PRACTICE MAKES PERFECT? (OR AT LEAST A LITTLE BETTER.)

SESSIONAL ORDERS AS A VEHICLE FOR PROCEDURAL REFORM IN THE NEW SOUTH WALES LEGISLATIVE COUNCIL

Introduction

Sessional orders are temporary rules which supplement, vary or override the standing orders. They are often used for routine purposes such as to appoint the days and time for the meeting of the House. However, they can also be used to trial new procedures to assist the House in deciding whether the new procedures should be adopted as permanent rules. Such procedures may include variations to procedures set out in the standing orders or new measures that have not previously been addressed in the standing orders. Sessional orders lapse at the end of a session, or at an earlier time if the House so decides, and may or may not be re-adopted in the following session.

In New South Wales the making of new or amended standing orders is governed by section 15 of the *Constitution Act 1902* (NSW). That section empowers each House of Parliament to adopt standing orders for the orderly conduct of its business and provides that such standing orders become 'binding and of force' on being approved by the Governor. However, there are no constitutional or statutory provisions which regulate the making of sessional orders that establish temporary variations or additions to the standing orders. While amendments to the standing orders require approval by the Governor temporary modifications introduced by sessional orders take effect immediately they are adopted by the House.

There are precedents for the Legislative Council using sessional orders to trial modifications to its procedures dating back to the 19th century. The practice became more common after 1978 following the Council's reconstitution as a popularly elected House which led to a revival in the performance of its review and scrutiny role. The trend was renewed after the 2019 state election which saw a strengthening of the positions of non-government parties in the Council and led to the adoption of sessional orders which introduced significant reforms to the House's operations in May 2019.

This paper examines the Council's use of sessional orders by providing:

- an overview of the sessional orders adopted by the House in May 2019
- a brief account of the history of the Council's use of sessional orders to modify its procedures
- an analysis of the House's authority to adopt sessional orders that set aside or amend procedures in the standing orders.

While focusing on the use of sessional orders the paper also includes references to other types of orders by which the House can vary its procedures - temporary orders, which lapse at a time as determined by that order such as the end of a calendar year; resolutions of continuing effect, which have no predetermined time limit but continue until amended or until the House resolves they no longer have effect; and ad hoc orders which establish procedures for particular purposes.

The sessional orders adopted in May 2019

The New South Wales state election held in March 2019 resulted in the return of the previous government to power with a reduced majority in the lower House. In the Legislative Council, where the government has not held a majority since 1988, the election resulted in a decrease in the number of government members, an increase in the number of opposition members and an expanded cross bench, which is now one of the largest cross benches in the Council's modern history. One consequence of the new Council make-up was that it became more difficult for the government to obtain a majority where the major parties do not agree: while in the previous Parliament the government needed two extra votes which could be obtained from one crossbench party, in the new Council the government needs five extra votes from a crossbench which consists of five parties and an independent. [1]

The impact of the new composition of the Council on the dynamics of the House became evident even before the sittings of the House commenced. In the lead up to the first sitting week an unusual process took place in which members from the opposition and various cross bench parties, including some with very different political views, collaborated in the development of a set of draft sessional and temporary orders which contained significant reforms to the operations of the House. This contrasted with previous Parliaments in which almost all sessional orders had been initiated by the Government. The draft provisions included a suite of variations to pre-existing sessional orders as well as a number of brand new procedures. On the second sitting day of the new Parliament the House agreed to 19 sessional orders which were either moved or amended by opposition or cross bench members, and 22 sessional orders which were moved by the government and agreed to without amendment.[2]

The new procedures established by the sessional and temporary orders included the following:

Questions and answers

- In Question Time answers to questions must now be 'directly' relevant[3] and there is a greater opportunity to ask supplementary questions.[4] For the first time parliamentary secretaries are also required to answer questions relating to their portfolio responsibilities but are prohibited from asking questions.[5]
- Each party and any independent member is able to ask one supplementary question each at the end of Question Time and written answers must be lodged by 10 am on the next working day.[6]

---

1 Following the 2019 election the numbers in the Council were: Government 17 (down from 20); Opposition 14 (up from 12); and Crossbench 11 (up from 10) comprising 2 Shooters, Fishers and Farmers, 2 One Nation, 2 Animal Justice, 3 Greens, 1 Independent (ex-Green) and 1 Christian Democrat, down from two.

2 For a detailed analysis of the nature and impact of the sessional orders adopted in 2019 see Allison Stowe, 'The shake-up: new rules in play for the NSW Legislative Council (as at December 2021)' paper presented at the Australasian Study of Parliament Group conference (Victoria), April 2022.

3 *Minutes*, NSW Legislative Council, pp 77-78.

4 *Minutes*, NSW Legislative Council, pp 75-76.

5 *Minutes*, NSW Legislative Council, pp 77, 78.

6 *Minutes*, NSW Legislative Council, p 75.

- Members may submit questions on notice on any business day, not just on sitting days,[7] and ministers must provide their answer within 21 rather than 35 days.[8]
- The House may now 'take note' of answers to questions for a total of 30 minutes after Question Time.[9]

Private members' business

- Private members' business now takes precedence over all other business on private members' days except for Question Time and frequently continues until the motion for the adjournment of the House is moved at midnight.[10] This has effectively doubled the time for private members' business as previously the House usually adjourned by 4.30 pm on Private Members' Day after reverting to Government business at 3.30 pm at the conclusion of Question Time.
- Private members now have the right to give three minute speeches on matters they choose to address for a total of 30 minutes on private members' days.[11]
- To enable the House to move through more private members' business a private member may now move that their motion be debated in a 'short-form' format with overall debate being limited to 30 minutes.[12]

Committees

- Government responses to committee reports are now set down for debate each week.
- There are new provisions for a minister to explain the reasons for a government's non-compliance with the requirement to address each committee report recommendation.[13]
- The budget estimates process will now be held three times per year rather than annually, with extended hours,[14] and parliamentary secretaries may be invited to give evidence.[15]
- The House has affirmed the power of Council committees to order the production of documents and set out a process for the production of documents ordered by committees consistent with the procedures for orders for papers by the House.[16]

