislative Council, 10 November 1870, p 66.

Further developments – 1870 to 1895

Throughout this period, the Council was once again subject to significant attempts at electoral and constitutional reform. The new free-trade Premier, Henry Parkes, was unsuccessful in attempts in 1873 and 1874 to reform the Council to a fully elected membership, and in 1880 to alter the powers of the Council in respect of money bills.[111] Parkes' successor, the second free-trade Premier, George Reid, was also unsuccessful in achieving this reform.

Despite the Council's contribution to the ongoing instability of the Government during the period, and protracted debates over key legislation, the tensions between the Houses did not significantly drive amendments made to the standing orders until the 1895 review. Instead, the Standing Orders Committee was focused on ensuring that the business of the increasingly unruly and unpredictable Council flowed as smoothly as possible.

The first matter reviewed was the power of the President to initiate business. While Presidents had quite regularly moved amendments and initiated business since 1856, in 1870, on President Murray seeking to move a motion of general business in his name, a point of order was taken as to the power of the President to initiate business. The matter was referred to the Standing Orders Committee[112] which, having considered conflicting evidence as to the rights of the President from Sir Alfred Stephen, the first President of the Council and an active initiator of business, and Richard O'Connor, Clerk of the Legislative Council, concluded that in its opinion the President had the same rights as any other member in that regard.[113] This conclusion was not entirely unexpected, given that President Murray was the Chair of the committee. Despite the committee's views, in practice the Clerk's view came to be preferred and instances of the President initiating business ceased to occur.[114]

Under the *Constitution Act 1855*, the quorum in the Legislative Council was one-third of members exclusive of the President. Achieving and maintaining this quorum proved a prominent theme and reflected some of the day-to-day challenges faced in the Council during this period. The appointed members of the Council were either ageing or infirm, or drawn from the ranks of the professional or moneyed classes and had other calls on their time. While the maintenance of a quorum presented few difficulties prior to 1870, the problem became more persistent in the 1870s, with the House adjourning for the want of a quorum on one in five sitting days during the worst periods.[115] In June 1871, following the House being adjourned for the lack of a quorum on consecutive sitting days,[116] the House agreed to a sessional order, readopted thereafter each session, providing that where the House was adjourned for the want of a quorum to a day that

111 Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, p 26.
112 *Minutes,* NSW Legislative Council, 24 August 1870, p 12.
113 *Minutes,* NSW Legislative Council, 19 October 1870, p 51.
114 Clune and Griffith, *Decision and Deliberation*, p 86.
115 Clune and Griffith, *Decision and Deliberation*, p 117.
116 *Minutes*, NSW Legislative Council, 2 June 1871, p 200; 6 June 1871, p 201; 7 June 1871, p 203.

was a holiday, thanksgiving or fast day, the House would stand adjourned to the next succeeding day.[117]

In 1878, the House adopted a further sessional order to require that when the House was counted out for the want of a quorum, the Clerk would record the names of members then present.[118] Ironically, the new sessional order was called on later the same day when the House was adjourned for the want of a quorum.[119] The trend of the House losing its quorum was reversed briefly following the adoption of the sessional order[120] and the sessional order was readopted over several successive sessions. Nevertheless, in 1881, the Standing Orders Committee revisited the quorum issue and found that it could make no recommendation, concluding that 'nothing but a sense of duty animating the members individually will protect the House from the evils consequent on irregular attendance'.[121] In 1883, the House adopted a new sessional order to provide that attendance at both divisions and count-outs would be recorded in the sessional return published in the *Journal of the Legislative Council*,[122] then in 1890 the *Constitution Act* was amended to change the requirement for a quorum from one-third to one-quarter of members. After this point, with the less stringent quorum in place and a growing tendency for members to ignore the absence of a quorum, count-outs ceased to interfere with the sittings of the House, with the exception of the year 1900, during which six count-outs were recorded.[123]

The issue of quorums also arose in the proceedings of select committees. In 1881, the House amended the standing orders to require the Clerk of a select committee to call to the attention of the Chair the loss of a quorum of the committee's members. Under the amended terms, the Chair would then be required to suspend proceedings until a quorum was formed, or adjourn proceedings until a future day.[124] The rule was adopted after a Committee Clerk unwittingly attracted the ire of a member of the Refreshment Room Committee when he drew the Chair's attention to the absence of a quorum, leading to a heated discussion among the members present as to the power of the Clerk to interfere with the conduct of the committee's business. A member of the committee raised the issue as a matter of privilege in the House and observed that while 'the clerk, in justification of his conduct, read an extract from May citing a rule [in force in the House of Commons] empowering the clerk to this effect', it was too serious a power to afford the Committee Clerk, as no such power could be exercised in the House itself. The President advised the House that, whereas the Assembly had adopted the rules of the House of Commons under its standing orders, the rules of the Commons applied only as a matter of practice in the Council, as the Council's standing orders made formal reference only to the House of Lords.[125] The matter was referred to the Standing Orders

117 *Minutes*, NSW Legislative Council, 8 June 1871, p 206; *Sydney Morning Herald,* 9 June 1871, p 2.
118 *Minutes*, NSW Legislative Council, 23 October 1878, p 32.
119 *Minutes*, NSW Legislative Council, 23 October 1878, p 33.
120 Clune and Griffith, *Decision and Deliberation*, p 118.
121 Standing Orders Committee, *Want of a quorum*, in *Journal of the Legislative Council,* 1881, pp 257-259.
122 *Minutes*, NSW Legislative Council, 24 January 1883, p 20.
123 Clune and Griffith, *Decision and Deliberation*, p 118.
124 *Minutes*, NSW Legislative Council, 16 March 1881, p 43.
125 *Hansard,* NSW Legislative Council, 23 February 1881, pp 550-552.

Committee,[126] which exonerated the Committee Clerk, concluding that he 'did no more than was regular for him to do, and no blame attached to him'. The committee recommended that, to settle the matter, the standing orders should be amended to formalise the obligation attaching to the Clerk in such circumstances.[127]

In the years following those changes, further amendments to the standing orders centred around the core business of the chamber – proceedings on bills and the precedence of motions. The amendments also reflected an increasing will within the Council to bring about greater consistency between the Council and Assembly standing orders, which by 1895 became the dominant driver for the review of the standing orders. This trend may be attributable to the increasing proportion of Council members who had also served in the Assembly or that, as noted earlier, despite the requirement under the standing orders that the Council have reference to the rules and practice of the House of Lords, in practice the Council often had reference to the Commons owing to the inconsistency and complexity of Lords' practice.

In 1884, at the recommendation of the Standing Orders Committee,[128] the House amended the standing orders for private bills to direct payment for private bills to the Consolidated Revenue Fund in place of the Colonial Treasurer; to require additional payment to cover the expenses incurred by a private bill when they exceeded the initial sum required of £25; and to allow the promoters of the bill, on its passing, to obtain from the Clerk a certificate showing the total expenses incurred, with a view to obtaining a refund of any amounts overpaid. The changes were made with a view to bringing Council procedures into line with those in the Assembly, where provision was made for a refund of amounts overpaid.[129] The procedures for private bills were further amended in 1887 to ensure that proceedings on private bills interrupted by prorogation in the Council could be resumed in the same manner as those interrupted in the Assembly. The change was made after an inconsistency in the rules to that effect had been noted and drawn to the attention of the House in an effort to prevent the proceedings on a bill from resuming in a new session of Parliament.[130] In 1871, the Standing Orders Committee had conducted an inquiry into private bills, and had recommended that certain matters be dealt with as public bills; that the rules and practices of the Imperial Parliament be adopted for bills relating to divorce proceedings; and that officers of the House should be appointed to ensure that the rules for private bills were complied with. Although a report was tabled, no amendments to the standing orders were made.[131]

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126 *Minutes,* NSW Legislative Council, 24 February 1881, p 32.

127 *Journal of the Legislative Council,* 1880-81, p 107; *Hansard*, NSW Legislative Council, 16 March 1881, pp 934-935.

128 *Journal of the Legislative Council,* 1883-84, Part 1, pp 451-453.

129 *Hansard,* NSW Legislative Council, 19 March 1884, pp 2359-2360; *Minutes*, NSW Legislative Council, 19 March 1884, pp 98-99.

130 *Hansard,* NSW Legislative Council, 28 September 1887, pp 129-133; 13 October 1887, pp 494-496; *Minutes*, NSW Legislative Council, 28 September 1887, p 13; 13 October 1887, p 24; *Journal of the Legislative Council*, 1887-88, Part 1, pp 341-344.

131 Standing Orders Committee, *Standing orders respecting private bills*, in *Journal of the Legislative Council*, 1870-71, pp 315-324.

In 1890, on the motion of former President Sir Alfred Stephen, the Standing Orders Committee considered a reference to determine the merits of the Council adopting the Assembly's practice of affording precedence to debate on orders of the day over notices of motions on particular days. Sir Alfred Stephen had argued that by giving new notices, members could block the progress of a bill because the House was obliged to consider notices of motion before proceeding to the consideration of orders of the day. During debate on the reference, the motion was amended to also require the committee to consider whether a motion could be moved on the adjournment of debate to give the resumption of debate on that item precedence on a named date.[132] At the recommendation of the committee, the House agreed to give general business precedence on days not fixed for government business, termed 'private days'; to give precedence to notices over orders of the day on every alternate private day, and to allow a member to move that the resumption of debate on an item have precedence of other items on a named day, except government business on a government day.[133] This system, known as 'remanets', proved susceptible to misuse and became the subject of extensive debate in the more recent history of the Council and ultimately led to the adoption of a new system for precedence of private members' business in the late 1990s.

In 1892, the House returned its attention to the rules for bills. Following a reference to the Standing Orders Committee,[134] the Council adopted a provision for the restoration of a public bill interrupted by prorogation. The new provisions covered Council bills interrupted by prorogation in the Council, Council bills that had been transmitted to the Assembly prior to prorogation, and Assembly bills interrupted by prorogation in the Council.[135] On receipt of the Governor's approval of the new standing orders, a message was forwarded to the Assembly inviting that House to adopt similar standing orders for dealing with lapsed bills.[136] However, in 1893, deficiencies in the new provisions became apparent, and the Standing Orders Committee tabled a further report[137] in which it recommended the repeal of one of the standing orders previously adopted and the adoption of two new standing orders in its place to 'provide for every possible contingency that may arise in connection with either a public or private bill interrupted by the closing of a session', including messages forwarding amendments to bills.[138] A message was forwarded to the Assembly enclosing a copy of the new standing orders and inviting that House to adopt similar provisions.[139] The following month,

132 *Minutes*, NSW Legislative Council, 14 May 1890, p 24; *Hansard,* NSW Legislative Council, 14 May 1890, pp 351-357.

133 *Minutes*, NSW Legislative Council, 28 May 1890, p 42; Standing Orders Committee, *Precedence of Motions; and Adjournment of Debate,* in *Journal of the Legislative Council*, 1890, Part 1, pp 351-353.

134 *Journal of the Legislative Council*, 1891-92, Part 1, p 401.

135 *Hansard,* NSW Legislative Council, 4 February 1892, pp 4852-4855; *Minutes,* NSW Legislative Council, 4 February 1892, p 214; 11 February 1892, pp 5126-27.

136 *Minutes,* NSW Legislative Council, 23 February 1892, p 238.

137 *Minutes* NSW Legislative Council, 18 October 1893, p 19.

138 *Journal of the Legislative Council,* 1893, p 89.

139 *Minutes,* NSW Legislative Council, 25 October 1893, p 24.

the Assembly notified the Council by message that it had adopted additional standing orders in the same terms as the Council's orders.[140]

THE 1895 REVIEW

In 1895 the Council adopted a revised set of standing orders, largely based on standing orders adopted in the Assembly the year before. In the years prior to 1895, the governments of the day had struggled to maintain control of the legislative agenda in both Houses. The perceived inability of the Assembly to legislate efficiently, owing largely to the increasingly obstructionist tendencies of the Council, had led to pressure to reform the standing orders, beginning first with a review in the other place.[141] Following several attempts to adopt a reformed code between 1888 and 1894, the Assembly finally adopted a new suite of standing orders numbering 411 rules in total, heavily informed by reforms recently adopted in the United Kingdom and New Zealand Parliaments.[142]

In March 1895, the Council agreed, without debate, that the Standing Orders Committee 'consider the desirability of revising the standing orders and, if necessary, to frame a new code for submission to the Council'.[143] The committee tabled its report in July 1895.[144] The committee drew heavily on the new procedures adopted by the Assembly, replicating many of the procedures either in their entirety or with amendment.[145] However, the Council committee was nevertheless selective in its approach, recommending the adoption of the comparatively small number of 281 new rules, informed in part by the determination that many of the Assembly's new procedures were 'not suitable' for the Council.[146]

The report of the Standing Orders Committee was listed for consideration on 4 July 1895, the last sitting day of the session prior to the dissolution of the 16th Parliament. The cursory attention given to the new code belied the wide-ranging reforms proposed for adoption. The period leading up to the review of the standing orders, and the period during which the review was undertaken, had coincided with a series of concerted attempts on the part of successive governments to reform the membership and powers of the Legislative Council, and on 4 July 1895 the Council's attention was focused on proposed resolutions

140 *Minutes,* NSW Legislative Council, 22 November 1893, p 40.

