

*The Shake-Up:
New rules in play for the NSW Legislative Council
(as at December 2021)*

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"... I hope these reforms will reflect well on the House and that we use them to hold the Government to account. This series of changes will have significant and positive outcomes not only for the House but also for the people of New South Wales as we rebalance the power between the Parliament and the Executive. Having worked across the Chamber with parties that are often at loggerheads, I hope it is a good signal for the next four years of parliamentary practice."

—Mr David Shoebridge, The Greens²

The NSW Legislative Council operates according to a combination of continuing 'standing orders' approved by the Governor, and a series of 'sessional orders' adopted by the House for that parliamentary session only.³ In the years immediately prior to 2019, the operation of the rules and practices of the House came under increasing scrutiny. A view emerged that much could be gained through procedural reform. Enhancing the capacity of the House to scrutinise the Executive was a key objective for members.⁴ As was providing more opportunities for private members to raise matters of interest or concern.⁵ Efficiencies in the operation of the House were also sought.⁶ While certain procedures were discussed or trialled in the 56th Parliament, the increased and diversified non-government majority which resulted from the 2019 State election was the impetus for a wide ranging shake up in the 57th Parliament.

Forty-one sessional orders were adopted on the first day of business for the 57th Parliament in May 2019. Seventeen more followed. About two-thirds of these fifty-eight sessional orders are new, or a variation on past practice. While a small number of sessional orders have been necessitated by the pandemic, procedural reform has been the overwhelming focus of the new rules. The reforms have been far-reaching—few areas of the operation of the House are unchanged. New sessional orders have been adopted in relation to questions, committees, private members' business, the conduct of business, the sitting pattern and parliamentary secretaries.

As a result of the large quantity and wide scope of the changes made, it is not possible for this paper to individually assess each new rule or area of change in detail. Instead, this paper provides a brief background and context for the 2019-2021 changes, outlines the intent and scope of the new rules, and explores the overall impact and use of the sessional orders within three themes: scrutiny, private members and conducting business. It also touches on how the new rules fit within the traditions of the House, and the 'great principles of parliamentary law'.⁷

¹ Principal Council Officer—Legislative Council, Parliament of NSW. The views in this paper are those of the author and do not necessarily reflect those of the two Houses of the Parliament of NSW or their members.

² New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), pp 135-136 (Mr David Shoebridge).

³ The House may also introduce rules which regulate proceedings via 'resolutions' or 'temporary orders'. While it is acknowledged that these are procedurally distinct to 'sessional orders', in this paper some rules established via these alternative mechanisms are included within the discussion of 'sessional orders'. Explanatory references are contained in footnotes wherever necessary.

⁴ New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), pp 77-78, p 82, p 106 (Mr Adam Searle).

⁵ New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), pp 78 (Mr David Shoebridge).

⁶ New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), pp 113 (Revd Mr Fred Nile).

⁷ This paper is guided by "the great principles of English parliamentary law", as quoted and summarised in the form of six questions in David Blunt, Clerk of the Parliaments, Parliament of NSW, [Parliamentary traditions, innovation and "the great principles of English parliamentary law"](#), ANZACATT, Canberra, 2012.

In doing so the extent and nature of the impact of the new rules becomes apparent. In the main they have achieved members' objectives. The new rules have enabled the House to further exert its powers to hold the executive to account, and have dramatically enhanced the capacity of the House to conduct business, particularly that of private members. Despite the disruption caused by the pandemic, the House has been far more active than any before it. The 57th Parliament has been both extremely busy and immensely complex, with members utilizing any opportunity available, both new and old, to exercise their roles as members in a House of Review. The new sessional orders have also enhanced the existing standing rules and procedures of the House, further developed the way in which the House exercises its powers and traditions, and have sought to uphold the principles of parliamentary law and practice.

Overall, the procedural reforms of the 57th Parliament have been viewed by members as an important achievement.⁸ This positive view has resulted in support for exploring their ongoing application. To this end, in June 2021, the House referred the standing and sessional orders to the Procedure Committee for review and ordered that revised standing orders be proposed for consideration by the House.⁹ Should new standing orders be adopted, this Parliament could indeed introduce the single most wide-ranging reform of the rules of the House.

So what were the circumstances and impetus for change in the 57th Parliament?