During debate on the adoption of the new sessional orders opposition and cross bench members cited a range of factors in support of the reforms. These included lifting the standard of parliamentary scrutiny of government in the state,[17] increasing the time available for private members' business in view of the diversity of opinions of the expanded cross bench,[18] lifting

---

7 *Minutes*, NSW Legislative Council, p 84.
8 Minutes, NSW Legislative Council, p 84.
9 *Minutes*, NSW Legislative Council, p 85.
10 *Minutes*, NSW Legislative Council, pp 68, 69-71.
11 *Minutes*, NSW Legislative Council, p 74.
12 *Minutes*, NSW Legislative Council, p 74.
13 *Minutes*, NSW Legislative Council, pp 86-87.
14 *Minutes*, NSW Legislative Council, pp 67, 119 (temporary orders).
15 *Minutes*, NSW Legislative Council, pp 77, 119.
16 *Minutes*, NSW Legislative Council, pp 81-83.
17 *Hansard*, NSW Legislative Council, 8 May 2019, pp 77-78, p 82, the Hon Adam Searle MLC.
18 *Hansard,* NSW Legislative Council, 8 May 2019 p 78, Mr Shoebridge MLC.

the reach of the House in the ways in which it holds the government to account,[19] enhancing government transparency[20] and helping the House to operate more efficiently.[21]

Brief history of the Council's use of sessional orders to vary its procedures

The Legislative Council has operated under three different sets of standing orders since 1856 when the system of responsible government was established in New South Wales. The first set, adopted in 1856, was replaced by a revised edition in 1895 which was superseded by the current edition in 2004. The use of sessional orders by the Council during the currency of each successive set of standing orders is outlined in turn below.

Under the 1856 standing orders

Most procedural changes in this period took the form of amendments to the standing orders themselves, usually following a report from the Standing Orders Committee, without an initial trial period established by sessional or temporary order. This was the case, for example, with amendments concerning the reading of newspapers in the chamber (1858),[22] inquiries into charges against judges and other public officers (1858),[23] protests against the passing of a bill (1860),[24] the rules to be applied where a member's vote is challenged on the grounds of personal interest (1863)[25] and the seconding of motions (1866).[26] However, some changes were trialled as sessional orders before being incorporated into the standing orders in some form. For example:

- A sessional order adopted between 1857 and 1894 provided that messages to the Assembly could be delivered by one of the clerks, in a departure from the terms of SO 68 which provided that messages were to be delivered by two or more members named by the President. Provision for delivery by the Clerks was subsequently included in the standing orders in 1895.[27]

- A sessional order adopted between 1857 and 1870 varied the procedure to be followed under SO 5 where notice was taken of the absence of a quorum after commencement of business by requiring the bells to be rung for two minutes prior to the President counting out the House. An amended form of the new rule was incorporated into the standing orders in 1870.[28]

- A sessional order adopted between 1862 and 1870 varied the procedure for divisions in SO 13 so that strangers could remain to the right and left of the chair unless otherwise ordered, to take account of an arrangement between the Houses whereby seats were provided for members of the other House on the right and left of the Chair.

---

19 *Hansard*, NSW Legislative Council, 8 May 2019, p 106, the Hon Adam Searle MLC.
20 *Hansard*, NSW Legislative Council, 8 May 2019, p 113, the Hon Robert Borsak MLC.
21 *Hansard*, NSW Legislative Council, 8 May 2019, p 113, Revd the Hon Fred Nile MLC.
22 S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, Federation Press, 2018, p 776.
23 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), pp 776-777.
24 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), p 780.
25 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), p 780.
26 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), p 781.
27 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), pp 398-400.
28 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), p 87.

The provisions of the sessional order were incorporated into the standing orders in 1870.[29]

- A sessional order adopted in 1878 provided that whenever the House was counted out for lack of a quorum the names of members then present would be recorded in the Minutes.[30] The standing orders already included a requirement that members' names be recorded if the House was counted out on the President first taking the chair[31] but did not include any similar requirement where the House was counted out during the course of a sitting. A further sessional order adopted in 1883 required that attendance at both divisions and count-outs would be recorded in the sessional return published in the Journal.[32] A requirement for members' names to be recorded at a count out for lack of a quorum during a sitting was incorporated into the standing orders in 1895.[33]

Under the 1895 standing orders

The early years of the 20th century were marked by tensions between the appointed Council and the elected Assembly and the vigorous prosecution by the Council of its role as a House of review. However, the reconstitution of the Council as a chamber elected by the members of both Houses in 1934 initiated a period of relative political stability and contributed to a falling-off in review activity across a range of measures.[34] In 1978 the Council was reconstituted as a popularly elected House and with the replacement of the last indirectly elected members in 1984 the Council commenced as a full time House of review which could legitimately claim the authority of the electors. The trend towards a more dynamic House was strengthened by later developments such as a period of non-government majorities from 1988 and reforms to the quota for election in 1991 which improved the prospects of minor parties.

The Council's pursuit of a more active scrutiny role after 1978 was mirrored by an increase in procedural experimentation and reform. Following the introduction of the 1895 standing orders until the 1980s procedural changes were effected by amendments to the standing orders approved by the Governor and sessional orders were confined to routine matters such as appointing sitting days and times. From the 1980s on however the position was reversed: no amendments to the standing orders were made after 1985 until the 2004 standing orders were adopted, but sessional orders were used to trial variations to procedures with increasing frequency. The change in the pace of reform following the reconstitution was noted during debate in the House in 2004:

> [S]ince 1978 the practices and procedures of the Legislative Council have changed significantly. To cover the increasing gaps in the 1895 standing orders

---

29 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), pp 368-371.

30 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), p 87.