141 See Clune and Griffith, *Decision and Deliberation,* pp 54-59 for a detailed analysis of the struggles.

142 *Votes and Proceedings*, NSW Legislative Assembly, 7 June 1894, p 319. The influence of the rules and practice of the United Kingdom and New Zealand on the Legislative Assembly's new standing orders was acknowledged during debate on the adoption of the Legislative Council's standing orders the following year, *Hansard*, NSW Legislative Council, 4 July 1895, p 7817.

143 *Minutes,* NSW Legislative Council, 14 March 1895, p 141.

144 *Minutes,* NSW Legislative Council, 2 July 1895, p 148.

145 The Council's standing orders may also have been drawn from the standing orders of the South Australian Legislative Council, as Edwin Blackmore, an authority on parliamentary procedure, was Clerk of the South Australian Legislative Assembly and then the Legislative Council, and was Clerk to the federal conventions leading up to Federation and Clerk to the committee which drafted the new Constitution of 1902, and became the first Clerk of the Senate in 1901.

146 *Hansard,* NSW Legislative Council, 1 July 1895, p 7817.

for Upper House reform, brought suddenly before the House to furious opposition.[147] Later during the sitting day, Mr Jacob, the Chairman of Committees and a member of the Standing Orders Committee, moved that the House agree to and adopt the new standing orders as proposed by the committee.[148] During debate on the motion, Mr Jacob acknowledged that although the report of the Standing Orders Committee had been tabled and printed two days before, the new rules had, in fact, not yet been circulated to members and described it as a 'bold step'. However, he went on to state that the Assembly had previously followed a similar procedure and, as the session was about to come to a close, he had moved the motion at the request of the President. Mr Jacob stated that the previous standing orders had been 'very defective' and in fact 'much of our action has been illegal', because the Council's SO 1 had adopted the rules and practice of the House of Lords, whereas in all proceedings the Council had in fact taken *Erskine May*, which reflects the procedure of the House of Commons, as a guide. Mr Jacob concluded that 'no harm will follow by adopting these standing orders. They can be printed and circulated during the recess and, if there are any which honourable members do not approve of, they can be referred again to the Standing Orders Committee'.[149] The motion was agreed to without further debate and the new standing orders sent to the Governor for approval.[150]

Further developments: 1895 to 1978

The atmosphere of the House through much of the period between 1895 and 1978 was primarily dominated by conflict and change, with regular battles over legislation leading to repeated attempts to reform, reconstitute and even abolish the Council. While various reconstitutions were achieved, abolition was not.

It is surprising then that, with the exception of the rescission of SO 210 in 1895, these reforms did not significantly impact procedural developments in the Council until the 1930s. For this reason, the commentary below focuses first on the procedural developments that took place immediately following the adoption of the 1895 standing orders, which sought to right practical anomalies and inconveniences apparent in the new rules. The discussion then moves to attempts to reform the Council, and the effect of those reforms on procedures in the House, before concluding with other procedural amendments made in the years leading to 1978, when the Council was reconstituted to a directly elected House.

Procedural developments from 1895 to 1930

The error of the Council in giving such cursory consideration to the adoption of its new rules in 1895 quickly became apparent when, in November 1895, the House repealed SO 210. During debate on the motion a member observed that 'this standing order, and,

147 *Hansard,* NSW Legislative Council, 4 July 1895, pp 7805-7816.
148 *Minutes,* NSW Legislative Council, 4 July 1895, p 256.
149 *Hansard,* NSW Legislative Council, 1 July 1895, p 7817.
150 *Minutes,* NSW Legislative Council, 4 July 1895.

indeed, all the standing orders, were passed in an unguarded moment, and without the consideration which such an important matter deserved'.[151] SO 210 had rather surprisingly conceded the Assembly's power to lay aside a bill amended by the Council, providing that, where an Assembly bill amended by the Council was laid aside by the Assembly on the basis that, in the Assembly's view, the Council did not have the power to make those amendments, the Council could not consider or introduce a similar bill in the same session, notwithstanding that the President or, by vote on motion, the Council, was of the view that the Council did have the power to make the amendments. As the Attorney General explained, to enable the bill to pass, the Council would be placed in the position of having to acquiesce in the Assembly's assertion that the Council had exceeded its rights and privileges and erred in making the original amendments to the bill, making 'a ridicule of the House's work in the consideration and amendment of the bill with a view to it passing'.[152]

A complex debate ensued, with members arguing that the Assembly could introduce a new bill containing the amendments proposed by the Council, and were it to do so, the Council could consider the bill as, according to *Erskine May* and in keeping with previous rulings of the President, if a bill is slightly altered it is not looked upon as an identical bill so would not be a 'similar' bill within the meaning of SO 210. The matter was ultimately referred to the Standing Orders Committee, which recommended that the standing order be rescinded. In a rare episode for the committee, it emerged during consideration in committee of the whole that the decision to recommend the rescission was not made with the full support of a all members of the committee, having been decided on a casting vote of the President.[153] Members proved to be similarly divided in the chamber, however, following extensive debate and an unsuccessful attempt to propose further amendment, the motion to rescind SO 210 was agreed to. Standing orders 211 to 281, as originally numbered, were then consequentially renumbered 210 to 280.

Further amendment of the rules took place in 1897 when the House, on the recommendation of the Standing Orders Committee and in response to a request from the Statute Law Consolidation Commission, resolved to amend SO 213 to omit the previous numbering sequence for Acts commencing with each year of 'Her Majesty's reign', to be replaced by reference to 'each secular year', aligning the standing orders with the newly adopted provisions of the *Interpretation Act 1897*. The Chair of the committee advised that the amendment was necessary because a number of new bills had not been able to be enrolled under the newly adopted provisions of the Act until the consequential amendments to the standing orders were agreed to.

In 1909, on the recommendation of the Standing Orders Committee, the House amended the rules for the appointment of the Chairman of Committees (SO 7) to provide for the President to appoint two temporary Chairmen each session, who would have the same powers as the President and the Chairman of Committees when in the chair. Under the

151 *Hansard,* NSW Legislative Council, 19 November 1895, p 2681.
152 *Hansard*, NSW Legislative Council, 6 November 1895, p 2321.
153 *Hansard*, NSW Legislative Council, 19 November 1895, p 2675.

standing orders the House could only appoint a member to take the chair from day to day. During debate on the proposed changes, members observed that the existing procedure had proved cumbersome as the Chair was regularly absent due to ill-health and his absence was frequently notified immediately prior to the House meeting, prevailing on members to take the chair at only a moment's notice. With the support of the Chairman of Committees, the Council therefore proposed to adopt the Assembly's practice of authorising the Presiding Officer to nominate Temporary Chairmen at the commencement of each session.[154] The committee also recommended consequential amendments to provide that a Temporary Chairman could take the chair as Deputy President when so requested by the President, and to provide that the Chairman of Committees could appoint a Temporary Chairman to act in his place during committee of the whole should he desire to leave the chair.[155] However, under these provisions, a Temporary Chairman could not take the chair in place of the President – which provision was not introduced until 1927.

In 1912, the House adopted a new SO 281 which provided that the members of the Standing Orders Committee, the Library Committee, the Printing Committee, and the Refreshment Room Committee would hold office until the appointment of their successors, and empowered the committees to sit during any adjournment or prorogation of the House.[156] The report of the Standing Orders Committee did not detail the reasons for the introduction of this standing order. One possible explanation was to ensure the smooth running of Parliament all year round, notwithstanding prorogation, which occurred almost on an annual basis. The provision pertaining to the power of committees to sit during prorogation did not remain for long, being reversed in 1938. The change was prompted when the Assembly amended its standing orders at the recommendation of its Standing Orders Committee in response to an argument that committees could not operate during prorogation. The Assembly invited the Council to make a similar amendment to ensure the Houses maintained comparable provisions, and the Council acceded to the request.[157] It is no longer the view of the Legislative Council that its committees cannot operate during the prorogation of the House, based on a more modern reading of the system of responsible government in New South Wales and the 'reasonable necessity' of committee inquiries to hold the government to account after prorogation (see SO 206).[158]

The Standing Orders Committee continued its work during the 1920s, tabling reports in 1922 and 1927 that proposed various reforms. The reports did not appear to follow a reference from the House, though may have been initiated by a referral agreed to in 1915 on which the committee did not report prior to prorogation.[159]

Recommendations implemented following the 1922 report included:

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154 *Hansard*, NSW Legislative Council, 3 November 1909, p 3197.

155 *Hansard,* NSW Legislative Council, 3 November 1909, pp 3197-3198; *Minutes*, NSW Legislative Council, 3 November 1909, pp 102-103; *Journal of the Legislative Council,* 1909, pp 213-215.

156 *Hansard*, NSW Legislative Council, 19 September 1912, p 1279.

157 *Hansard*, NSW Legislative Council, 6 September 1938, pp 1553-1554.

158 Advice of the Clerk of the Parliaments, *Advice to the President of the Legislative Council on the power of standing committees to sit during the prorogation of the House*, 11 January 2011.

159 *Minutes,* NSW Legislative Council, 21 July 1915, p 34.

- SO 7 was amended to provide for the election of the Chairman of Committees at the commencement of each Parliament, rather than each session, in order to bring the Council's provisions into line with those of the Assembly.
- SO 18 was amended by omitting the requirement for orders for papers to be communicated to the Colonial Secretary and inserting instead a provision for the Clerk to communicate the order to whichever minister was responsible for the portfolio of the Legislature, with a view to accommodating any future departmental restructures.
- SO 27 was amended by inserting a footnote noting that provisions for leave of absence by the Governor could be found in the *Constitution Act 1902*.
- New SO 32A was adopted to replace the old practice of reading notices of questions aloud with a new provision for questions to be handed to the Clerk and published in the Minutes of Proceedings, with a view to bringing the Council's procedures into line with those in the Legislative Assembly, the Federal Parliament and Westminster.
- SO 33 was amended to authorise members to present petitions that had been typewritten or lithographed, reflecting the emergence of new technology, but to prohibit the presentation of those written in pencil.
- SO 49 was amended to provide that lengthy notices need not be read (instead being handed to the Clerk), with a view to preventing inconvenience to the House.
- SO 59 was amended to provide for votes of thanks or motions of condolence to be moved without notice.
- SO 141 was amended to provide for messages from the Council to the Assembly to be typewritten.
- SO 191 was amended to simplify the procedural motions required to be moved following the third reading of a bill, with a view to bringing the Council's practice into line with that in the Assembly.
- SO 245 was amended by omitting the requirement for the Clerk of a committee to draw attention to the absence of a quorum, and authority for a committee adjourned for the want of a quorum to meet again later that same day, the Leader of the Government having observed that the obligation previously placed on the Clerk was 'invidious' and wrongly took discretionary power away from the Chairman.
- SO 252 was amended to authorise select committee to publish evidence taken before it, omitting the previous requirement for the committee to obtain the House's permission before doing so.

Further amendments were adopted in response to the committee's report of 1927, including:

- SO 2 was amended to replace the requirement for the House to resort to reference to the 'latest' edition of *Erskine May* to instead refer to the '13th edition', at that

time the most recent edition. The Chair of the Standing Orders Committee stated that the amendment would obviate the considerable expense incurred by the House in obtaining six new editions of *Erskine May* at frequent intervals.

- SO 4 was amended to provide for a Temporary Chair to be able to perform the duties of either the President or Deputy President.
- SO 7(b) was amended to provide for the Chairman of Committees to hold office for the duration of a Parliament, rather than a session as provided for previously.
- SO 7(c) was amended to provide for three Temporary Chairman, rather than two, to be appointed, there being a view that the Council ought to provide for additional members to take the chair in view of the Assembly's practice of appointing five Temporary Chairs.
- SO 18 was amended to require the Clerk to communicate orders for papers to the Premier's Department, reversing the amendment adopted in 1922. While the 1922 committee had envisaged that leaving the provision open-ended would accommodate future departmental restructures, the committee in 1927 expressed concern that there was 'nobody to whom the duty was assigned', and it was thought that 'someone should definitely be named to carry out the duty'.
- SO 280 and SO 281 were amended to omit reference to the Refreshment Room Committee, which had been renamed the House Committee to reflect the practice of the Legislative Assembly.