2004-2019: Background and Context

Proceedings in the Legislative Council are conducted according to 'standing orders' adopted by the House, and approved by the Governor, under section 15 of the Constitution Act 1902.¹⁰ There are currently 234 standing orders. These were adopted in 2004, replacing the standing orders of 1895. In addition, each session, the standing orders are supplemented, varied or overridden by 'sessional orders' to ensure that the rules governing the conduct of business reflect the needs of the House in that parliamentary session.¹¹

From the reconstitution of the Council in 1978 up until 2004, sessional orders were progressively adopted and relied on "to cover the increasing gaps" in the standing orders.¹² During this time, procedural reform could be characterised as ongoing but intermittent, with rules considered at the commencement of a parliament or on the occasion of issues arising. Simplifying and codifying this complicated body of sessional orders was the driving impetus for the 2004 revision of the standing orders, and only a limited number of new procedures were introduced in this review.¹³

A similar, progressive, increase in the use of sessional orders to vary practice occurred again between 2004 and 2019. In 2004 only nine sessional orders were adopted, the majority of which were required under the revised standing orders for the purpose of scheduling business (eg times

⁸ See New South Wales, *Parliamentary Debates*, Legislative Council, 21 November 2019, [Christmas Felicitations](#).

⁹ *Minutes*, Legislative Council, [9 June 2021](#), p 2273. See also Procedure Committee inquiry, [Review of the Standing and Sessional Orders](#) and report entitled [Review of the Standing and sessional orders](#), tabled 31 March 2022.

¹⁰ *Constitution Act 1902*, s 15(1)(a). Under these provisions, standing rules and orders are approved by the Governor and have ongoing effect beyond a parliamentary session or term.

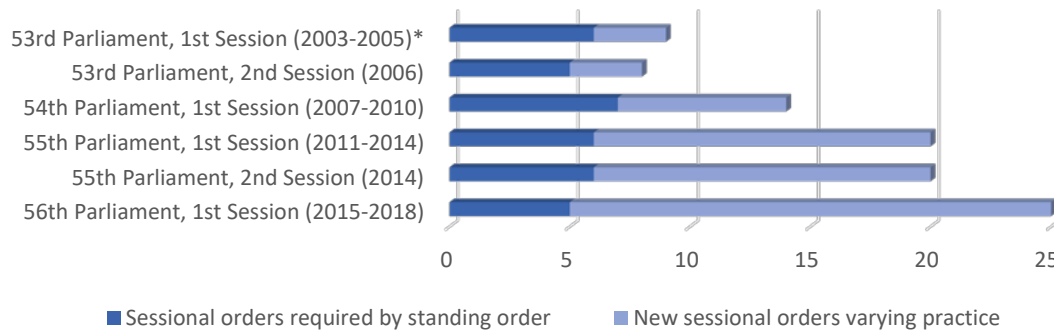
¹¹ While there is a solid body of precedent relating to the use of sessional orders by the Council, there have been discussions concerning their status and use in the current parliament. These issues are discussed further in a forthcoming paper by Velia Mignacca, Parliament of NSW, 'Sessional orders as a vehicle for procedural reform in the New South Wales Legislative Council'.

¹² New South Wales, *Parliamentary Debates*, Legislative Council, 5 May 2004, p 8264, (the Hon Michael Egan).

¹³ Stephen Frappell and David Blunt (eds.) [New South Wales Legislative Practice](#), 2nd Edition, The Federation Press, 2021, p 316. See also Susan Want and Jenelle Moore, [Annotated Standing Orders of the New South Wales Legislative Council](#), The Federation Press, 2018, for a comprehensive examination of the purpose, operation and development of the Council's standing orders.

of meeting, and precedence of business). By 2018 the number of sessional orders had risen from nine to twenty-five, twenty of which varied practice or introduced new procedures. The chart below shows this increased use of sessional orders by parliamentary session since the standing orders were adopted in 2004. It also provides a breakdown of how many sessional orders were required by standing order to schedule business, compared to those which varied or introduce new practices and procedures.

Breakdown of sessional orders, by parliamentary session, 2003 - 2018.



Between 2004 and 2018, the impetus for new sessional orders varied. Some new sessional orders were an immediate response to events in the House. For example, an extended filibuster in 2011 over industrial relations legislation resulted in the introduction of time limits for speakers.¹⁴ More often, the House established committee inquiries to review either an existing practice as need arose, or a new sessional order when proposed. Thirteen such inquiries were conducted by the Procedure Committee between 2004 and 2019,¹⁵ as well as a 2016 committee inquiry into the Legislative Council Committee System.¹⁶ Particularly in 2011, at the commencement of the 55th Parliament, and in 2017 in the later part of the 56th Parliament, inquiry activities resulted in the adoption of sessional orders which varied practice.