31 Standing order 5 adopted in 1870.

32 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), p 88.

33 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), p 88 (SO 11 adopted in 1895).

34 For example, the period following the establishment of the indirectly elected Council was noted for a decline in orders for papers, questions on notice, percentage of bills amended and rates of member attendance: D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales*, 1856-2003 (Federation Press, 2006), pp 339-343.

> each new Parliament has seen the adoption of a growing body of sessional orders.[35]

The sessional orders adopted after 1978 included new requirements which had the effect of strengthening scrutiny procedures, enhancing government accountability and expanding opportunities for private members. A summary of the development of some of the more notable requirements is provided below:

- *Precedence of motions to disallow statutory instruments*

  Under the 1895 standing orders disallowance motions were dealt with under the normal rules relating to private members' motions and had no special precedence. However, in 1988 on the motion of a cross bench member the House adopted a sessional order which provided that a notice of motion to disallow a statutory instrument 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. The same sessional order was readopted in August 1988, 1990 and 1991, on motions by the government, and in 1995, on a motion by the opposition. The sessional order continued to be adopted with modifications from 1996 to 2003.[36]

- *Time for consideration of Council bills*

  In 1988 the House agreed to a government motion for the adoption of a sessional order which varied the procedures for consideration of bills introduced in the Council by providing that after the mover's second reading speech the debate was to be adjourned until 'five clear days ahead' to ensure that members would have sufficient time to examine the bill. 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. The same sessional order continued to be readopted in later sessions with modifications until 2003.[37]

- *Unproclaimed legislation*

  In 1996 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 agreed to with an amendment 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. The same procedure for the tabling of a list of unproclaimed legislation every 90 days was subsequently adopted as a sessional order between 1997 and 2003.[38]

- *Deadline for answers to questions on notice*

  In 1995 a government amendment to a sessional order concerning questions on notice introduced a requirement for ministers to lodge answers to questions within 35 calendar days and for the President to report a failure to answer within the timeframe to the

---

35 *Hansard*, NSW Legislative Council, 5 May 2004, p 8264, the Hon Michael Egan MLC.
36 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), pp 273-274.
37 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), pp 441, 804, 809
38 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), p 809.

House. In 1996 on a motion by the opposition the House adopted a sessional order which applied the same 35 day time limit to answers to questions on notice referred to ministers in the Assembly. Both sessional orders continued to be readopted until 2003.[39]

- *Consideration of private members' business*

  Under the 1895 standing orders private members' notices of motions and orders of the day were dealt with on alternate private members' days in the order in which they appeared in the Notice Paper and any items not reached by the end of the day were set down for the next sitting day at the end of the business already fixed for that day. However, in 1999 the House agreed to a sessional order which introduced a new system under which items of private members business would be considered in accordance with an 'order of precedence' of items selected in a draw periodically conducted by the Clerk. The new system was based on proposals developed by the Clerk to address concerns about the complexity and lack of flexibility of the procedure in the standing orders which had become magnified by the increase in private members business brought before the House after 1978. The sessional order continued to be adopted in later sessions with modifications until 2003.[40]

- *Rules for questions and answers*

  In 2001 the House agreed to an opposition motion which provided for the adoption of a sessional order introducing new rules for questions and answers, including time limits for questions and answers, provision for supplementary questions and a requirement for answers to be relevant. The same sessional order continued to be readopted in later sessions until 2003.[41]

Many of the procedures introduced as sessional orders during the period of the 1895 standing orders were included in a modified form in the new standing orders adopted in 2004.[42] The 2004 standing orders also incorporated procedures which had their origins in other types of orders of the House. For example:

- Procedures concerning the arbitration of disputed claims of privilege arising from orders for the production of documents, which are now in SO 52, originated in provisions often included in particular orders for the production of documents between 1996 and 2003.

- The procedure for the recall of the House at the request of an absolute majority of members now in SO 36 began as amendments to the special adjournment motion between 1990 and 2003.

- The citizen's right of reply procedure now in SOs 202-203 began as a resolution of continuing effect in 1997.

---

39 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), pp 219-220, 225.

40 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), pp 599-602.

41 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), pp 213-214, 217.

42 For a description of the origins of each of the standing orders adopted in 2004, including procedures initially introduced as sessional orders, see *Annotated Standing Orders of the New South Wales Legislative Council* (n 22).

Under the 2004 orders

Since the adoption of the current standing orders in 2004 the Council has continued its practice of using sessional orders to modify procedures where the need arises. At the time of writing there are sessional orders in place which vary or expand the operation of 41 standing orders [43] and others which set out procedures concerning matters that are not addressed in the standing orders at all.[44] In recognition of the development of this significant body of new procedures, in June 2021 the Council referred an inquiry to its Procedure Committee to review the standing and sessional orders of the House. The terms of reference for the review require the Committee:

(a) to consider whether the current sessional orders should be adopted as standing orders, whether any current standing orders require amendment, and whether any additional standing orders should be adopted

(b) to propose a draft revised set of standing orders for consideration by the House.[45]

The committee is required to report on the review by the first day of the second sitting week of 2022. In the event that the committee fails to report by the due date, the President is authorised to table a draft revised set of standing orders for consideration by the House and subsequent approval by the Governor.[46]

The Council has also used temporary and continuing orders to establish new procedures.[47]

The authority of the House to adopt sessional orders to vary its procedures

House of Commons

The ancient practice of the House of Commons developed at a time when the Commons were concerned with grievances and their redress rather than with the despatch of Crown business. The forms of the proceedings of the House operated as a check and control on the actions of ministers, and were in many instances a shelter and protection to the minority 'against the attempts of power'.[48] With the development of the modern Cabinet system however, and the growing complexity of the machinery of government, the government demanded a stricter control over parliamentary business and in the 19th century this demand was met by the passing

---

43 The 35 standing orders currently varied by sessional order are: SOs 12, 25, 29, 30, 32, 34, 35, 36, 37, 44, 46, 52, 55, 57, 64, 65, 66, 67, 68, 70, 106, 113, 141, 154, 172, 180, 183, 184, 185, 186, 188, 196, 198, 208, 210, 211, 218, 222, 227, 232, 233: Legislative Council, *Sessional and Temporary order variations to the standing orders, First Session of the Fifty-Seventh Parliament*, 21 October 2021.