It was at this point that the constitutional reforms that had been attempted particularly impacted on procedural developments in the House. The following two sections therefore summarise the background to these reforms, from 1895 to 1930, the reconstitution of 1934 and the effect of the 1934 reforms on procedures in the House.

Reform of the Council from 1895 to 1930

With the advent of Federation in 1901, questions of free trade versus protectionism moved to the federal arena. A new political division arose between the modern reformist Labor Party, with a legislative agenda of industrial, social and constitutional reform, and the Free Traders who were to rename themselves the Liberal Party.[160] In 1898, the New South Wales Labor Party had adopted abolition of the Legislative Council as part of its party platform and, from 1910, various Labor ministries maintained an uneasy relationship with the Council, which rejected a number of their proposed bills. Elements of the Labor Party continued to press for the abolition of the Council and, following his election to the Assembly in May 1925, Jack Lang set about attempting to reform the Council by swamping the House. Three new members were appointed soon after and a further 25 in December. The following year, Lang introduced a bill to abolish the Council. The bill was delayed a first time when debate on the second reading was adjourned on division, and

160 See Lovelock and Evans, *New South Wales Legislative Council Practice*, p 28.

the House prorogued soon after.[161] In the next session, a motion to restore the bill was defeated on division, 41 votes in favour and 47 against. Seven Labor members who either crossed the floor or failed to attend in the House to vote were expelled from the Party.[162] Lang sought to have the Governor appoint a further 10 members to assist in progressing the measures later in 1926, however, the request was refused.

Lang lost office in 1927 and the new Nationalist Government acted to safeguard the Council, motivated to do so both by Lang's attempts at abolition and Queensland's abolition of its Upper House in 1922. The Government began by securing the appointment of 5 new Nationalist members, raising the total membership to 101. In May 1928, the Government then introduced the Constitution (Legislative Council) Amendment Bill to insert new section 7A, to require that a bill to abolish the Council must be approved at a referendum. The provision was a manner and form provision - section 7A could only be repealed if legislation to do so was also approved at a referendum.

In September 1929, before section 7A came into effect, the Government introduced the Constitution (Further Amendment) Bill to reconstitute the Council to comprise 60 members, indirectly elected by both Houses voting under a system of proportional representation for a term of nine years, with one-third retiring every three years. The Government also sought to amend the deadlock provisions. The reconstitution bill was agreed to but was not forwarded for assent, the Government waiting for the provisions of the Constitution Further Amendment (Referendum) Bill, which would provide for a referendum on the reconstitution provisions, to be in place. However, the promised referendum was postponed owing to the economic crisis caused by the Great Depression and the Constitution (Further Amendment) Bill was never enacted.

The *Constitution (Legislative Council) Amendment Act*, which provided for section 7A, finally came into force on 1 October 1930.

At the next election the Nationalists were defeated, Lang was returned to office, and the bills for reconstitution of the Council lapsed.

The reconstitution of 1934 and amendments to the standing orders

Following Jack Lang's re-election as Premier in 1930, his Government immediately set about attempting to abolish the Council. This was in part motivated by Labor's opposition to the conservative, wealthy and privileged nominated members of the Upper House, and in part by the Council's obstructionist approach to Labor's legislative agenda. Notwithstanding that Lang was successful in making further appointments to the Council, increasing membership to 109, including the appointment of its first two female members,[163] during

161 *Minutes*, NSW Legislative Council, 22 January 1926, p164.

162 Clune and Griffith, *Decision and Deliberation,* p 284; Lovelock and Evans, *New South Wales Legislative Council Practice,* 2008, p 29. See for further details, Clune and Griffith, *Decision and Deliberation*, pp 278-286.

163 Provision for women to be appointed to the Legislative Council was made in 1926 (*Constitution (Amendment) Act 1925,* s 2.

the 1930s, Labor was not in control of the Council. Attendance of members was haphazard and unreliable, divisions within the Labor Party made it difficult to calculate Government support in the Council, there were heated clashes between members who were forced to sit longer hours than in previous sessions, and members rallied against the Government's attempts to push for bills to be dealt with in one sitting.[164]

The expedited consideration of bills was achieved by the suspension of standing orders without notice and by consent of the House, or, failing that, on a motion of necessity. While this was not a new device, under Lang's Government it reached what has been described as 'epidemic proportions', prompting the amendment of the rules governing suspensions.[165] In 1931, the House agreed to an amendment to require that, unless a member had the unanimous consent of the House, 24 hours' notice was required of a motion for the suspension of standing and sessional orders to alter the precedence of business. The amendment was agreed to on division, even though it was opposed by the Government, which argued that motions for suspension were only moved at the end of the session to facilitate the conclusion of the Government's legislative agenda.[166] The amendment also removed the provision which limited the mover to speaking for 10 minutes. This proved to be a controversial amendment in future years, with the length of members' speeches in support of suspensions becoming a point of frequent argument until as late as 1986 when the matter was finally resolved by way of a President's ruling.[167]

The Lang Government introduced two bills in the Council in December 1930 to abolish the Council and to repeal section 7A of the *Constitution Act 1902*.[168] The bills were agreed to,[169] the Council having allowed the bills to pass with the intention of challenging the validity of the bills in the courts, on the advice of the President that a referendum was necessary to abolish the Council. Subsequent legal proceedings delayed the presentation of the bills to the Governor for assent.[170] By 1932, the New South Wales Supreme Court,[171] the High Court of Australia[172] and, ultimately, the Privy Council in London[173] had determined that the bills failed to meet the manner and form requirements enacted

164 Clune and Griffith, *Decision and Deliberation*, pp 297-298.

165 Clune and Griffith, *Decision and Deliberation*, p 298.

166 *Minutes*, NSW Legislative Council, 22 December 1931, pp 416-417; *Hansard,* NSW Legislative Council, 22 December 1931, pp 7553-7555; *Minutes*, NSW Legislative Council, 23 February 1932, p 427.

167 *Hansard*, NSW Legislative Council, 24 September 1986, p 3825.

168 *Minutes,* NSW Legislative Council, 2 December 1930, p 22 (Constitution (Amendment) Bill, Constitution Further Amendment (Legislative Council Abolition) Bill).

169 *Minutes,* NSW Legislative Council, 3 December 1930, p 26 (Constitution (Amendment) Bill); 4 December 1930, p 30; 9 December 1930, p 34 (Constitution Further Amendment (Legislative Council Abolition) Bill).

170 *Minutes,* NSW Legislative Council, 11 December 1930, p 38; 17 December 1930, p 42; 20 January 1931, p 51; 28 April 1931, p 122 (Injunction against Presentation of Constitution (Amendment) Bill and Constitution Further Amendment (Legislative Council Abolition) Bill).

171 *Trethowan v Peden* (1930) 31 SR (NSW) 183.

172 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

173 *Attorney-General (NSW) v Trethowan* (1932) AC 526*; Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

169 *Attorney-General (NSW) v Trethowan* (1932) AC 526

in section 7A, and that they required approval at a referendum. This was a landmark decision upholding the validity of the 'manner and form' provisions of 7A.[174]

On 13 May 1932, the Governor, Sir Philip Game, exercised his reserve powers as guardian of the laws and conventions of the Constitution to dismiss Lang from office after he sought to prevent the Commonwealth Government from seizing New South Wales revenues for interest owed by the NSW Government to foreign bondholders.[175] With Lang's departure, the latest attempt to abolish the Council failed.

The Lang Government was succeeded by the conservative United Australia Government. The new Government initially swamped the Council's membership, which culminated at a peak of 125 members by 1932, but in 1933 the Government went on to successfully reconstitute the Council. The new structure, agreed at a referendum, provided for 60 members, elected indirectly by members of both Houses for a term of 12 years, with one-quarter being elected every three years. For the first time in the Council's history, the President was to be elected by the members of the Council rather than appointed by the Governor.[176] The legislation, through sections 5A and 5B, dealt with the powers of the Legislative Council and the Legislative Assembly in relation to financial legislation and also provided for resolution of deadlocks between the Houses.[177]

Throughout 1934, the House agreed to a series of amendments to the standing orders, some made as a consequence of reconstitution of the Council which provided for the indirect election of its members for 12-year terms. For example, amendments were made to authorise the reconstituted Council to elect its Chairman of Committees, with a term of office to ensue for the duration of the Parliament,[178] and to alter the provisions pertaining to the Register of Members to omit reference to the writ of summons and instead require the date of election and term of service of a member to be recorded in its place.[179]

Other changes to the procedures were informed by new provisions for the resolution of deadlocks between the two Houses, which had been adopted concurrently with the amendments to reconstitute the Council in 1933. The *Constitution Act 1902* had been amended to insert section 5B, which provided for the resolution of deadlocks between the two Houses, and section 38A, which authorised the Council to resolve that an Assembly minister could sit in the Council for the purposes of explaining the provisions of a bill relating to or connected with a department administered by that minister – or by 'him', as the Act was introduced and, surprisingly, still reads to this day. In December 1934, the House agreed to a series of consequential amendments to the standing orders to

174 George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006), p 4.

175 Lovelock and Evans, *New South Wales Legislative Council Practice*, p 32.

176 *Constitution Amendment (Legislative Council) Act 1932*.

177 As set out in Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008, pp 402-412, the powers of the Legislative Council in relation to money bills other than the appropriation bills has been contested. The position, at least from the perspective of the Legislative Council, appears to now be settled – see Ruling: Chair Khan, *Hansard*, Legislative Council, 24 June 2015, pp 1727-1728.

178 *Minutes*, NSW Legislative Council, 27 April 1934, pp 15-16.

179 *Minutes*, NSW Legislative Council, 31 July 1934, p 94.

omit the old provisions for free conferences, insert two new standing orders setting out the procedure for free conferences applied under the new provisions of the *Constitution Act*, and to adopt a new standing order which made provision for an Assembly minister to sit in the Council for the purposes of explaining a bill under section 38A. As the amendments were consequential in nature, they were agreed to as formal business, without debate.[180]

Following the reconstitution of the Council in 1934, there were three further attempts by Labor to abolish the Council – in 1943, 1946 and 1959.[181] The two earlier attempts were defeated in the Council at the second reading stage. In 1959, the Constitution Amendment (Legislative Council Abolition) Bill, introduced in the Assembly, proposed not only to abolish the Council but also to prohibit the establishment of any form of bicameral parliament in the future without a referendum.[182]

Having been agreed to in the Assembly, the bill was forwarded to the Council for consideration. Although Labor held a majority of seats in the Council, seven Labor members crossed the floor to vote with the Opposition in refusing to consider the bill on the procedural argument that a bill to abolish the Council should have been introduced in the Council.[183]

The bill was introduced in the Assembly for a second time and, on again being rejected by the Council, proceeded through all the stages provided under section 5B of the *Constitution Act* for the resolution of deadlocks between the Houses, ultimately being submitted to a referendum. However, prior to a referendum, the Leader of the Opposition in the Council, the Hon Colonel Hector Clayton, sought an injunction to prevent the referendum being held, claiming that the requirements of section 5B had not been met. The Supreme Court in *Clayton v Heffron,* found for the Government and, on 29 April 1961, the matter was determined at a referendum, a majority of 57.6 per cent of voters rejecting the abolition of the Council.[184] This was the last attempt to abolish the Council, and further reform of its membership was set aside until 1978 when the Labor party was again in government and held a majority in the Council.

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180 *Minutes*, NSW Legislative Council, 12 December 1934, p 210.

181 Labor held government between 1941 and 1965.

182 The Liberal/Country Party Coalition in Opposition was not in accord on the matter, with the Country Party in favour of maintaining the Upper House and the Liberal Party being committed to reform. In the Assembly, the majority of the Liberal Party members in Opposition voted with the Government in order to allow the bill to be decided at a referendum under the 'manner and form' provisions of s 7A of the *Constitution Act*. Clune and Griffith, *Decision and Deliberation* p 406.

183 The Labor members who voted against the Government were expelled from the Labor Party, causing a split in the party and a period of significant challenge for the Labor Government which could no longer claim a majority in the Council. For a discussion on the division within the Labor Party, see Clune and Griffith, *Decision and Deliberation* pp 404-411.

184 For detail of the passage of the bill under the deadlock provisions of s 5B see Lovelock and Evans, *New South Wales Legislative Council Practice*, 2008 pp 36-37 and Clune and Griffith, *Decision and Deliberation* pp 404-411.