By the end of the 56th Parliament, fifteen sessional orders were based on inquiry recommendations. These changes were broad in scope, relating to cut-off dates for the receipt or introduction of government bills, the Selection of Bills Committee¹⁷, government responses to petitions, the operation of private members' business, and votes of members with the care of a child. In instances where immediate change was not recommended or a recommended change did not occur, their consideration nevertheless highlighted to members the possibilities for procedural reform via sessional order, and provided a basis from which consideration could be given to *future* changes to practice and procedure.

* Statistics for this session are reflective of the sessional orders adopted after the 2004 Standing Orders came into effect.

¹⁴ *Minutes*, NSW Legislative Council, [2 June 2011](#). The bill was mostly considered on the sitting day of Thursday 2 June which did not conclude until Saturday 4 June. During debate three members spoke for approximately six hours each. In order to progress the bill, the conduct of certain proceedings were varied and on three occasions debate was closed via 'guillotine' motions which required the 'question be now put' (SO99).

¹⁵ Between 2004 and 2018 the Procedure Committee examined: the sitting pattern, deadlines for government bills, rules for questions, procedures for private members' business, e-Petitions, expert assistance to committees, and young children accompanying members in the chamber. Inquiry information is available via the committee [webpage](#).

¹⁶ See [Select Committee on the Legislative Council Committee System](#), Legislative Council, Parliament of NSW, *The Legislative Council committee system*, 28 November 2016, p vi-ix.

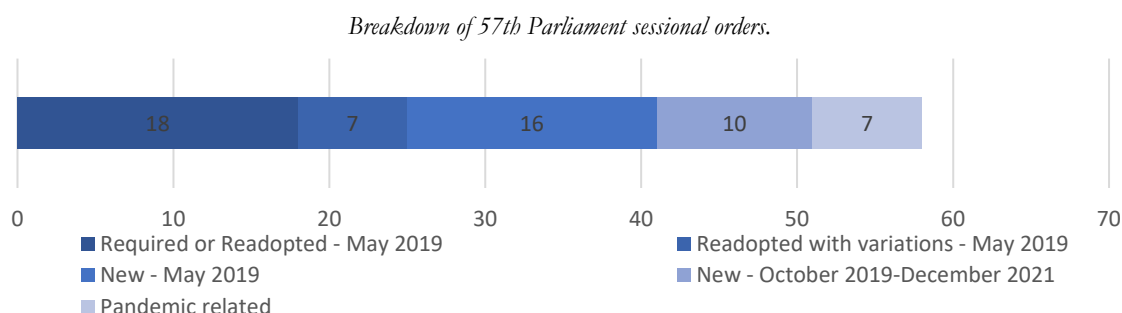
¹⁷ While the Selection of Bills Committee was technically established via a resolution and not via a sessional order, as the committee provides a procedural mechanism to facilitate improved scrutiny of legislation and does not conduct inquiries, it warrants review alongside the sessional orders and accordingly an exception has been made for the purpose of this paper.

2019: The Shake-up

'Future' change came surprisingly swiftly. While the 56th Parliament initiated or explored a number of reforms, the real impetus for broad and significant procedural change came at the beginning of the 57th Parliament. Following the 2019 State election, the non-government majority in the House expanded and diversified.¹⁸ Within this increased non-government majority, Mr Searle (ALP - Opposition), Mr Shoebridge (The Greens), and Mr Borsak (Shooters, Fishers and Farmers Party), saw there was enthusiasm for procedural reforms which further developed the Council's role in executive scrutiny and provided opportunities for members to conduct business.