44 For example, time limits on government bills and cut-off dates for government bills in the Budget and Spring sitting periods are the subject of sessional orders but are not addressed in the standing orders.

45 *Minutes*, NSW Legislative Council, 9 June 2021, p 2273.

46 *Minutes*, NSW Legislative Council, 9 June 2021, p 2273, item 3, paragraph (4).

47 NSW Legislative Council, *Sessional orders, temporary orders and resolutions of continuing effect and office holders, First Session of the Fifty-Seventh Parliament*, 21 October 2021, pp 39-62.

48 *Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 19th edition, 1976, London, Butterworth, p 213.

of standing orders. These standing orders were designed to safeguard the government program from being interrupted or forestalled by a diversionary use of the opportunities open to members under the ancient rules of procedure.[49]

Following the development of the standing orders the House retained the ability to adapt its procedures. In 1910 Josef Redlich noted that any change to a procedural rule in the Commons took effect by force of a simple resolution although a second resolution was required to raise a new regulation to the status of a standing order with permanent validity.[50] He further noted that the House could free itself from its 'self imposed … fetters' by suspending standing orders by motion on notice or by prescribing a course of procedure inconsistent with the standing orders and by implication cancelling their operation on a particular occasion.[51] Redlich also observed that in addition to the standing orders there were other types of orders which described rules as to the House's business namely sessional orders and orders not expressly endowed with either a short or long term duration which by virtue of continuous practice had acquired the force of customary law. While standing orders were 'intended to bind all future parliaments' sessional orders were 'renew[ed] at the beginning of each session, making the principles contained in them binding for the duration of its currency.'[52]

Similar observations appear in editions of Erskine May which include descriptions of the roles of different types of procedural rules. For example, in the 17th edition it is noted that while a standing order differs from every other order by having an express duration beyond the end of the session, no special procedure is involved in its passage except that after it has been agreed to on motion a further order is made declaring it to be a standing order of the House.[53] It is further noted that a sessional order 'can set aside … a standing order'[54] and that sessional orders can be used 'to experiment with new rules which are intended to be permanent if they prove satisfactory in working'.[55] The current edition of May also notes the House's flexibility to introduce, amend and repeal standing orders by motion and decision in the normal way.[56]

The autonomy of the House of Commons in matters of procedure is supported by principles developed by the courts in the United Kingdom concerning the relationship between the competence of the courts and the jurisdiction of Parliament. Under these principles it is the duty of the common law to define the limits of parliamentary privilege where it is relevant in a particular case, but each House has exclusive jurisdiction over its own proceedings (which includes jurisdiction over whether or not a particular privilege has been breached).[57] The

---

49 *Erskine May*, 19th ed (n 48), p 213.

50 J Redlich, *The procedure of the House of Commons; a study of its history and present form*, Vol II, London, Archibald Constable & Co Ltd, Ltd, 1903, p 8.

51 J Redlich, *The procedure of the House of Commons; a study of its history and present form*, Vol II, pp 7-8.

52 J Redlich, *The procedure of the House of Commons; a study of its history and present form*, Vol II, pp 6-7.

53 *Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 17th ed, 1964, London, Butterworth, p 226.

54 *Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 17th ed (n 53), p 228.

55 *Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 17th ed (n 53), p 226.

56 *Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 25th ed, LexisNexis 2019), paragraph 20.96.

57 *Erskine May's Treatise on the Law, Privileges, proceedings and usage of Parliament*, 25th ed, (LexisNexis 2019), paragraphs 16.1, 16.3. This power has been used in radical ways, such as adding lay

distinction between the limits and the exercise of a privilege may sometimes be difficult to draw[58] and grey areas exist along the boundaries between where parliament enjoys exclusive jurisdiction and where the courts may intervene.[59] Further, there is room for debate as to whether the exclusive jurisdiction of the House is a right, power or privilege[60] and as to the nature of its relationship to the immunity in article 9 of the Bill of Rights.[61] However, it is accepted that there is a sphere in which the jurisdiction of each House is absolute.

New South Wales and Australasian Houses

In New South Wales the Houses of Parliament operate on a different footing to the legislatures in other Australasian jurisdictions whose powers, privileges and immunities are defined by reference to those of the House of Commons at specified dates.[62] In the absence of House of Commons equivalency the Houses possess certain powers and privileges which have been defined by statute[63] and such other powers and privileges as are reasonably necessary for the performance of their functions. The powers which are necessary for the performance of the House's functions are protective and self-defensive in nature rather than punitive.[64]

While there can be difficulties establishing a boundary between the 'necessary' and 'self defensive' application of the powers of a House and their 'punitive' application,[65] the principle of necessity has been found to support the existence of some significant powers. These include the power to suspend a disorderly member for the duration of the sitting,[66] to expel a member guilty of conduct unworthy of a member as a means of protecting the House[67] and to suspend a minister for failing to table state papers[68] including papers subject to claims of legal professional privilege or public interest immunity.[69] Conversely, it has been held that the boundaries of necessity stop short of a right to suspend a disorderly member for an indefinite

members to a committee and setting up a panel of non members to deal with certain types of complaints against members.

58 *Canada (House of Commons) v Vaid* [2005] 1 SCR 667, at 700.

59 G Griffith, *Parliamentary privilege: first principles and recent applications*, NSW Parliamentary Library Research Service, Briefing Paper No 1/09, February 2009, p 12.

60 See R Laing, 'Exclusive cognisance: is it a relevant concept in the 21st century?', Australasian Parliamentary Review, Vol 30, No 2, 2015, p 59.