Further procedural developments from 1934 to 1978

Notwithstanding the tumultuous changes that had taken place in the Council, the final amendment to the standing orders agreed to in 1934 was motivated by different considerations entirely. The addition of a new standing order to provide for the reading of the prayers was adopted with surprisingly little discussion in the Council, in view of the controversy the proposed measure had been met with when first proposed in 1856. This time the fight was waged in the Assembly, whose new provisions the Council now sought to replicate. While the provisions had been adopted on the recommendations of the Assembly's Standing Orders Committee, members of the Assembly expressed competing viewpoints, speaking to the difficulties in formulating a prayer that would acknowledge the differing religious views of individual members, noting the differing practices of other Westminster Parliaments, and expressing concern that it would be 'hypocritical' to offer a prayer over political proceedings that, they argued, 'would not incur the blessing of God'. During debate, it emerged that the move to make provision for the prayers to be read was likely prompted by a recommendation made by the newly appointed Anglican Archbishop of Sydney.[185]

In 1935, the Legislative Council returned to the practical business of the House, adopting new provisions and making consequential amendments to the existing standing orders, to provide that a member could only present a petition or give a notice of motion after the House had proceeded to the orders of the day on the Notice Paper with the leave of the House. The amendments were not considered by the Standing Orders Committee and were agreed to without debate.[186]

In 1946, the House adopted a new provision for Commissioners to be appointed by the Governor for the purposes of swearing in new members when a vacancy occurred in the office of President mid-session, and for the subsequent election of a new member as President. The amendment was prompted by an impending situation which would occur in April of that year, whereby the terms of service of the President, the Hon Sir John Beverly Peden, and the Chair of Committees would expire under section 17F(3) of the *Constitution Act 1902*, both members having been elected following the 1934 reconstitution.

A minor amendment was made in 1951, when the House agreed to reverse the amendment made in 1927 to SO 2 by omitting the requirement that the House have reference to the '13th edition of May's Parliamentary Practice', in favour of a reference to the 'latest' edition. A new edition of *Erskine May* having been published, the amendment was made with a view to obviating any further amendments to the standing orders in the event that subsequent editions should be published.[187]

185 *Hansard,* NSW Legislative Assembly, 8 May 1934, p 200.

186 *Minutes,* NSW Legislative Council, 5 April 1935, pp 353-354.

187 *Minutes,* NSW Legislative Council, 15 May 1951, p 81; *Hansard*, NSW Legislative Council, 15 May 1951, p 1927.

In 1968, the House made its final procedural amendment prior to the reconstitution of the Council in 1978, resolving to omit from the sessional order made under 1895 SO 280 reference to an earlier resolution that had granted the Library Committee leave to act jointly with the Library Committee of the Legislative Assembly.[188]

1978 RECONSTITUTION AND RESURGENCE OF THE LEGISLATIVE COUNCIL

In 1978, *the Constitution and Parliamentary Electorates and Elections (Amendment) Act* reconstituted the Legislative Council to a House of 45 members directly elected with the whole of the state as one electorate. Casual vacancies in the Council were to be filled by the Governor appointing a member of the group from which the member whose seat had become vacant had been elected. When a vacancy could not be filled under this method, a joint sitting of both Houses would instead be held. The term of members remained three terms of the Assembly. However, according to provisions for the gradual replacement of those members indirectly elected before 1978, it was not until 1984 that the Council became fully reconstituted as a House of 45 members directly elected by the people. Schedule 4 to the 1978 reform Act also provided for the Legislative Council to elect one of its own as the President of the Council and prescribed the rules for the election.

There were no immediate consequences for the operations of the chamber resulting from the reconstitution and no immediate action taken to amend standing orders. However, it marked the commencement of the Council as a directly elected and full-time House of Review, and one which could legitimately claim the authority of the electors.

In 1981, the maximum term of Parliament was set at 4 years, increasing the term that Council members could expect to serve to 12 years.[189]

In 1982, following a request from the Assembly to establish a joint standing committee on road safety,[190] standing orders 168, 169, 171 and 183 relating to sessional committees were amended and standing orders 257A, 257B and 257C adopted to allow the appointment of standing committees. Prior to this, the Council had been scrutinising legislation and executive decisions and actions through select committees, some of which were appointed with the power to report from time to time. The appointment of standing committees would allow subject specialisation by members and staff and ongoing superintendence of particular policy areas.

In August 1984, the House agreed to the publication of written questions and answers in a separate Questions and Answers Paper[191] instead of being published in the minutes, and for questions to be handed to the Clerk. The House also agreed to a sessional order the following day, which was adopted over the next three sessions, for Question Time to

188 *Minutes*, NSW Legislative Council, 26 November 1968, p 217.
189 *Constitution (Legislative Assembly) Amendment Act 1981.*
190 *Minutes*, NSW Legislative Council, 17 March 1982, pp 261-263.
191 *Minutes*, NSW Legislative Council, 15 August 1984, pp 27-28

commence at 5.30 pm on Monday to Wednesday and 2.30 pm on Thursday and Friday. In April 1988, the times for interruption for questions were changed by sessional order to 4.00 pm on Monday to Wednesday and 12 noon on Thursday and Friday.[192]

In October 1984, the Hon Barry Unsworth, Leader of the Government in the Legislative Council, gave a ministerial statement outlining the Government's intention to establish a select committee to consider a system of standing committees of the Council.[193] Later the same day, the Hon William Lange, a member of the Opposition, moved, on notice, that four standing committees on Resources; Health, Welfare and Education; Law and Justice; and Statutory Bodies be appointed.[194] In speaking to his motion, Mr Lange stated that there was no doubt that had his motion not been on the Notice Paper for that day, Mr Unsworth would not have made his statement. Nevertheless, he welcomed the Government's announcement, and congratulated the Minister on obtaining Government support for the concept of a system of standing committees.[195] Debate on the motion was interrupted for adjournment, and subsequently lapsed on prorogation.

In February 1985, as outlined by the Government the previous year, the Council established a select committee to inquire into a system of standing committees in the Legislative Council.[196] The select committee reported in 1986, recommending the establishment of three standing committees covering state progress, social issues and country affairs and that the existing Subordinate Legislation and Deregulation Committee be revamped.[197] This report was fundamental to the establishment of the modern committee system in the Legislative Council to enable the proper scrutiny of actions and decisions of the Executive, but it would take a number of years before this eventuated.

In November 1985, Mr Unsworth, on behalf of the Chair, tabled a report from the Standing Orders Committee which recommended a number of amendments to the standing orders. On 21 November 1985 the report was considered in committee of the whole, reported without amendment and adopted without debate.[198] A number of the proposed new or amended standing orders were consequential on the enactment of the *Constitution and Parliamentary Electorates and Elections (Amendment) Act* of 1978:

- New SO 3A provided for the swearing in of members after a periodic Council election and included a provision for the Clerk to announce the name or names of the Commissioner or Commissioners appointed by the Governor to administer the oath to members and for the Clerk to read the Commission,[199]

192 *Minutes*, NSW Legislative Council, 16 August 1984, p 36; 20 February 1986, p 26; 28 April 1988, p 27.
193 *Hansard*, NSW Legislative Council, 11 October 1984, pp 1719-1721.
194 *Minutes*, NSW Legislative Council, 11 October 1984, pp 134-137.
195 *Hansard*, NSW Legislative Council, 11 October 1984, p 1762.
196 *Minutes*, NSW Legislative Council, 28 February 1985, pp 333-334.
197 Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), pp 6-7.
198 *Minutes,* NSW Legislative Council, 21 November 1985, p 933; *Hansard,* NSW Legislative Council, 21 November 1985, p 10229.
199 *Minutes,* NSW Legislative Council, 20 November 1985, pp 910-914.

- SO 3 was amended as a consequence of the adoption of SO 3A to provide for the swearing in of members other than by Commissioners on the first sitting day after an election, provisions that had not been required prior to reconstitution in 1978,
- SO 6 was amended to omit reference to the 'Clerk of the Council' in favor of 'the Clerk', which definition had been adopted in new SO 3A, and
- SO 8A was also amended to provide for the filling of a vacancy in the office of President to reflect the provisions of Schedule 4 to the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*.

The reconstitution of the Council preceded the construction of a new tower block at the rear of Parliament House to adequately accommodate the 45 full-time members of the Legislative Council, and the Executive and members of the Legislative Assembly on sitting days. As a consequence, it was necessary to amend those standing orders relating to the ringing of bells to ensure that members had sufficient time to make their way from level 12 in the Tower Block to the chamber before the doors were locked. It is understood that considerable time was devoted to measuring the time it would take for a member to travel the several floors from their new office to the chamber. Standing orders 11 and 224, providing for a quorum call in the House during the sitting and in committee of the whole, were amended to increase the duration of the bells from one minute to five minutes and SO 128, providing for divisions, was amended to increase the duration of the bells from two minutes to five minutes.

SO 10 was amended to provide that the chair was to be taken at the time appointed for the meeting of the House and if, at the expiration of five minutes, a quorum had not been formed, the President was to declare the Council adjourned to the next sitting day. Prior to the amendment, the standing order had provided a more lenient approach to the commencement of the sittings, allowing the chair to be taken within half an hour of the time appointed for the meeting. If after the expiration of half an hour after the time the chair was taken there was no quorum the bells would be rung, and if there was still an absence of a quorum, the President was to adjourn the House until the next sitting day.

The provisions of two additional standing orders were modernised. Standing order 270, which provided for the payment of funds to cover the costs of a private bill was amended to refer to the Consolidated Fund instead of the 'Consolidated Revenue Fund', to omit reference to the colony and to change the sum payable from £25 to $50, reflecting the transition in 1966 to decimal currency in Australia.[200] Finally, standing order 280 was amended to omit the provision that the House was to meet at 4.00 pm each sitting day. While in previous years sessional orders had been adopted to vary the times of meeting of the House, they had continued to reflect the constitution of the House as a part-time House of Review, the members of which had occupations outside of their work as

200 *Minutes,* NSW Legislative Council, 21 November 1985, p 933; *Hansard,* NSW Legislative Council, 21 November 1985, p 10229.

members of the Council. For example, a sessional order adopted on 25 August 1976 provided that the House was to meet at 4.00 pm on Monday, Tuesday, Wednesday and Friday and at 2.00 pm on Thursday each week.

After 1985, with the expectation that the House would operate on a full-time basis, the sessional order for the meeting of the House provided for the House to sit earlier each sitting day. In February 1986, the sessional order set the times for the House to meet on Monday, Tuesday and Wednesday at 2.30 pm and Thursday and Friday at 10.30 am each week, with the House regularly sitting on Tuesdays, Wednesdays and Thursdays,[201] a pattern which has continued apart from a variation in 2011 under which the House sat four days a week in two-week blocks. Another consequence of the constitutional amendments was that the House began to sit for a greater number of days each year and for longer hours. In 1984, the House sat for just over 144 hours over 22 days whereas in 1987 the House sat for just over 380 hours over 48 days.

In 1986, the House adopted, by sessional order, procedures for an adjournment debate of 15 minutes with each member speaking for no more than five minutes. Members were not required to be relevant to the motion thereby allowing members to speak on any matter.[202] On 13 October 1987, the House adopted a sessional order which imposed time limits on debate on all bills. However the provision only operated until the end of the session, 18 sitting days, and was not reintroduced by the new government.

1988 – the modern committee system and non-government majorities in the Legislative Council

Following the 1988 election, the Liberal/National Party Coalition led by the Hon Nick Greiner MP formed government with a sizeable majority in the Assembly but with the balance of power in the Council being held by minor parties. This was the first election since the 1978 reconstitution of the House that the government did not win a majority of seats in the Council and marked the commencement of a new era of non-government majorities. Since then, the government has needed the support of minor parties in order to pass any items of business to which the Opposition objects.

A number of procedural changes were adopted which particularly benefited the crossbench members by providing more opportunities to introduce matters of importance to them and for scrutinising government action and decisions.

On the second day of the new Parliament, the House agreed to a sessional order on the motion of the Hon Liz Kirkby MLC, a member of the Australian Democrats, giving precedence to motions for the disallowance of statutory rules.[203] A similar rule had been a standing order in the Legislative Assembly since 1964.

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201 *Minutes,* NSW Legislative Council, 20 February 1986, p 26.

202 *Minutes,* NSW Legislative Council, 19 March 1986, pp 89-90; *Hansard,* NSW Legislative Council 19 March 1986, p 1139.

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

The provisions for consideration of bills introduced in the Council were varied by sessional order to ensure that members were allowed sufficient time to examine bills by providing that after the mover's second reading speech, the debate was to be adjourned until 'five clear days ahead'. This provision was similar to one that had been adopted in the 1829 standing orders but not subsequently. The new rules also provided for a bill to be declared urgent in order that it could proceed through all stages in one sitting if a majority of members agreed.[204]

Modifications to the rules for introducing matters of public importance were also adopted. Under the new provisions, the motion was referred to as a 'matter of public interest', rather than an important matter, debate would proceed for one and a half hours, rather than two hours, members were explicitly confined to debating the subject of the motion, and the restriction on the consideration of only one such matter per sitting day would not extend to the resumption of the adjourned debate on a matter previously moved and set down for consideration on a future day.[205]

The newly elected Coalition Government also agreed to establish a standing committee on social issues and a standing committee on state development, based on the recommendations of the 1986 committee appointed by the House to consider a structured committee system in the Legislative Council. The appointment of these committees marked the commencement of a committee structure which would, in time, allow the Council to fulfil its role of scrutinising government legislative proposals, decisions, actions and administration.