Between the election in March 2019, and the commencement of sittings in May, members worked across party lines to develop, and garner support for, substantial changes to the rules of the House. Knowing the numbers lay with the non-government majority, the Government was pragmatic in their response to the new sessional orders, with the then Leader of the Government, the Hon. Don Harwin MLC, stating: "we are taking a collaborative approach to these proposals".¹⁹ Ultimately, the Government either supported or did not oppose, all but one of the final versions of the sessional orders proposed. On the first day of business for the 57th Parliament the post-election work of members bore success with forty-one sessional orders being adopted. Twenty-five were either required by the standing orders or readopted from the 56th Parliament. Seven of these readopted sessional orders had undergone review and varied from past practice.²⁰ The remaining sixteen sessional orders were new. All but one of these forty-one sessional orders passed 'on the voices'.²¹

The shake-up continued throughout the 57th Parliament, with members maintaining a sustained focus on the rules and procedures of the House and continuing their efforts in procedural reform. Between May 2019 and December 2021, an additional seventeen sessional orders have been adopted and six sessional orders have been amended. Only one, relating to the conduct of divisions during the height of the pandemic, has been rescinded. As at December 2021, fifty-eight sessional orders had been passed by the Council, with fifty-seven still in operation.



The volume of sessional orders was a consequence of the scope of the procedural reform sought by members. To achieve their objectives to improve and strengthen the Council's capacity to scrutinise the Executive; provide more opportunities for private members to conduct business or raise matters of concern; and gain efficiencies in the conduct of business, the House adopted sessional orders which:

¹⁸ Representation in the 56th Parliament: 20-Government members (LIB/NAT), 12-Opposition members (ALP) and 10 crossbench members from 5 parties/groups (AJP, CDP, G, IND, SFFP). Representation in the 57th Parliament: 17-Government members (LIB/NAT), 14-Opposition members (ALP) and 11 crossbench members from 6 parties/groups (AJP, CDP, G, IND, PHON, SFFP).

¹⁹ New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#) p. 78 (Mr Harwin).

²⁰ It is further noted that some others contained minor variations but are generally considered to be in the same form.

²¹ See *Minutes*, NSW Legislative Council, [8 May 2019](#).

- increased the opportunities to ask Questions, and provided mechanisms to scrutinise answers,
- provided greater alignment between the work and powers of the House and its committees,
- reconsidered the role of parliamentary secretaries,
- introduced a new framework for consideration of private members' business,
- rescheduled the sitting pattern and limited the ability of the House to sit past midnight, and
- provided mechanisms for the progression of business outside the formal sitting hours of the House, including by delegating authority over specific matters to a committee or the President.

This paper will explore each of these areas of change within three themes: scrutiny, private members and conducting business. Information on individual sessional orders can be found in the Appendix.²²

So what has been the impact of the new rules on the operation of the House?

The Impact: 2019-2021

Sessional orders relating to Scrutiny

"With the commencement of the new Parliament, new and not-so-new members have engaged in discussions about how we can lift the standard of parliamentary scrutiny in this State..."

—The Hon Adam Searle, ALP-Opposition²³

"...the gradual evolution of the powers of committees towards an equality with the powers of this House ... must continue. We need transparency, government honesty, and questions answered properly..."

—The Hon Robert Borsak, Shooters, Fishers, and Farmers Party²⁴

The NSW Legislative Council is a strong 'House of Review'. Effectively asserting its powers to scrutinise the executive has historically underpinned the actions of the Council and is fundamental to the principles which guide its rules and procedures.

Unsurprisingly, improving the rules relating to the scrutiny of the Executive has been a key driver for procedural reform this parliament. In May 2019, Opposition and crossbench members expressed concern that the Executive was not as accountable to the Council as it could be, and that the balance of power between the Executive and the Parliament required readjustment.²⁵ To improve the capacity of the House in this regard, the rules for questions, committees, and parliamentary secretaries were reviewed. Some new sessional orders varied existing practice—others introduced new opportunities for executive scrutiny. The new rules have gone a substantial way to achieving the objectives of members.

²² The standing and sessional orders are published in full via the Legislative Council [Rules of the House](#) webpage.

²³ New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), p 77 (Mr Searle).

²⁴ New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), p 113 (Mr Borsak).

²⁵ New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), p 135-136.

Questions

The existing rules for questions have been in place since 2001 and when introduced were modelled on Commonwealth practice.²⁶ Under standing orders 64 to 67, members have opportunities to ask questions and receive timed answers in the House, as well as place written questions on notice. The timeframes and quality of answers received under this system were of concern for members. Six rules were introduced in 2019 to address these concerns, including:

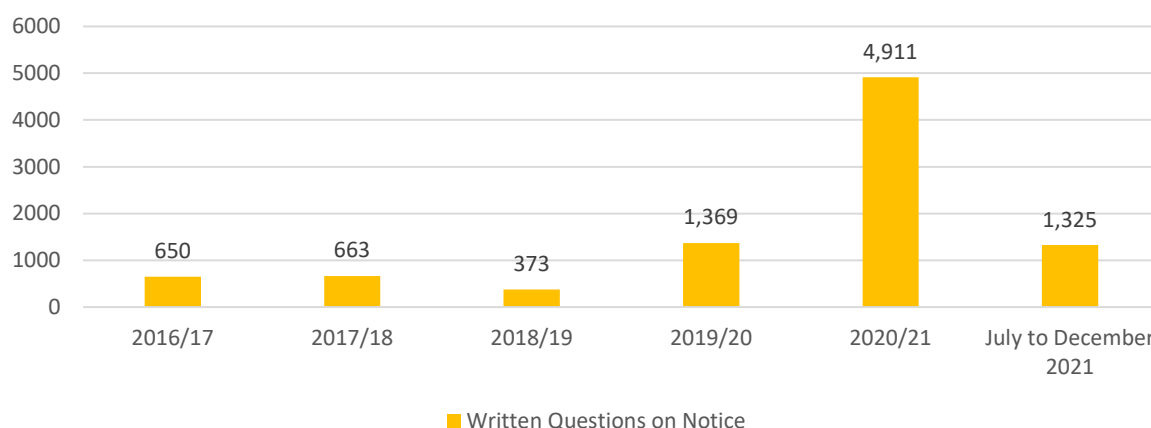
- timeframes for providing answers to written questions and to question taken on notice during Question Time was reduced to 21 days (from 35 days),
- Written Questions may be asked each business day (previously only sitting days),
- two supplementary questions may be asked provided they seek elucidation of an aspect of a ministers answer (up from one supplementary question),
- one written supplementary question per party/independent member may be asked at the end of Question Time, the answer is due before 10.00 am on the next working day (new provision),
- a 30 minute take note debate on answers to questions has precedence immediately after Question Time each sitting day (new provision), and
- answers must be '**directly** relevant' (rather than simply 'relevant').

While minor tweaks were made to the take note of answers sessional order, and a substantial ruling guides practice in relation to supplementary questions, the procedural operation of these sessional orders has been relatively unproblematic.

They also appear to have produced many of their intended outcomes. These sessional orders have certainly provided more opportunities for members to ask questions, seek further explanation of answers and debate the responses given by the Executive.

The most easily identifiable impact of these sessional orders is the exponential increase in the number of written questions asked. Members may now submit written questions each day—no longer needing to wait for the next sitting of the House. The graph below shows the extent to which members are utilising this new rule, with two to seven times the number of questions asked in the 57th Parliament compared to similar financial years in the 56th Parliament.

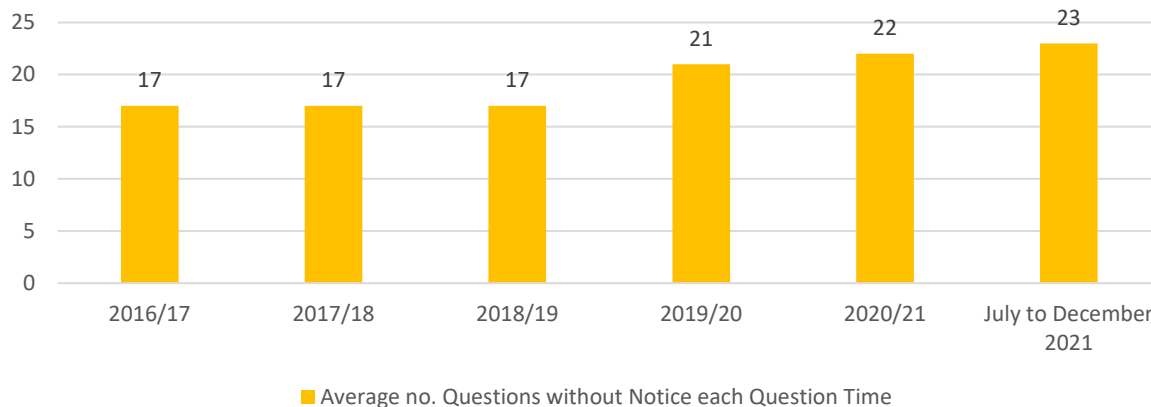
Comparison of Written Questions on notice in the last five financial years and July to December 2021.



²⁶ Susan Want and Jenelle Moore, *Annotated Standing Orders of the New South Wales Legislative Council*, The Federation Press, 2018, pp 212-214.