61 G Griffith, *Parliamentary privilege: the continuing debate*, NSW Parliamentary Library Research Service, Background Paper No 2/2014, pp 15-18.

62 R Laing, 'Exclusive cognisance: is it a relevant concept in the 21st century?', *Australasian Parliamentary Review*, Vol 30 No 2, 2015, p 59, n 4.

63 For example, the *Parliamentary Evidence Act 1901* (NSW) confers certain powers on the Houses and their committees to summon witnesses.

64 See S Frappell and D Blunt (eds), *New South Wales Legislative Council Practice*, 2nd ed (Federation Press, 2021), pp 67-75.

65 *New South Wales Legislative Council Practice*, 2nd ed (n 63), p 71.

66 *Barton v Taylor* (1886) 11 AC 197 at 204 per Lord Selborne.

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

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

69 *Egan v Chadwick* (1999) 46 NSWLR 563. However, the majority (Spigelman CJ and Meagher JA) found that the power to compel the government to produce documents was limited in the case of Cabinet documents.

time,[70] to arrest a member who was disorderly but has since left the chamber[71] or to expel a member for reasonable cause as a cloak for punishment.[72]

One limitation which flows from the common law foundation of the powers in New South Wales is that unlike the House of Commons which adopts standing orders of its own volition the Houses have no inherent power to adopt standing orders but rely on a statutory power to do so.[73] Section 15 of the *Constitution Act 1902* authorises each House to adopt standing orders regulating its 'orderly conduct' (section 15(1)(a)) and provides that such orders 'become binding and of force' on approval by the Governor (section 15(2)). However, the requirement for standing orders to be approved by the Governor before they come into effect has not been applied in such a way as to prevent the making of temporary procedural rules. Nor has it precluded the adoption of practices not provided for in the standing orders or which are inconsistent with the standing orders in some respects.

In a paper prepared in 1969, the then Clerk of the Legislative Council, J.R Stevenson, observed that the proceedings of the Council are not guided by standing orders alone:

> … the Legislative Council relies to a considerable degree on practice rather than on Standing Rules and Orders and retains a flexibility in its approach to matters that come before it, so that it is "master of its own business".[74]

Stevenson suggested that this 'flexibility' encompasses suspension of standing orders,[75] interpretations of the standing orders by the presiding officer,[76] orders by the House without the support of a standing order on the subject[77] and the adoption on occasion of procedures which appear to conflict with standing orders. Regarding these procedures, Stevenson observed:

> In practice, certain procedures are followed on occasions which appear to be in conflict with a particular standing Rule and Order and the standing Rule and order is not suspended – the action is sometimes taken on an order by the House or merely follows practice.[78]

As to actions taken on an order by the House, Stevenson noted that the Council sometimes agrees to a motion that the bill be now read a third time with concurrence immediately after

---

70 *Barton v Taylor* (1886) 11 AC 197 at 205 per Lord Selborne.

71 *Willis and Christie v Perry* (1912) 13 CLR 592 at 598 per Griffith CJ, at 599 per Barton J, and at 600-601 per Isaacs

72 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 396 per Herron CJ.

73 In *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 669 Gleeson CJ noted: 'In …*Crick v Harnett* (1907) 7 SR (NSW) 126 at 132 … it was observed that a House of the New South Wales Parliament has no inherent power to make Standing Orders; its power to do so derives from s 15'.

74 NSW Legislative Council, J.R. Stevenson, Clerk of the Parliaments, 'Application of standing rules and orders in proceedings of the Legislative Council', 21 March 1969, p 10.

75 J.R. Stevenson, 'Application of standing rules and orders in proceedings of the Legislative Council' (n 73), p 4.

76 J.R. Stevenson, 'Application of standing rules and orders in proceedings of the Legislative Council' (n 73), pp 6-7.

77 J.R. Stevenson, 'Application of standing rules and orders in proceedings of the Legislative Council' (n 73), p 9.

78 J J.R. Stevenson, 'Application of standing rules and orders in proceedings of the Legislative Council' (n 73), p 4.

the report of the committee of the whole is adopted whereas the standing orders state that a future day for the third reading may be fixed.[79] He also referred to the process whereby an order of the House may become a sessional order and then a standing order, citing 19th century precedents of orders which required members' names to be recorded when the House was counted out for want of a quorum which led to a change in the standing orders.[80] As to actions which merely follow practice the Clerk gave a number of examples, including the practice that a bill be read three times which is not required by the standing orders and the practice of grouping clauses of a voluminous bill in parts in committee of the whole contrary to the requirement in the standing orders that each clause be read separately.[81]

The flexible approach to the application of standing orders described in Stevenson's paper is consistent with judicial authorities which have considered the nature of standing orders. It has been held that, while the power to make standing orders derives from section 15 of the *Constitution Act 1902*, '[t]he Act does not make them part of the general law'.[82] Further, the courts will not question the validity of a standing order providing it relates to 'orderly conduct'.[83] Moreover, standing orders are not a source of the powers of the House but may regulate the exercise of existing powers.[84] In that regard, in *Egan v Willis and Cahill*, when discussing the relationship between the Council's power to order the tabling of state papers, which derives from the common law principle of necessity, and standing orders which provided for the making of such orders, Gleeson CJ observed:

> Section 15 of the *Constitution Act 1902*, which authorises the making of Standing Orders, is not a source of power of the kind presently in question. Standing Order 18 and Standing Order 19 assume the existence of a power, but do not operate as a source of power; rather they regulate in certain respects the exercise of a power which, if it exists, must have some other source.[85]

Court decisions concerning the validity of orders by the Council for the suspension or expulsion of members have set out the principles which determine the extent of the House's inherent powers. It has been held that the functions of the Council, on which the existence of its inherent powers depends, include the making of laws pursuant to section 5 of the *Constitution Act 1902* and the superintendence of the conduct of the executive within the framework of responsible and representative government.[86] It has been recognised that the question of what is necessary for the performance of these functions requires reference to the conventional practices of the House:

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

---

79 J.R. Stevenson, 'Application of standing rules and orders in proceedings of the Legislative Council' (n 73), p 5 (paragraph (e)).