The resolution appointing the committees provided comprehensive terms of reference, under which the committees could: consider proposals, matters or things concerned with their policy area and had the power to send for and examine persons, papers, records and things; adjourn from place to place; make visits of inspection within Australia and, with the approval of the President, outside Australia; request the attendance of and examine members of the Legislative Council; and report to the Council from time to time. In addition, the resolution provided that the committees were to have the resources necessary to carry out their functions.[206]

In August 1988, provision was made for the procedure to be followed in the event that the House was in committee of the whole, or a division was in progress, at the time appointed for Questions and for any business then under discussion to be set down on the Notice Paper for a later hour of the sitting.[207]

Later in 1988, the House appointed the Council's first standing committee on privileges, at that time called the Standing Committee upon Parliamentary Privilege, 'to consider and report upon any matters relating to privilege which may be referred to it by the House'.[208]

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204 *Minutes,* NSW Legislative Council, 24 May 1988, p 54.
205 *Minutes*, NSW Legislative Council, 25 May 1988, p 64.
206 *Minutes*, NSW Legislative Council, 9 June 1988, pp 182-186.
207 *Minutes*, NSW Legislative Council, 18 August 1988, pp 24-28
208 *Minutes*, NSW Legislative Council, 20 October 1988, pp 182-186.

The appointment of the committee followed the recommendation of the Joint Select Committee on Parliamentary Privilege in 1984.[209]

Until 1990, notices of motions were recorded at the end of the Minutes of Proceedings. From 21 February 1990, notices of motions have been published in a separate Notice Paper. In a statement to the House, the President advised members that he had approved the publication of a *Notices of Motions and Orders of the Day* paper to streamline preparation and printing and also to enable members and other users of the publication to have easier access to information on the business of the House.[210] The separate Notice Paper would also address the challenges created by the increasing number of items of private members' business.

In 1990, the Hon Liz Kirkby again initiated provisions for scrutinising the Executive Government by proposing a requirement for the government to table a list of unproclaimed legislation every six months,[211] a provision similar to one adopted by the Australian Senate in 1989. Although the motion was agreed to, no list was provided to the House before Parliament was prorogued two months later. The issue was not revisited again until 1996.

In 1991, the *Constitution (Legislative Council) Amendment Act 1991* reduced the number of members of the Council from 45 to 42, reduced the term of office from 12 years to 8 years and provided for 21 members to be elected at each periodic Council election. As a consequence, the quota of votes a candidate required for election to the Council fell from 6.25 per cent to 4.55 per cent thereby improving the chances of members of minor parties to be elected. The method of filling casual vacancies was also changed to the system used in the Senate, whereby a joint sitting of both Houses was held to elect a person of the same political party as the original member.

The *Constitution (Legislative Council) Further Amendment Act,* adopted later in 1991, provided for the President to be elected when the Council first meets after an election. Previously the President continued in office until removed or ceased to be a member. The Act also provided that the President was to be elected in the same manner as the President of the Senate until standing orders were made by the Council. Rules for the election of the President were finally adopted in SO 12 in 2004. The quorum for meetings of the Council was also changed from 12 to 8 members, exclusive of the President or other person presiding.

Following the May 1991 election, the Liberal/National Party Coalition retained government with the support in matters of confidence and supply of three independent Assembly members in exchange for a number of concessions known as the Charter of Reform. The majority of reforms set out in the charter were intended to create a more open and accountable government, for example, by reforming freedom of information

209 Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege, *Parliamentary privilege in New South Wales*, 1984, p 114.

210 *Minutes*, NSW Legislative Council, 22 February 1990, p 19.

211 *Minutes,* NSW Legislative Council, 11 October 1990, pp 461-462; *Hansard,* NSW Legislative Council, 11 October 1990, pp 8223-8229.

legislation, adopting whistleblower legislation, strengthening the independence of the Ombudsman and the Auditor-General and reforming election funding legislation.

Constitutional amendments also followed the Charter of Reform. In 1992, the *Constitution Act 1902* was amended to provide for the Speaker to be elected by ballot, to give constitutional recognition of the Speaker as the independent and impartial representative of the Legislative Assembly, and the President as the independent and impartial representative of the Legislative Council, and to reinforce the independence of the judiciary.[212] The *Constitution Act 1902* was again amended following referenda held at the time of the 1995 general election to provide for fixed-four year parliamentary terms and to entrench the provisions for independence of judges and magistrates.[213]

A number of briefing papers were approved by cabinet for consideration by the Assembly's Standing Orders and Procedure Committee, which resulted in reforms to Question Time, opportunities for private members to raise matters important to their constituencies and to introduce legislation, procedures for debating committee reports and findings and, in 1994, the repeal of all previous standing orders and the adoption of new standing orders. In order that private members not be prevented from introducing legislation due to potential prohibitive costs of engaging a private legislative drafter, arrangements were made for the opposition and crossbench members to access the services of the Parliamentary Counsel's Office, so long as such services did not interfere with the Government's legislative program and subject to the availability of resources. This arrangement has continued since, with private members in the Legislative Council taking full advantage of the services of Parliamentary Counsel to draft bills and amendments to government bills.

Some of the procedural reforms proposed in the Charter of Reform had already been initiated in the Council in previous years. For example, provisions for private members to raise matters of importance, and the requirement for the government to table a list of unproclaimed legislation had been agreed to following the 1988 election (although not complied with).

However, one of the significant proposals would impact on the Council. A proposal for joint estimates committees to inquire into the State Budget was forwarded to members of the Legislative Council by Tim Moore MP, Leader of the House in the Assembly and Ted Pickering MLC, Leader of the Government in the Council in July 1991.[214] The proposal was subsequently referred to the Council's Standing Orders Committee by Mr Pickering, with the Clerk, Mr John Evans, taking the opportunity to also circulate a briefing paper on reform of private members' business in the Council.[215]

While no record was found of the Standing Orders Committee reporting to the House, the appointment of the joint estimates committees proceeded soon after. On 26 September

212 *Constitution (Amendment) Act 1902.*

213 *Constitution (Fixed Term Parliaments) Amendment Act 1993.*

214 Memorandum from Tim Moore MP and Ted Pickering MLC to Legislative Council members, 24 July 1991, enclosing discussion papers.

215 Memorandum from Ted Pickering MLC to the President, the Hon Max Willis MLC, 12 August 1991.

1991, the Council received a message from the Assembly advising that it had agreed to the appointment of five joint estimates committees on Human Services; Natural Resources and Environment; Economic Planning, Development and Infrastructure; Law and Justice and Machinery of Government. The Council subsequently agreed to the appointment of the committees, named the members of the Council to serve on each committee and agreed to the schedule of hearings proposed by the Assembly. An amendment moved by the Leader of the Opposition, the Hon Michael Egan, to prohibit the committees meeting while the House was sitting and to vary the schedule was unsuccessful.[216] The joint estimates committees were appointed again in 1992, 1993 and 1994, but became the subject of considerable disagreement between the Houses following the 1995 election when a majority Labor Government was returned in the Assembly and would remain in power until 2011.[217]

Other proposals for reform following the 1991 election, such as changes to Question Time, were not adopted in the Council until 1999, and although a review of the Council standing orders was initiated at the time, it was not finalised until 2003.

Also in 1991 the House adopted a resolution authorising the broadcast of its proceedings to the Premier's Office in an offsite building. The decision to broadcast was not taken lightly. The Premier had initially requested that proceedings be broadcast to his office in 1989, to which request the Speaker of the Legislative Assembly had agreed, but to which the President of the Council, having consulted members, had not. The President advised the Premier by letter that: 'Having considered the responses received in the matter, I regret that I am unable to accede to your request.'[218] Requests had also been received from the Press Gallery to access audio and video footage of Parliament. On receiving a verbal request that the decision of the President be reviewed, the Clerk prepared a briefing note, referring to an opinion of the Crown Solicitor regarding the possible liability for defamation in relation to the broadcast of proceedings. The advice of the Crown Solicitor was that while there was no doubt that the member speaking defamatory words that were broadcast would be protected by the Bill of Rights, as adopted by the *Imperial Acts Application Act 1969*, there was sufficient doubt as to the absolute privilege against liability of a person who 'establishes, or gives approval to the establishment, of electronic means of simultaneously broadcasting the defamatory matter outside the Chamber…'.

The Clerk of the Parliaments advised that, in view of the doubts expressed by the Crown Solicitor, the approval of broadcasting the proceedings of the House by landline to the State Office Block should be by resolution of the House. With the authority of the House, the broadcast of proceedings would enjoy absolute privilege against liability for the publication of defamatory matter outside the chamber. Consequently, a resolution was passed authorising the broadcast of proceedings to the Premier's Office in the State Office Block under terms and conditions as determined by the President from time to

216 *Minutes,* NSW Legislative Council, 26 September 1991, pp 160-171.

217 *Minutes,* NSW Legislative Council, 14 October 1992, pp 311-316; 13 October 1993, pp 279-300; 13 October 1994, pp 298-329.

218 Briefing note, John Evans, Clerk of the Parliaments, *Broadcasting of Proceedings of the Legislative Council*, undated.

time.[219] In 1992, the House extended its authorisation for the broadcast of audio excerpts of proceedings to radio and television stations under conditions set out in the resolution, and as determined by the President from time to time, for a trial of 12 months.[220] In 1993, the audio and television broadcasting of proceedings was referred to the Standing Orders Committee, which tabled a progress report in October that year.[221] Some days later, the House authorised, for the remainder of the session, the broadcast and rebroadcast by television stations of proceedings and excerpts of proceedings.[222] In 1994, a new resolution superseded previous resolutions and provided for the sound and video broadcast and rebroadcast of proceedings within Parliament House and to organisations and persons outside Parliament House on the approval of the President. The resolution also authorised a committee to permit the broadcast of its proceedings.[223]

On 4 December 1991, a sessional order was adopted to provide that if a bill read a second time was not referred to a committee the President could inquire if leave was granted to proceed to the third reading forthwith,[224] and if no member objected, the bill would so proceed. Prior to the adoption of the sessional order, every bill was considered in committee of the whole regardless of there being any amendments proposed, or any desire on the part of the House to consider the bill in detail.

Following the 1995 election, while the Australian Labor Party had won government, it had a total of only 17 seats in the Council, with the Coalition holding 18 and the crossbench holding 7 seats. Consequently, the Labor Government would need to negotiate with the crossbench on any matters to which the Opposition objected.

The House again established the standing committees on social issues and state development and for the first time appointed a standing committee on law and justice. A law and justice committee had been proposed by Mr Lange in 1984, but was not one of the committees recommended by the Select Committee on Standing Committees.[225] In the absence of a proposal from the Assembly for the appointment of joint estimates committees, as had occurred in the previous four years, the Council appointed three Legislative Council estimates committees, reflecting the distribution of Government ministers' portfolio responsibilities. In addition, the Council resolved that the Estimates Committees would examine and report on the expenditure or income of any statutory body or corporation appointed, constituted or regulated under an Act of Parliament.[226]

The sessional order for the disallowance of statutory rules, first adopted in April 1988 and readopted in 1990 and 1991 on motions of the Liberal/National Party Government,[227] was not adopted again until 1995 on the motion of the Liberal/National Party Coalition

219 *Minutes*, NSW Legislative Council, 19 November 1991, p 280.
220 *Minutes*, NSW Legislative Council, 22 September 1992, pp 267-268.
221 *Minutes*, NSW Legislative Council, 19 May 1993, p 146; 13 October 1993, p 276.
222 *Minutes*, NSW Legislative Council, 26 October 1993, pp 314-315.
223 *Minutes*, NSW Legislative Council, 11 October 1994, pp 279-281.
224 *Minutes*, NSW Legislative Council, 4 December 1991, p 310.
225 *Minutes*, NSW Legislative Council, 24 May 1995, pp 36-43.
226 *Minutes,* NSW Legislative Council, 17 October 1995, pp 217-222.
227 *Minutes*, NSW Legislative Council, 18 August 1988, p 24; 8 May 1990, p 118; 21 February 1991, p 28.

then in opposition.[228] In 1996, the sessional order was agreed to with the inclusion of time limits and, on the motion of the Leader of the Government, was amended to include an additional step in the procedure for the House to determine the precedence of the motion.[229] The provisions for precedence of and debate on a disallowance motion were adopted in 2004 as SO 78 with two changes. Under the new standing order, a notice of motion would be placed on the Notice Paper as business of the House. When called on, the House would first decide on a question proposed by the President without amendment or debate 'That the motion proceed as business of the House'. If that question was agreed to, the House would then decide, on motion, 'when the matter would proceed'. The new provision not only introduced an extra step before the substantive matter could proceed but also omitted the prohibition on amending or debating the motion by which the House decides when the matter is to proceed. [230]

The sessional order for the adjournment of the second reading debate on a Council bill, first adopted in 1988, was readopted in the same terms in subsequent sessions until May 1995, when it was adopted with the variation that debate was to be adjourned until a future day which must be at least 'five calendar days ahead'.[231] That provision was incorporated in standing order 137 in 2004. The provision for declaring a bill an urgent bill was incorporated in SO 138 in 2004.