There has also been an increase in the average number of questions asked in the House each Question Time, up from seventeen to twenty-three. One contributing factor in this regard is the shorter, two-minute time frames for supplementary answers, rather than three. Where three primary questions with answers would take twelve minutes, one primary question and two supplementary questions with answers takes ten. The modest increase which resulted is therefore unsurprising as the duration of Question Time has remained the same at one hour.

Comparison of Questions Without Notice in the last five financial years and July to December 2021.



The new sessional orders also reduced timeframes for the submission of answers. This has been successful in shortening the time members must wait for an answer thus improving the immediacy of the response. It is noted that NSW has enjoyed strong compliance with timeframes for answers by consecutive Governments, and the current Government has consistently met the reduced timeframes for the submission of answers. While already historically rare, it is noted that in this parliament no minister has been called to account for non-compliance for a failure to provide a response within the timeframe.²⁷

The impact of the new sessional orders on the quality of answers is more difficult to ascertain. During Question Time, points of order are quickly taken in the House to ensure ministers stay directly relevant, however the distinction between relevant and directly relevant could well have limitations in practice. In relation to written questions, members have voiced concerns over the quality of the information provided in answers.²⁸ In some instances members have sought information not forthcoming in response to their questions via the powers of the House under standing order 52 to order the production of State papers. This approach has had limited success as the government refutes the power of the House to use standing order 52 to seek information, arguing the power is to obtain existing documents rather than create them.²⁹

²⁷ Under standing order 66 and 67 ministers are required to explain any non-compliance to the House should they fail to provide a response to a question within the timeframe and without an explanation of the reasons for lateness.

²⁸ See New South Wales, *Parliamentary Debates*, Legislative Council, 20 October 2021, [The Hon. Adam Marshall](#).

²⁹ For example see correspondence from the Department of Premier and Cabinet relating to an order for papers regarding a [list of current TAFE courses](#), received 5 March 2020.

Committees

The Council committee system is a much valued mechanism through which members are able to scrutinise policies and actions of the executive. Informed by the 2016 inquiry by the Select Committee on the Legislative Council Committee System,³⁰ and in keeping with members' objectives for greater equity in the operation of the House and committees, twelve sessional orders adopted this parliament relate to committees, nine of which are new.³¹ Key sessional orders relating to committees include:

- a framework for committees to order the production of State papers under standing order 208 (new provision),
- a requirement that, in instances where a government response to a committee report does not address each recommendation, the relevant Minister must address the House and explain their reasons for non-compliance (new provision),
- provisions for take note debates on government responses to committee reports (new provision), and
- a 'Selection of Bills Committee', which reports to the House each sitting week with recommendations on whether new bills should be the subject of a short committee inquiry by a standing committee (re-adopted following a 2018 trial).³²

Other new sessional orders relate to the power of a committee to travel outside the State, electronic participation, substitute members, rules for answers, and a deadline for the circulation of the Chair's draft report.

In their operation, some of the new rules have resulted in unintended outcomes requiring further attention. For example, an increased number of committee inquiries this parliament has resulted in an increased number of committee reports for debate. Coupled with the new provision for debate on government responses, the list of reports and responses for debate by the House became overloaded and well beyond the capacity of the House to consider. To remedy this issue, the House varied the operation of the sessional order so that reports and responses are debated simultaneously wherever possible. Other minor operational issues have also been raised in relation to the process for bill restoration which is contained in the Selection of Bills Committee resolution.

The sessional order providing committees a framework for the production of State papers is yet to operate as intended as it is contested by the Government. This was the only sessional order opposed by the Government in May 2019, who argued that committee powers in this regard are uncertain and accordingly documents should only be produced in response to orders made by the House under standing order 52.³³ Since its adoption, committees have sought to use the power on only two occasions. In the first instance no documents were provided.³⁴ In the second, documents were provided on a 'voluntary basis'.³⁵ To ensure committees are not impeded by this impasse, committee chairs and members, on behalf of their committees, have instead relied on the powers

³⁰ See [Select Committee on the Legislative Council Committee System](#), Legislative Council, Parliament of NSW, *The Legislative Council committee system*, 28 November 2016, p vi-ix.

³¹ The number and structure of committees along with the provisions contained in committee terms of reference were also reviewed for the 57th Parliament. Procedurally these are 'resolutions' not 'sessional orders' and fall outside the scope of this paper. As does the substantial changes also made to the annual Budget Estimates hearings. See Stephen Frappell and David Blunt (eds.) *New South Wales Legislative Practice*, 2nd Edition, The Federation Press, 2021, Chapter 20: Committees p 726-796.