80 J.R. Stevenson, 'Application of standing rules and orders in proceedings of the Legislative Council' (n 73), p 6 (paragraph (h)).

81 J.R. Stevenson, 'Application of standing rules and orders in proceedings of the Legislative Council' (n 73), p 5 (paragraphs (a) and (c)).

82 *Clayton v Heffron* (1960) 105 CLR 214 at 240 per Dixon CJ, McTiernan, Taylor and Windeyer JJ.

83 *Harnett v Crick* [1908] AC 470 at 475-476.

84 *New South Wales Legislative Council Practice*, 2nd ed (n 63), p. 131.

85 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 664.

86 *Egan v Willis* (1998) 195 CLR 424 at 448-454; *Egan v Chadwick* (1999) 46 NSWLR 563 at 565.

> question, have come to be conventional practices established and maintained by the Legislative Council.[87]

These decisions also provide support for the view that, while parliamentary privilege rests on different foundations in New South Wales compared to the United Kingdom and is bound by the principle of necessity, there is a sphere concerning the internal proceedings of each House which is subject to the House's exclusive control. For example, in *Egan v Willis* 195 CLR 424, the joint majority noted that for the courts to examine the content of particular exercises of valid privilege 'would trump the exclusive jurisdiction of the legislative body' and that intervention by the courts is only 'at the initial jurisdictional level'.[88] In a separate judgment McHugh J stated that the obtaining of information concerning government administration is part of 'the business of the Council' and that 'it is a matter for the Council as to the way in which it conducts business and the order of business'. He went on to state that:

> The right of any legislative chamber under the Westminster system to control its business has existed for so long that it must be regarded as an essential part of its procedure which inheres in the very notion of a legislative chamber under that system.[89]

The importance of the right of a legislative chamber to control its business can be demonstrated by reference to the practice of many Australasian Houses which have used sessional, temporary and/or continuing orders to trial changes to their procedures. For example:

- In 1978 the President of the Senate advised that the Senate 'has made wide use of both sessional orders and resolutions to give new procedures a trial before adopting them as standing orders, if found satisfactory.'[90] The Senate has also trialled a range of accountability mechanisms as 'continuing' orders. These include a procedure for senators to seek and take note of an explanation from a minister where a question on notice is not answered within 30 days, which was later incorporated into the standing orders.[91] In addition, procedures for following up tardiness of ministers in responding to issues raised by the Scrutiny of Bills Committee were initially trialled as temporary orders[92] before being incorporated into the Standing Orders.[93]

- The House of Representatives 'has often adopted sessional orders, which are temporary standing orders or temporary changes to the standing orders, in order, for example, to enable experimentation with a new procedure or arrangement before a permanent change is made to the standing orders'.[94]

---

87 *Egan v Willis* (1998) 195 CLR 424 at 454 per Gaudron, Gummow and Hayne JJ.
88 *Egan v Willis* (1998) 195 CLR 424 at 446 per Gaudron, Gummow and Hayne JJ.
89 *Egan v Willis* (1998) 195 CLR 424 at 478 per McHugh J.
90 Senator the Hon Condor L. Laucke, President of the Senate, 'The use of sessional orders and resolutions as preliminary to standing orders', paper presented to the Presiding officers and Clerks conference, 1978, p 1.
91 R Laing (ed), *Annotated Standing Orders of the Australian Senate*, Department of the Senate, Canberra, 2009, pp 268-271.
92 *Senate Journals*, 29 November 2016, pp 656-657.
93 Senate Standing Order 24(1)(d) to (h).
94 D Elder (ed), *House of Representatives Practice*, 7th ed, Department of the House of Representatives, Canberra, 2018, p 191.

- In New Zealand, '[w]hile the Standing Orders are permanent orders of the House, the House sometimes makes other orders regarding its procedures on a temporary or limited basis. … the House can experiment and trial new procedures before deciding whether to adopt them for the long term'.[95]

- In 2003 the Victorian Legislative Council adopted 35 sessional orders which 'constituted the most far-reaching modifications of the Council's procedures in its history'.[96]

- The journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments periodically reports on the adoption by Houses of sessional orders to trial new procedures.[97]

- In Tasmania, the only other Australian jurisdiction apart from New South Wales in which the powers and privileges of the Houses of Commons have not been adopted, certain powers of the Houses are codified in the *Parliamentary Privilege Act 1858* (Tas), such as the power to punish defined contempts, but the Houses also rely on the common law principle of necessity. Nevertheless, despite the lack of House of Commons-style powers sessional orders are often used to trial new procedures in the House of Assembly at least.[98]

Some Australian Houses have adopted standing orders which expressly provide that the House may make sessional[99] or temporary[100] orders, or which acknowledge the House's right to make such orders by the use of expressions such as 'In all cases that are not provided for in these Standing Orders *or by sessional or other orders* …'[101] The adoption of such standing orders is unlikely to confer on the Houses concerned powers they would not otherwise have but may have the benefit of clarifying or defining aspects of the Houses' procedures. The types of considerations that come into play can be illustrated by reference to the circumstances which led to the adoption of standing orders providing for the making of temporary orders in Western Australia:

- In the Legislative Assembly in 2003, following an announcement that the government intended to do away with the annual prorogation of Parliament, the Procedure and Privileges Committee recommended that a pre-existing standing order which provided

---

95 M Harris and D Wilson (eds), *McGee Parliamentary practice in New Zealand*, 4th ed, Oratia Books, Auckland, 2017, chapter 2, p 16.

96 S Redenbach, 'Radically Revising the Rules?: Victoria's Legislative Council 2003–06', *Australasian Parliamentary Review*, Spring 2007, Vol. 22(2), p 90.