1996 estimates committees and the *Egan* cases

The year 1996 was the commencement of a period of significant disagreement between the Legislative Council and the Executive Council.

The issue of unproclaimed legislation was again raised in 1996 when a censure motion against the Attorney General and Minister for Industrial Relations for failing to proclaim the commencement of certain provisions of the *Industrial Relations Act 1996* was amended to require the tabling, every second sitting day of each month, of a list of all legislation that had not been proclaimed 90 calendar days after assent.[232] The new rule incorporated the requirement in the Assembly standing order adopted in 1991 for legislation remaining unproclaimed 90 days after assent to be tabled,[233] a more frequent tabling requirement than had been adopted in the Council in 1990. The provision was adopted as a sessional order in 1997 and in subsequent sessions until adopted as standing order 160(2) in 2004.

The power of the House to order the production of state papers was the subject of a series of legal cases known as the *Egan* cases,[234] which confirmed the power of the Legislative

228 *Minutes*, NSW Legislative Council, 18 October 1995, p 230.

229 *Minutes*, NSW Legislative Council, 18 April 1996, pp 44-47; *Hansard,* NSW Legislative Council, 18 April 1996, pp 172-173.

230 *Minutes*, NSW Legislative Council, 5 May 2004, p 676.

231 *Minutes*, NSW Legislative Council, 24 May 1995, p 26.

232 *Minutes,* NSW Legislative Council, 22 October 1996, pp 379-380.

233 *Votes and Proceedings,* NSW Legislative Assembly, 24 September 1991, p 191.

234 Egan v Willis (1996) 40 NSWLR 650; Egan v Willis [1998] HCA 71; Egan v Chadwick & Ors [1999] NSWCA 176.

Council, derived from the common law principle of reasonable necessity, to order the production of state papers, which power extends to those documents in respect of which a claim of legal professional privilege or public interest immunity is made. The power to suspend a member as a measure of self-protection was also confirmed. This was a significant victory for the Legislative Council and for representative democracy, by enforcing the accountability of the Executive to the Parliament through the revelation of the workings of government (except Cabinet deliberations), notwithstanding claims of privilege and immunity.[235] However, the matter did not rest there. Further proceedings in the Council in 1998 led to the censure of the Leader of the Government for refusing to return documents for which a claim of privilege was made, and adoption of provisions for the evaluation of the validity of a claim of privilege by an independent legal arbiter in the event of a dispute. The current rules and mechanisms for managing returns to orders developed from this time are detailed in SO 52.

The accountability of the Executive to the Parliament was also the subject of disagreement between the Council and the Assembly in the context of the appointment of parliamentary committees to scrutinise the yearly budget estimates.

In April 1996, the Council again appointed three estimates committees to inquire into and report on the 1996-1997 'estimates of payments by program in the Budget Estimates and related documents presenting the amounts to be appropriated from the Consolidated Fund', and again resolved that the committees could examine, by portfolio, the expenditure or income of any statutory body or corporation appointed, constituted or regulated under an Act of Parliament. A number of new provisions were proposed, which would later be incorporated in the resolutions appointing standing committees and General Purpose Standing Committees (renamed as 'portfolio committees' in 2017):

- for questions to be asked across program areas, so that members did not have to limit their questions to line items in the budget;
- for substitute members to represent an appointed government or opposition member of the committee, and for crossbench members to nominate a substitute member in writing;
- for the Chair to nominate a government member to act as Deputy Chair;
- for the committees to meet during any sitting or adjournment of the House;
- for supplementary hearings;
- for written questions to be submitted to the Clerk to the committee and for answers to be lodged within 14 days; and
- for dissenting statements.[236]

235 John Evans, *Order for papers and Executive claims of privilege and immunity – Egan v Chadwick & Ors,* 30th Conference of Presiding Officers and Clerks, 18-23 July 1999, Suva Fiji.

236 *Minutes,* NSW Legislative Council, 30 April 1996, pp 80-95.

During debate on the motion, the mover, the Hon Liz Kirkby, stated that it was important for the Council, as a House of Review, to have its own estimates committees and that the Council estimates committees of the previous year had been a vast improvement on the joint estimates committees of previous years.[237]

Although the Government opposed the motion, with the support of the Opposition the motion was agreed to, with amendments to provide for a non-government majority of members and for the Chair to be elected by the committee at its first meeting.[238]

The following month a message was received from the Assembly advising that it had resolved to appoint joint estimates committees, as had occurred in previous years, and requesting that the Council agree to a similar resolution. However, the motion of the Leader of the Government agreeing to the appointment of the joint committees was amended on motion of the Leader of the Opposition to state that the House had already appointed its own estimates committees to inquire into and report on the 1996-1997 budget estimates and related documents, that as a House of Review it had a right and duty to examine and review all aspects of the operations of the Executive Government, and that the Executive Government was accountable to the people of New South Wales through the Legislative Council, notwithstanding the limitations of section 5 of the *Constitution Act 1902*.[239]

In May the following year, on the motion of the Leader of the Opposition, the Hon John Hannaford, the House agreed to the appointment of joint estimates committees to inquire into the 1997-1998 estimates and a message was forwarded to the Assembly requesting that it pass a similar resolution.[240] Later on the same day, the House appointed five General Purpose Standing Committees for the first time, also on the motion of the Leader of the Opposition.[241] The General Purpose Standing Committees each had five members: two government, two opposition and one crossbench member, with authority to elect its own Chair. According to the Opposition, whereas the standing committees on social issues, state development and law and justice were policy committees, the General Purpose Standing Committees would be oversight committees, looking at the management, structure and business of government. The motion was opposed by the Government on the basis that members were already involved in a number of permanent committees established by the Council, and the five joint estimates committees, and that the capacity of members to perform the duties of committee members was limited. The Government also objected to the 'sweeping powers' which it said pre-empted the determination of the High Court on the powers of the Legislative Council in relation to the production of papers and went further than the Court of Appeal determination in *Egan v Willis and Cahill* by devolving such a power to a committee. The Attorney General, the Hon Jeff Shaw stated:

237 *Hansard,* NSW Legislative Council, 30 April 1996, pp 492-502.
238 *Minutes,* NSW Legislative Council, 30 April 1996, pp 81-95.
239 *Minutes,* NSW Legislative Council, 16 May 1996, pp 147-148.
240 *Minutes,* NSW Legislative Council, 7 May 1997, pp 658-673.
241 *Minutes,* NSW Legislative Council, 7 May 1997, pp 675-680.

> It is arguable that it is not necessary to the functions of a House that a committee have this power if the power can be exercised by the House itself. That is particularly the case where a majority of the committee may not represent a majority of the House. It would be inappropriate for such a significant power to be exercised without the approval of a majority of the House.

Nevertheless, the motion was agreed to with one Government amendment to restrict the power of the committees to make visits of inspection to within the state.[242]

On 22 May 1997, the Council received a message from the Assembly advising that it had appointed five estimates committees and requesting that the Council pass a similar resolution.[243] The Assembly's message was considered on the next sitting day, during debate on which the Leader of the Opposition moved a number of amendments which sought to modify the resolution to reflect the motion agreed to by the Council some weeks earlier. In speaking to the motion, the Leader of the Opposition stated:

> It is an indictment of the Government that this House having carried a motion to establish joint estimates committees and having sent a message to the Legislative Assembly seeking its concurrence with the proposal, the Legislative Assembly has ignored completely this House's message. Rather than the Legislative Assembly dealing with that message and at least sending it back with amendments, which would have been the appropriate courtesy between the two Houses, the Government has proposed its own motion to establish joint estimates committees.
>
> This House should continue to insist upon a set of joint estimates committees in accordance with the proposal at least in principle that was advocated by this House. The Government in the main is opposed to proposals that would establish committees which appropriately reflect the various compositions of the Houses but in the structure of them would not give the Government control of those committees. The amendments mean that the Government will be answerable to the House in relation to the estimates committees.[244]

The Opposition amendments were agreed to and a message returned to the Assembly seeking its concurrence. However, the Assembly was not prepared to accept the amendments and no further communication was received on the matter. On 29 May 1997, the Leader of the Opposition proposed that the budget estimates and related papers be referred to the General Purpose Standing Committees for inquiry and report. In speaking to his motion, Mr Hannaford stated:

> … joint estimates committees will not be held and the estimates will now be dealt with through the General Purpose Standing Committees. Some might regard that as regrettable, while others might take the view that it is an appropriate role for this House. I will not become involved in that debate. However, I believe there should be formal communication between the Chambers on these matters. It is regrettable that the arrangements which some members agreed with were

242 *Minutes,* NSW Legislative Council, 7 May 1997, pp 674-680; *Hansard*, NSW Legislative Council, 7 May 1997, pp 8128-8134.

243 *Minutes,* NSW Legislative Council, 22 May 1997, pp 741-745.

244 *Minutes,* NSW Legislative Council, 27 May 1997, pp 752-766; 27 May 1997, p 9209.

> not accepted by others. So be it. This House will now proceed with its own consideration of the budget.[245]

The following year, on 28 May 1998, the Council received a message from the Assembly proposing the appointment of joint estimates committees and requesting that the Council pass a similar resolution.[246] On the next sitting day, the Council agreed to a resolution for the appointment of the committees, on the motion of a minister, but with a number of amendments.[247] No response to the Council's message was received and, on 4 June 1998, the budget estimates were referred to the General Purpose Standing Committees for inquiry and report,[248] a practice which has occurred each year since.

Adoption of new procedures following the 1999 election

The 1999 election is known not only for the size of the ballot paper upon which the names of the 264 candidates were listed, but for its results in the Council. The new composition of the House significantly altered its dynamics and introduced a period of complexity in which the votes of the minor parties were unpredictable and during which the Government, when not able to rely on the support of the Opposition, was required to negotiate with members of nine minor political parties and two independents in order to progress its legislative agenda.

The 21 seats available at the half Council election in 1999 were filled by 9 government members, 6 opposition members and 7 others, resulting in the Government holding only 16 seats in the Council, with the Opposition holding 13 and the remaining 13 being held by Crossbench members. The election highlighted the ease with which micro parties could gain seats in the Council and led to criticism of the Council's electoral system and calls for reform, culminating in the introduction of the Parliamentary Electorates and Elections Amendment Bill in November 1999. Although the reforms were not as significant as originally proposed by the Government, the amendments to the rules for the registration and membership of parties and the abolition of group voting tickets would have a significant impact on the future election of micro parties.[249]

Following the election, the Opposition and Crossbench members were successful in making changes to procedures which would particularly benefit private members.

In a significant change to practice, the House agreed without debate to a Government motion establishing a new system for the consideration of private members' business which would replace procedures in operation since 1895. Based on the system in the Canadian House of Commons,[250] a sessional order established an 'order of precedence' of items of private members' business selected in a draw conducted by the Clerk.

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245 *Hansard,* NSW Legislative Council, 29 May 1997, p 9504
246 *Minutes,* NSW Legislative Council, 28 May 1998, p 487.
247 *Minutes,* NSW Legislative Council, 2 June 1998, pp 506-520.
248 *Minutes,* NSW Legislative Council, 4 June 1998, pp 543-549.
249 See Lovelock and Evans, *New South Wales Legislative Council Practice*, pp 41-42.
250 *Minutes,* NSW Legislative Council, 12 May 1999, pp 50-51.

The sessional order also introduced time limits for debate on private members' items. This new system of managing private members' business had been investigated by former Clerk Les Jeckeln in 1987[251] and in 1991 was the subject of a submission by the new Clerk, John Evans, to the Standing Orders Committee.[252] However, it was not until 1999 that the changes first proposed in 1991 were adopted.

During debate on the usual sessional order setting the time for questions without notice each sitting day, the Hon Richard Jones spoke to the Crossbench concerns that ministers were using lengthy answers to take up the time of the House, and suggested that a minimum of 21 questions be answered during Question Time, or that the House introduce time limits on answers. The Opposition stated that while it did not support any changes at that time, it put the Government on notice and would closely watch the way Question Time was used in the ensuing months to make sure that the best interests of the people of New South Wales were served.[253] Rules for questions including time limits on questions and answers were eventually adopted by sessional order in 2001.[254]

Modifications to private members' business in 2000 provided a new procedure for items in the order of precedence to be postponed up to three times without losing their position in the order of precedence; separated the rules and time limits for debate on motions and bills; and provided that when an item of private members' business was dealt with on days set aside for government business the time limits under the sessional order would apply.[255] In 2002, additional rules regarding eligibility for the draw and transferring items in the order of precedence were adopted.[256]

In response to the Government rushing large volumes of bills through both Houses during the final days of a sitting period, in 2002 the Council adopted a sessional order, based on a Senate standing order, imposing cut-off dates, or deadlines, for the receipt of bills from the Legislative Assembly and for the introduction of bills in the Legislative Council. The sessional order provided that where a bill was introduced by a minister, or received from the Legislative Assembly after a named date, debate on the motion for the second reading was to be adjourned at the conclusion of the minister's second reading speech, and resumption made an order of the day for the first sitting day of the next sitting period. The sessional order also provided that a bill which had been read a first time and circulated to members could be declared urgent by the minister. If the question was agreed to, the second reading debate and subsequent stages could proceed forthwith.[257] Since 2002, the sessional order has been readopted in most budget and spring sessions in the same terms except for variations to the provision for debate on the

251 Correspondence from Les Jeckeln to Ms N S Lever, Principal Clerk, Private Members' Business Office, House of Commons, Ottawa, 3 June 1987.

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

253 *Hansard*, NSW Legislative Council, 12 May 1999, pp 61-62.

254 *Minutes,* NSW Legislative Council, 30 May 2001, pp 976-980 and 981-986.

255 *Minutes,* NSW Legislative Council, 5 April 2000, pp 356-359.

256 *Minutes,* NSW Legislative Council, 7 May 2002, pp 137-138; *Hansard,* NSW Legislative Council, 7 May 2002, pp 1514-1515.

257 *Minutes,* NSW Legislative Council, 20 March 2002, pp 81-84.

motion for urgency.[258] A Procedure Committee inquiry into the sessional order in 2014 found that while the provision did not appear to have had the effect of diminishing the number of bills passed in the concluding weeks of a sitting period, it nevertheless sent a strong message to the government and the public service, and gave the House a level of influence and control over the timing and extent of debate on government legislation. The committee also considered that deadlines for the introduction of government bills should be imposed by resolution rather than standing order. A cut-off date has been adopted by sessional order each budget and spring session since the committee reported.

ADOPTION OF THE 2004 STANDING ORDERS

In 2003, the Standing Orders Committee tabled a report proposing new standing rules and orders for consideration and adoption by the House. A review of the 1895 standing orders had been initiated in 1991 by the Leader of the Government in the Legislative Council, the Hon Ted Pickering, following the Government's proposal for a review of the Assembly standing orders as part of the Charter of Reform. Following a change of government, the subsequent Leader of the House, the Hon Michael Egan, continued to support this initiative, but it was not until September 2002 that a draft finalised by the then Clerk, John Evans, and Deputy Clerk, Lynn Lovelock, was considered by the Standing Orders Committee. Due to the demands of the House, the Standing Orders Committee was unable to conclude its consideration of the draft new standing orders until 12 months later. In a report tabled on 18 September 2003, to which a briefing paper explaining the recommended changes to the Council's practices and procedures was attached, the committee proposed that the new standing rules and orders be adopted for the orderly conduct of the business of the House.[259]

As initially envisaged by Mr Pickering in 1991, the proposed standing rules and orders were drafted in modern, plain English and gender-neutral language and incorporated a number of rules and provisions modelled on the standing orders of the Australian Senate, a number of the practices and procedures adopted by way of sessional orders in the preceding years and certain practices which had never been codified including:

- the provision that in cases not provided for, the matter would be determined by reference to the latest edition of *Erskine May* be amended to provide for the Chair to base decisions on parliamentary customs and practices in general,
- a new provision for the President to issue practice notes intended to clarify procedures under the standing orders and which would be subject to disallowance by the House,

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258 *Minutes*, NSW Legislative Council, 20 May 2003, p 89; 11 May 2004, pp 776-777; 20 September 2006, p 200; 2 September 2009, pp 1310-1311; 10 August 2011, p 332; 12 June 2012, p 1042. The sessional order agreed to in 2004 specifically exempted the Appropriation Bill and cognates from the terms of the deadline.

259 Standing Orders Committee, NSW Legislative Council, *Proposed New Standing Rules and Orders*, 18 September 2003.

- procedures for the election of the President be adopted to replace a provision that the President be elected in the same manner as the President of the Senate,
- provisions for prayers be amended to allow the President to nominate another member or the Clerk to read the prayers,
- a provision for a minister to rearrange government business at any time without having to give notice,
- a new provision for members to postpone an item of business during formalities at the beginning of the sitting**,**
- procedures relating to tabled papers be amended to include procedures for the handling of privileged documents returned to order of the House and the adjudication of disputes by an independent arbiter,
- a provision for any document required to be tabled in the House to be lodged with the Clerk when the House is adjourned, at which time they would be deemed to have been published,
- a provision for any member to move a motion without notice at the conclusion of a minister's speech, requiring the minister to table a document from which the minister had been quoting,
- a provision to replace the Printing Committee with a recommendation that certain documents be printed,
- rules for questions be amended to authorise the Clerk to publish answers to questions on receipt,
- the rules for the motion that a member 'be no longer heard' be amended to require the Chair, before putting the question, to advise the House to consider whether: the member had had sufficient opportunity to debate the matter; the member was abusing the standing orders or conventions of the House or obstructing business; or, if carried, the motion would take away the rights of the minority; a similar provision was applied to closure of debate,
- a new provision that if only one member calls for a division the member could request that their vote be recorded in the minutes,
- changes to the procedure for bills to provide for the first reading and printing of a bill introduced in the Council to be taken on one motion and determined without amendment or debate, for a bill to be referred to a committee following the second reading on motion without notice, and for the reconsideration of clauses in committee without having to first report to the House,
- a provision to clarify that a member suspended from the House may not serve on or attend any proceedings of a committee during the period of suspension,
- a provision setting a time limit on debate on the motion for the suspension of standing orders.

- changes to the procedure for moving the adjournment of the House to discuss a matter of urgent public importance, to provide that at the conclusion of the debate the motion lapses, with no question being put, and
- committee procedures adopted by way of resolution be incorporated in the standing orders to provide that, unless otherwise stated, committees may not sit while the House is sitting; that each committee will have a Chair and a Deputy Chair; that a quorum of a committee is three members; that committees may appoint sub-committees, may table out of session, and may have take note motions moved in relation to their report; and that where a committee recommends that the Government take action, the government would be required to respond to the recommendation.

On 14 October 2003, the House suspended, for the remainder of the 2003 sittings, all existing standing orders and several sessional orders inconsistent with the proposed new standing rules, and adopted the proposed new Standing Rules and Orders as sessional orders so they could be trialled before being adopted as standing orders under the *Constitution Act 1902*.[260] On 24 February 2004, the House resolved to continue the resolution of 14 October 2003 until the adjournment of the House for the winter recess.

During the budget session of the following year, the Procedure Committee, renamed from Standing Orders Committee by the proposed new standing orders, reviewed the operation of the new procedures and recommended that the proposed standing orders, with minor modification, be adopted before being forwarded to the Governor for approval.

The Procedure Committee proposed amendments to SOs 49 and 51 to provide for the electronic publication of the records of the House and Hansard; to SO 66 to provide that on the prorogation of the House, the Clerk would publish all answers to questions without notice delivered since the last sitting of the House; and to SO 213 to provide for the Chair and Deputy Chair of a committee to be elected at the committee's first meeting unless otherwise ordered by the House.[261]

The standing orders, including SO 1 which repealed all previous rules and orders, were adopted on 5 May 2004,[262] a schedule containing the Standing Rules and Orders being appended to the Minutes of Proceedings.[263]

Variation to the standing orders since 2004

In November 2006, the House adopted two sessional orders which varied the usual rules for the period following prorogation of the House. The first required a Questions

260 *Minutes,* NSW Legislative Council, 14 October 2003, p 324.
261 Procedure Committee, NSW Legislative council, *Proposed New Standing Rules and Orders: Second Report*, May 2004.
262 *Minutes,* NSW Legislative Council, 5 May 2004, p 676.
263 *Minutes,* NSW Legislative Council, 5 May 2004, p 685.

and Answers Paper to be printed and circulated to members on five specific dates. The second was to provide for the tabling of any reports of an Independent Legal Arbiter appointed to evaluate and report on the validity of a claim of privilege lodged with the Clerk while the House was not sitting, and of any document considered by the independent legal arbiter not to be privileged.[264]

The new standing orders operated as adopted until 2007, when the first variations were agreed to as sessional orders:

- The rules for formal motions under SO 44 were varied to require a member to request, on the day before the member wished the matter to be considered as formal business, that a notice of motion standing in their name on the Notice Paper be taken as formal business. The sessional order was intended to provide members with sufficient notice to consider whether objection should be taken to the matter proceeding as formal business. The sessional order set no time frame for giving such notice, aside from that the notice be given on the previous day.[265]
- SO 210(10) was varied to clarify a perceived contradiction between the provision under SO 210(10) that 'No member may take part in a committee inquiry where the member has a pecuniary interest in the inquiry of the committee' and SO 113(2) which states 'A member may not vote in any division on a question in which the member has a direct pecuniary interest, unless it is in common with the general public or it is on a matter of state policy. If a member does vote, the vote of that member is to be disallowed.' SO 210(10) was varied to provide that a member cannot take part in a committee inquiry if they have a *direct* pecuniary interest, 'unless it is in common with the general public, or a class of persons within the general public, or it is on a matter of state policy'.[266]
- The rules for quorum under SOs 29 and 30 were varied to provide for the President to adjourn the House either to the next sitting day (as provided by SO 29(1)) or to a later hour of the sitting, ensuring that business could resume in the event that a quorum is formed at a later hour.[267]

Also in 2007 the House adopted a resolution of continuing effect which established the Office of Assistant Deputy President. Under the resolution, an Assistant President is to be elected in the same manner as the President after each periodic election or when a vacancy occurs, and holds office for the life of the Parliament in which elected. In the absence of both the President and Deputy President on a day when the House is sitting,

264 *Minutes,* NSW Legislative Council, 22 November 2006, pp 397 and 406.

265 *Minutes,* NSW Legislative Council 5 June 2007, p 102.

266 *Minutes*, NSW Legislative Council, 28 June 2007, p 193; 9 May 2011, p 73; 9 September 2014, p 9; 6 May 2015, p 58.

267 *Minutes,* NSW Legislative Council, 18 October 2007, pp 281-282; 9 May 2011, pp 73-74; 9 September 2014, pp 9-10; 6 May 2015, pp 56-57.

the Assistant President performs the duties of the President.[268] In November, the sessional order was amended to replace 'Assistant Deputy President' with 'Assistant President'.[269]

Changes in technology required that the resolution of continuing effect for the broadcasting of proceedings of the House adopted in 1994 be updated, and in 2007 it was replaced with a new resolution which included authorisation for still photography and webcasting of proceedings.[270]

In 2009, the following sessional orders were adopted:

- SO 198 was varied to provide that where a standing order or other order of the House is suspended in whole or in part, any subsequent procedural motion is to be put without amendment or debate. This rule applied to a procedure common at the time of members suspending standing orders on contingent notice, debate on which was limited to 30 minutes, to allow a subsequent motion to be moved that an item on the Notice Paper be called on forthwith. There were no time limits under the standing orders on the second motion.
- SO 106 regarding lapsed questions was amended to resolve a contradiction between SO 106 and SO 176 concerning the consequences of the interruption of proceedings by lack of a quorum. The sessional order was adopted in slightly different terms in 2015 to provide greater clarity.[271]
- SO 55, which provides that documents may not be lodged with the Clerk when the House has been prorogued, was varied to allow tabling with the Clerk, during prorogation, of documents which are required, by legislation, to be tabled in the House.[272]

Following a number of disturbances which required visitors to be removed from the galleries, the House adopted in 2009 a resolution of continuing effect establishing rules for visitors in the galleries. The rules extended those provided under SO 196 to prohibit audible conversations, applause and jeering, the use of mobile phones and other electronic equipment, food and drink in the chamber and the taking of photographs.[273]

At the 2011 election the Liberal/National Party Coalition was elected, ending 16 years of Labor Government. A new sitting pattern was introduced under which, instead of sitting three days per week, the House would sit four days a week in a two-week block. During the first week the House sat from Tuesday to Friday and during the second week from Monday to Thursday. The Procedure Committee reviewed the new sitting pattern in its report of June 2011 and, while acknowledging that the Government, by

268 *Minutes,* NSW Legislative Council, 28 June 2007, p 197.
269 *Minutes,* NSW Legislative Council, 28 November 2007, p 376.
270 *Minutes,* NSW Legislative Council, 11 October 1994, pp 279-281; 18 October 2007, pp 279-281.
271 *Minutes,* NSW Legislative Council, 3 June 2009, p 1188-1189; 9 May 2011, pp 72-73; 9 September 2014, p 8; 6 May 2015, p 57.
272 *Minutes*, NSW Legislative Council, 3 June 2009, pp 1188-1189.
273 *Minutes,* NSW Legislative Council, 10 November 2009, pp 1487-1488.

convention, determines a sitting pattern that best suits its legislative and policy program, recommended that consideration be given to a sitting pattern for the Legislative Council of a regular four-day sitting week from Tuesday to Friday. Following the winter break, the Government advised that it had accepted the request of the Council to sit Tuesday to Friday, although the Assembly would continue to meet according to the two-week blocks as originally scheduled. In a further report tabled in November 2011, the committee noted that the Government had announced the sitting calendar for the following year under which the House would return to the more conventional sitting pattern of Tuesday, Wednesday and Thursday each week.[274]

At the commencement of the sittings in 2011, the House also adopted the new time of 2.30 pm for the interruption of business for questions each sitting Wednesday, Thursday and Friday.