97 For example, the 2019 edition reported that the South Australian House of Assembly had adopted a sessional order requiring that questions on notice be answered within 30 days, and that the New Zealand Parliament had adopted sessional orders trialling procedures for e-petitions and Estimates: *The Table*, Vol 87, 2019, pp 200, 208.

98 Australia and New Zealand Association of Clerks-at-the-Table (ANZACATT) cattinfoshare post from the Tasmanian House of Assembly, 12 August 2021

99 NSW Legislative Assembly (SO 364), Victorian Legislative Council (SO 24.02) and Queensland Legislative Assembly (SO 3)

100 Western Australian Legislative Council (SO 2); Western Australian Legislative Assembly (SO 2).

101 South Australian House of Assembly (SO 1); South Australian Legislative Council (SO 1); Queensland Legislative Assembly (SO 2(2)); Western Australian Legislative Assembly (SO 1; Tasmanian House of Assembly (SO 1), Tasmanian Legislative Council (SO 2).

for the House to adopt sessional orders should be amended to provide for the adoption of temporary orders.[102]

- In the Legislative Council in 2011 when the standing orders were rewritten a new standing order 2 was inserted which provided that the House may adopt temporary orders for a specified period and that such orders shall prevail over the standing orders during that period. In recommending this change the Procedure and Privileges Committee stated that the provisions to be included in the first chapter of the new standing orders 'reflect current practice' and 'provide …. a definition of Temporary Orders'.[103]

In addition to Australasian Houses it is also relevant to note recent practice in the Canadian Senate where, following the introduction of a new appointments process for senators in 2016 there has been an expansion in the number of senators not affiliated with a political party which in turn has led to the growth of a trend towards the adoption of sessional and temporary orders rather than changes to the formal rules.[104] Matters addressed in recent sessional or temporary orders include the representation of non-affiliated senators on committees,[105] the ability of committees to meet when the Senate is sitting or adjourned,[106] the power of committees to appoint additional deputy chairs,[107] the right of a particular committee to nominate external members[108] and the conduct of hybrid committee meetings and hybrid sittings of the Senate.[109]

The Governor's role in approving standing orders

As in New South Wales all State Houses in Australia have an express power to adopt 'standing rules and orders' regulating their 'orderly conduct' or the conduct of their business and proceedings. In the Commonwealth Parliament the power extends to 'rules and orders'[110] which appears to encompass temporary and continuing orders as well as standing orders. However, it appears that only two of the jurisdictions apart from New South Wales have a requirement for standing orders to be approved by the Governor.[111] In the other jurisdictions

---

102 The revised standing order provided that: 'The Assembly may from time to time adopt Temporary Orders which will have effect for 12 calendar months, unless a lesser period is specified': Parliament of Western Australia, Legislative Assembly, Procedure and Privileges Committee, *Changes to Prorogation and Extended Sessions*, Report No. 4, 2003, pp 12-13.

103 Parliament of Western Australia, Legislative Council, Standing Committee on Procedure and Privileges Committee Subcommittee, *Review of the standing orders*, Report 22, October 2011, p 4; *The Standing Orders of the Legislative Council*, reprint October 2011, SO 2.

104 Email from Shaila Anwar, Clerk Assistant, Senate Committees, Canadian Senate, to David Blunt, Clerk of the Parliaments, New South Wales Legislative Council, 9 October 2022.

105 Canadian Senate, Committees Directorate, *Sessional Orders of the 1st Session, 44th Parliament*, updated 4 July 2022, pp 14-15.

106 Canadian Senate, Committees Directorate, *Sessional Orders of the 1st Session, 44th Parliament*, updated 4 July 2022, pp 11-12, pp 13-14.

107 Canadian Senate, Committees Directorate, *Sessional Orders of the 1st Session, 44th Parliament*, updated 4 July 2022, pp 3-4.

108 Canadian Senate, Committees Directorate, *Sessional Orders of the 1st Session, 44th Parliament*, updated 4 July 2022, pp 13-14.

109 Canadian Senate, Committees Directorate, *Sessional Orders of the 1st Session, 44th Parliament*, updated 4 July 2022, pp 4-11, pp 30-34.

110 Section 50 of the Commonwealth Constitution empowers each House to adopt 'rules and orders with respect to … the order and conduct of its business and proceedings …'

111 Tasmania (*Constitution Act 1934*, s 17) and South Australia (*Constitution Act 1934*, s 55).

the constitution or equivalent statute provides for standing orders to be adopted by the Houses and does not refer to any requirement for approval by an external body.[112]

Reflecting on these provisions in 2009 the then Clerk of the Senate observed:

> Some state constitutions retain colonial vestiges in having Governors approve the standing orders of the Houses … Provision for external approval is … an anachronism and an unnecessary fetter on the freedom of the Houses to determine their own standing rules of procedure.[113]

As noted by the Senate Clerk the requirement for standing orders to be approved by the Governor in New South Wales has its origins in colonial times. Following its establishment in 1824, the Legislative Council operated in accordance with rules of conduct set out in an imperial Act and (from 1827) 'standing' orders that were readopted at the commencement of each session.[114] However, in 1842 a new imperial Act granted a measure of self-government to the colony and empowered the Council to adopt standing rules and orders regulating its orderly conduct. Such 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.[115] This procedure, without the reference to confirmation or disallowance of Her Majesty, was later included in section 35 of the Constitution Act of 1855 which established responsible government in New South Wales. When that Act was superseded by the *Constitution Act 1902* the same procedure was carried forward in section 15.

The first set of standing orders referred to the Governor for approval under the 1842 Act included Standing Order 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. The Council subsequently received a message from the Governor requesting that the House reconsider this provision. The House ultimately agreed to this request though not without some dissent: a 'this day six months' amendment, and a motion that the Governor's message be considered early in the next session, both of which were negatived on division.[116]

It could be argued, however, that in the context of a modern upper House within a system of representative and responsible government, a requirement to submit procedural rules to the Governor for approval is inconsistent with the independence and autonomy of the House. On the one hand the New South Wales Crown Solicitor has advised that: 's 15 gives rise to an implication that the Governor is not to act with the advice of the Executive Council in relation to whether approval should be given to standing orders'[117] However, in *Crick v Harnett* (1907) 7 SR (NSW) 126 at 133, Darley CJ stated that the assent of the Governor to standing orders 'of course is given or withheld according to the recommendation of his responsible advisers.'

---

112 Commonwealth (*Constitution Act 1901*, s 50), Victoria (*Constitution Act 1975*, s 43), Western Australia (*Constitution Act 1889*, s 34), Queensland (*Parliament of Queensland Act 2001*, s 11), Norther Territory (*Northern Territory (Self Government) Act 1978* (Cth), s 30), Australian Capital Territory (*Australian Capital Territory (Self Government) Act 1988* (Cth), s 21).

113 R Laing, 'Exclusive Cognisance: Is it a Relevant Concept in the 21st Century?', *Australasian Parliamentary Review*, (Vol 30, No 2, Spring/Summer 2015), p 63.

114 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), pp 763-766.

115 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), p 766.

116 *Annotated Standing Orders of the New South Wales Legislative Council* (n 22), p 767.

117 NSW Crown Solicitor, 'Whether the Governor must act with the advice of the Executive Council when approving standing orders', 1 May 2007, cited in *NSW Legislative Assembly Practice, procedure and privilege* (online), chapter 28, p 1.

One issue which would need to be considered in the context of any proposals to reform section 15(2) is the potential application of section 7A of the *Constitution Act 1902*. This section provides that a bill to alter the powers of the Legislative Council must be approved at a referendum. However, the requirement does not apply to a bill to repeal or amend from time to time of any of the provisions of section 15.

Conclusion

There is a solid body of precedent, dating back to the 19th century, of compliance with sessional orders adopted by the Legislative Council. This includes executive government compliance with scrutiny and accountability mechanisms introduced by sessional orders since the 1980s. Sessional orders establishing new procedures have often been adopted on motions by the opposition or cross bench but there have also been cases of such orders being proposed by the government itself. Other Australasian Houses have also made use of sessional or temporary orders to trial new procedures. It appears that the use of these orders in other jurisdictions has not been as extensive as in the New South Wales Legislative Council in recent years although the Victorian Legislative Council's adoption of comprehensive sessional orders to reform its procedures in 2003 is a notable exception. However, the practices of these Houses reinforce the view that temporary procedural rules and not just standing orders are an important and legitimate tool for the management of the business and proceedings of a legislative chamber.

In New South Wales where the powers of the Houses have not been defined by reference to those of the House of Commons each House possesses such inherent powers as are necessary for the performance of its functions, and specific statutory powers. The inherent powers do not extend to the adoption of standing orders, for which each House relies on the express power conferred by section 15 of the *Constitution Act 1902*, but the basis for the power to adopt sessional and temporary orders has never arisen for determination. Should the question arise it is likely that the source of the power would be identified in the principle of necessity and the inherent right of the chamber to control the conduct of its business and that the boundaries of the power would be found to lie in the limits of necessity rather than in any of the provisions of section 15. While section 15 requires standing orders to be approved by the Governor the Legislative Council has a longstanding practice of adopting sessional orders that modify or override the operation of standing orders by simple resolution of the House.

To the extent that there may be unresolved issues relating to the status of the Council's sessional and temporary orders, the Procedure Committee's current review of the standing and sessional orders could consider whether it would be desirable for the Council to adopt a standing order providing that the House may make sessional orders from time to time. A number of other Australian Houses have adopted standing orders to this effect. The adoption of such a provision by the Council would have the benefit of codifying an established practice which has had an important role in the development of the House's procedures over many years.

Another potential issue for review is whether there is any justification for maintaining the constitutional requirement that standing orders must be approved by the Governor before they become binding. It appears that the requirement for standing orders to be referred to the Governor for approval is shared by only two other Australian jurisdictions. With the bicentenary of the Legislative Council approaching in 2024 it is timely to ask whether this

'unnecessary fetter' on the House's freedom to determine its procedural rules, which was introduced in 1842, continues to serve the interests of good government in New South Wales.

Epilogue

Since this paper was prepared in 2021 there have been further developments in the evolution of the Council's procedural rules.

In March 2022 the Procedure Committee reported on its review recommending a new set of standing orders for the Council. The proposed standing orders incorporate most of the existing sessional orders with minor amendments, and a new provision which expressly acknowledges the House's practice of adopting sessional and temporary orders (SO 2A). The committee recommended that the new standing orders be trialled as sessional orders and that following a further review and any necessary modifications they be adopted as standing orders and referred to the Governor for approval. It proposed that such adoption and referral occur by 17 November 2022, the likely last sitting day of the 57th Parliament.

In May 2022 the House adopted the committee's report with a small number of amendments. It also resolved that the proposed standing orders take effect as sessional orders from 7 June 2022 for the remainder of the session, or until rescinded, and that the existing standing orders and most of the sessional orders be suspended for that period.

During debate in the House the Leader of the Government in the Council acknowledged that the goals of the review which had led to the development of the new standing orders had included to 'enhance the role of the Legislative Council as a house of review, and enhance the role of private members …'. He also noted that the changing character of the House had influenced the evolution of its standing orders:

> Often standing orders, when they were originally introduced, contemplated a government and an opposition, but as the House has developed, and the culture and character of the House has developed, proper consideration needs to be made with respect to the rights and entitlements of private members and crossbench members of this House.[118]

As a result of these developments many of the temporary reforms discussed at the start of this paper which were introduced as sessional orders in 2019 are now on their way to becoming permanent. It is expected that the new provisions will be in place as standing orders for the start of the 58th Parliament in May 2023.

118 *Hansard*, NSW Legislative Council, 18 May 2022, p 37, the Hon Damien Tudehope MLC.