Further modifications to the provisions for private members' business were adopted by way of sessional order in 2011, on the recommendation of the Procedure Committee,[275] to address operational difficulties including a lack of flexibility that restricted the ability of the House to respond to topical issues and the ability to repeatedly adjourn and postpone items resulting in relatively few items being disposed of.[276] The sessional orders provided:

- for the expiry of notices of motions outside the order of precedence that remained on the Notice Paper for 20 sitting days without being moved;
- that notices of motions could be postponed only once before losing precedence;
- for a reduction in the overall time for debate on private members' motions;
- for members to substitute items in the order of precedence.[277]

In addition, the sessional order amending standing order 44 to provide that the written request from a member for a notice of motion to be called over as formal business was modified to require the notices to be handed to a Clerk-at-the-Table by 2.30 pm on the sitting day prior to the sitting day on which the member wished the matter to be

274 Procedure Committee, NSW Legislative Council, *Report relating to private members' business, the sitting pattern, Question Time and petitions,* November 2011, p 7.

275 The committee inquired into modifications to the system for managing private members' business and the merits of a Selection or Business Committee following recommendations made by the Joint Select Committee on Parliamentary Procedure. Joint Select Committee on Parliamentary Procedure, *Reforms to Parliamentary Processes and Procedures*, October 2010, pp 33-34

276 *Minutes*, NSW Legislative Council, 10 May 2011, p 83.

277 In November 2011, the Procedure Committee reported that the sessional orders had seemed to have a positive effect on the operation of private members' business and consequently considered that the adoption of a Business Committee was not warranted at that time. Procedure Committee, NSW Legislative Council, *Report relating to private members' business, the sitting pattern, Question Time and petitions,* November 2011, p 7.

considered as formal business.[278] The deadline for submitting requests was amended to 3.00 pm in 2012.[279]

Following a lengthy debate on a bill, during which two Greens members spoke for approximately six hours each, the House adopted a sessional order setting time limits for speeches during the second and third reading debates on government bills.[280] The time limits are more generous than those for private members' bills, allowing 40 minutes for the Government and lead Opposition speakers and 20 minutes for each subsequent speaker and the mover in reply, with provision for an extension of 10 minutes moved on motion. The rules also imposed a 15-minute limit during committee of the whole, although members can speak more than once to a question.

On 15 May 2014, a new sessional order was adopted to provide a mechanism for the time for debate on private members' motions to be extended. Under the sessional order, on the matter being interrupted according to SO 186, the mover or any member who has not already spoken may move that the time for debate be extended. The sessional order sought to regularise the procedure for the extension of debate time in light of the tendency of members to seek to do so by leave.

In August 2014, a provision for a ministerial response to petitions signed by more than 500 persons was adopted.[281] The sessional order followed a similar rule being adopted in the Legislative Assembly in 2009 and Assembly ministers seeking to provide responses to petitions presented to the Council.[282]

In a departure from long-held practice, in 2014 the House adopted a new procedure, largely based on that of the Senate, to give greater flexibility when considering amendments to bills in committee of the whole. Under the procedure the bill is considered as a whole, so long as no member objects, and members may move amendments to any part of the bill in any order. Since the adoption of the new procedure most bills have been considered as a whole, but from beginning to end, with amendments being proposed in the order in which they occur in the bill. The traditional method of considering bills clause by clause continues to be available for the consideration of particularly complex bills.[283]

At the commencement of the 56th Parliament in May 2015, the House adopted sessional orders to clarify the operation of certain standing orders:

278 *Minutes,* NSW Legislative Council, 21 June 2011, p 232.
279 *Minutes,* NSW Legislative Council, 15 February 2012, p 684.
280 *Minutes*, NSW Legislative Council, 3 August 2011, pp 296-297.
281 *Minutes*, NSW Legislative Council, 12 August 2014, p 2648
282 *Minutes*, NSW Legislative Council, 6 May 2015, pp 59-60.
283 See, for example, *Hansard*, NSW Legislative Council, 19 November 2014, p 3073. (Statute Law (Miscellaneous Provisions) Bill (No 2) 2014 split into two bills, the Statute Law (Miscellaneous Provisions) Bill (No 2) 2014 taken as a whole, the Ombudsman and Public Interest Disclosures Legislation Amendment Bill 2014 considered clause by clause).

- The rules for the participation in committee proceedings under SO 218 were varied to clarify that, unless a committee decides otherwise, a member of the House who is not a member of the relevant committee may take part in the public or private proceedings of a committee and question witnesses but may not vote, move any motion or be counted for the purpose of any quorum or division. Persons other than members may only attend a private meeting by express invitation of the committee, and will always be excluded when the committee is deliberating.[284]
- A procedure for the consideration of a document under SO 57[285] sets time limits for debate, and makes clear that the debate will be set down as either government or general business, according to the member who requests consideration. Under the terms of the sessional order speakers are limited to 10 minutes, including the mover, and after one hour the Chair is to interrupt business and put all questions to finally dispose of the matter. Consistent with practice, the House considers documents under SO 57 on a motion to take note of the document.[286]

A number of sessional orders were also adopted varying the requirement under the standing orders for the suspension of standing orders. Prior to the adoption of the sessional orders, a majority of members would give contingent notices to satisfy the requirement for notice to be given of a motion for the suspension of standing orders. Standing orders were suspended on contingent notice with such frequency on private members, days that the rules under SO 198 had virtually become redundant. The sessional orders were intended to codify practice as follows:[287]

- SO 198(1) was varied to provide that on the President calling on a notice of motion, or reading the prayers, or on the Clerk being called on to read the order of the day, a motion may be moved without notice for the suspension of standing orders to bring on a particular item on the Notice Paper.[288] Previously, this had been achieved by a three-step process of moving a contingent notice for the suspension of standing orders to allow a subsequent motion to be moved forthwith, then moving a motion that a particular item on the Notice Paper be called on forthwith. If these two motions were agreed to, the item would be called on.[289]
- SO 37 was varied to allow a motion to be moved without notice for the precedence of government business and for a motion to be moved by any member, without notice, for the suspension of standing orders to allow the moving of a motion relating to the conduct of business of the House.[290]

284 *Minutes,* NSW Legislative Council, 6 May 2015, p 60.
285 *Minutes,* NSW Legislative Council, 6 May 2015, p 61.
286 See, for example, *Minutes*, NSW Legislative Council, 13 September 2016, p 1111.
287 *Minutes,* NSW Legislative Council, 6 May 2015, pp 61-62.
288 See, for example, *Minutes,* NSW Legislative Council, 18 November 2015, p 600.
289 See, for example, *Minutes,* NSW Legislative Council, 16 October 2014, pp 155-156.
290 See, for example, *Minutes,* NSW Legislative Council, 22 October 2015, pp 495-496.

- SO 154 was varied to provide that, on a bill from the Assembly being presented for the concurrence of the Legislative Council, a motion for the suspension of standing orders could be moved without notice for the bill to proceed through all its stages on that day or in any one sitting.[291]
- SO 180 was varied to omit the requirement for an instruction to committee of the whole on a bill to be moved on notice and provided that such an instruction is to be moved after the second reading and before the House resolves itself into committee of the whole, or when the order of the day is read for the resumption of committee.

Despite the adoption of sessional orders to improve the efficiency of private members' business, the business to be conducted on private members' days continued to be uncertain as members regularly sought to bring on items outside the order of precedence and to postpone others.

In 2015, the Government Whip initiated an informal process, akin to a business or selection committee, whereby government, opposition and crossbench members meet to agree on the items of private members' business to be considered during general business the following day. At the commencement of the next sitting day, on the motion of the Government Whip, standing orders are suspended to allow a subsequent motion to be moved to establish the order of private members' business for the day, which motion can be amended. Where standing and sessional orders have failed to provide a system sufficiently flexible to allow private members to debate topical matters of importance to them and their constituencies, a Whip's meeting appears to have succeeded.

Also in 2015, a sixth General Purpose Standing Committee was established,[292] and the House established a Select Committee on the Legislative Council Committee system to inquire into whether the Council's committees reflected the modern Parliament and would continue to support the Legislative Council to fulfil its role as a House of Review. The committee reported in November 2016, making a number of recommendations. Pre-eminent among these was the need to enhance the Council's role in scrutinising bills and delegated legislation and it recommended the establishment of a Selection of Bills Committee and a Regulation Committee on a trial basis. These recommendations are yet to be considered by the House. The Committee also recommended that the three Legislative Council subject standing committees – Law and Justice, Social Issues and State Development – be referred to collectively as the 'legislation and ministerial reference committees', and that the General Purpose Standing Committees be renamed as 'portfolio committees'. These recommendations were adopted by the House in March 2017.[293]

The rules for voting in division were amended in October 2016 to provide the President with the discretion to have the vote of a member caring for a child and seated in the

291 See, for example, *Minutes,* NSW Legislative Council, 14 October 2015, p 442.
292 *Minutes*, NSW Legislative Council, 6 May 2015, pp 65-68.
293 *Minutes*, NSW Legislative Council, 7 March 2017, pp 1425-1426.

President's Gallery counted in a division.[294] The sessional order was recommended by the Procedure Committee which found that it was the unpredictability of divisions in particular which was most likely to cause problems for members who happened to be caring for a child while the House was sitting. The committee recommended that the new sessional order be trialled for the remainder of the current Parliament, following which its practical operation and effectiveness be reviewed.[295]

ONGOING DEVELOPMENTS

As has occurred over more than 170 years, Chairs, members and clerks continue to observe the procedures of the House and its committees, questioning the efficiency and relevance of rules and practices in place.

In 2017, the Procedure Committee has three references before it. The first reference concerns the rules for questions, in particular a provision for the House to take note of answers, for a change in the time for questions so that the Council Question Time does not coincide with Question Time in the Legislative Assembly, and for answers to questions to be directly relevant.[296] The second reference was agreed to on the motion of the Leader of the Government in the Legislative Council, for the consideration of amendments to the rules for notices of motions to prohibit quotations and lists of names that are not strictly necessary to make the proposed resolution or order intelligible, to prohibit argument and debating points in notices, to provide that notices not exceed 250 words unless the proposed motion relates to the business of the House, matters of privilege, or the establishment of committees, and to limit members to giving only three notices of motions each sitting day.[297] There is no time frame on either reference.

The third reference concerns the merits of introducing e-petitions and the mechanisms by which they could be accepted in the Legislative Council. The committee is to report by the last sitting day in June 2017.[298]

The majority of the recommendations of the Select Committee on Legislative Council committees remain to be considered by the House and may yet result in significant new provisions for Legislative Council committees.

Since 1856, the standing orders have been reviewed and redrafted a total of four times, with numerous modifications and omissions made over time. As this chronology demonstrates, modifications have sought to correct minor anomalies, to clarify ambiguities, to improve the conduct of business, and to fundamentally reform procedures of the House. This book seeks to describe how the current rules of the Legislative Council have developed, and why.

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294 *Minutes,* NSW Legislative Council, 9 November 2016, p 1260.
295 *Minutes,* NSW Legislative Council, 20 October 2016, p 1186.
296 *Minutes,* NSW Legislative Council, 14 September 2016, pp 1126-1127.
297 *Minutes,* NSW Legislative Council, 16 November 2016, p 1336.
298 *Minutes,* NSW Legislative Council, 23 February 2017, p 1417.

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