³² New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), p 113.

³³ New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), p 106.

³⁴ See *Minutes*, NSW Legislative Council, 24 March 2020, p 855, item 26 and *Minutes*, NSW Legislative Council, 12 May 2020, p 855, item 22. In response to an order by Portfolio Committee No. 7 – Planning and Environment, the Department of Premier and Cabinet advised that in their view it would only be appropriate for the documents to be provided pursuant to a formal order made under standing order 52.

³⁵ *Minutes*, NSW Legislative Council, 12 October 2021, p 2443.

of the House under standing order 52.³⁶ This has at times delayed the evidence available to a committee and also resulted in greater complexity of the work undertaken by members, who have concurrently drawn on the powers and processes of committees and the House in order to scrutinise the Executive.

The sessional order requiring ministers to explain reasons for non-compliance where government responses fail to address each recommendation of a committee report has been more effective. In the past the record of government responses to committee reports has generally been very good but not without issue.³⁷ In May 2019 the non-compliance mechanism was introduced to address concerns that not all government responses adequately or directly addressed each committee recommendation. To December 2021, fifty-eight government responses have been received. On two occasions the government has sought to delay providing an adequate response to a first report of a committee inquiry, until after the final report. In the first instance, the President reported to the House that a response was received but it did not specifically address each recommendation—the House took no further action pending receipt of the response to the final report.³⁸ In the second instance the Government advised prior to the due date, that a response would not be forthcoming until after the final report of the committee. According to the new sessional order the Leader of the Government was called on to explain non-compliance. It is expected this will continue each month until a response is received.³⁹

The Selection of Bills Committee process has been a successful reform. First trialled in 2018, the committee was established in response to concerns that Council committees undertake relatively low levels of legislative review compared to other jurisdictions.⁴⁰ The Committee does not scrutinise legislation, but instead considers all bills introduced into **either** House each week and reports on whether any bill should be referred to a committee for inquiry and report—in short it "selects bills" for inquiry.⁴¹ The Committee also recommends which committee should undertake the inquiry, the stage a bill should be referred from and the timeframe of the inquiry. Resolving these matters within the Committee process has meant the recommendations of the Committee are usually adopted by the House without amendment or debate. This process has proven a more efficient mechanism to the existing practice of referring a bill at the conclusion of the second reading debate.⁴²

The Selection of Bills process has also created greater links between committees and the House relating to legislative review. Inquiries into referred bills allow for full consideration of the provisions of the bill by members and often includes public stakeholder engagement. While the short length of the inquiry ensures legislation is not unduly delayed, it does not usually allow for a detailed report, or the exhaustive findings or recommendations, expected from other committee

³⁶ In the 57th Parliament to December 2021, 339 orders for papers have been agreed to. This compares with just 15 in the entirety of the 56th Parliament. While the majority of these are not a result of the impasse over the power of committees to order documents, it does demonstrate how focused current members are on executive scrutiny.

³⁷ In 2011 the House took action to ensure government responses were received to reports of the previous parliament, there have also been instances of late submission after, in some cases well after, the required six month deadline (standing order 233(4)). See Susan Want and Jenelle Moore, *Annotated Standing Orders of the New South Wales Legislative Council*, The Federation Press, 2018, pp 754-759.

³⁸ *Minutes*, NSW Legislative Council, 23 May 2020, p 948.

³⁹ *Minutes*, NSW Legislative Council, 12 October 2021, p 2430, 16 November 2021, p 2713.

⁴⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 4 April 17, [Select Committee on the Legislative Council Committee System](#).

⁴¹ *Minutes*, NSW Legislative Council, [23 November 2017](#), p 2221-3, item 3, paragraph (3) (2). The Council model was largely based on that used by the Australian Senate. According to the Council sessional order, the House must agree to the recommendations via motion, which can be amended, agreed to or defeated as the will of the House may be. Procedural provisions for the consideration and implementation of the recommendations of the report of the Selection of Bills Committee, and for restoration of referred bills are also specified in the sessional order.

⁴² See standing order 140(2)(c).

inquiries. Instead a recommendation is made to the House on whether the bill should proceed and it is expected that the key issues raised during the inquiry will be acknowledged and addressed during any further consideration of the bill.

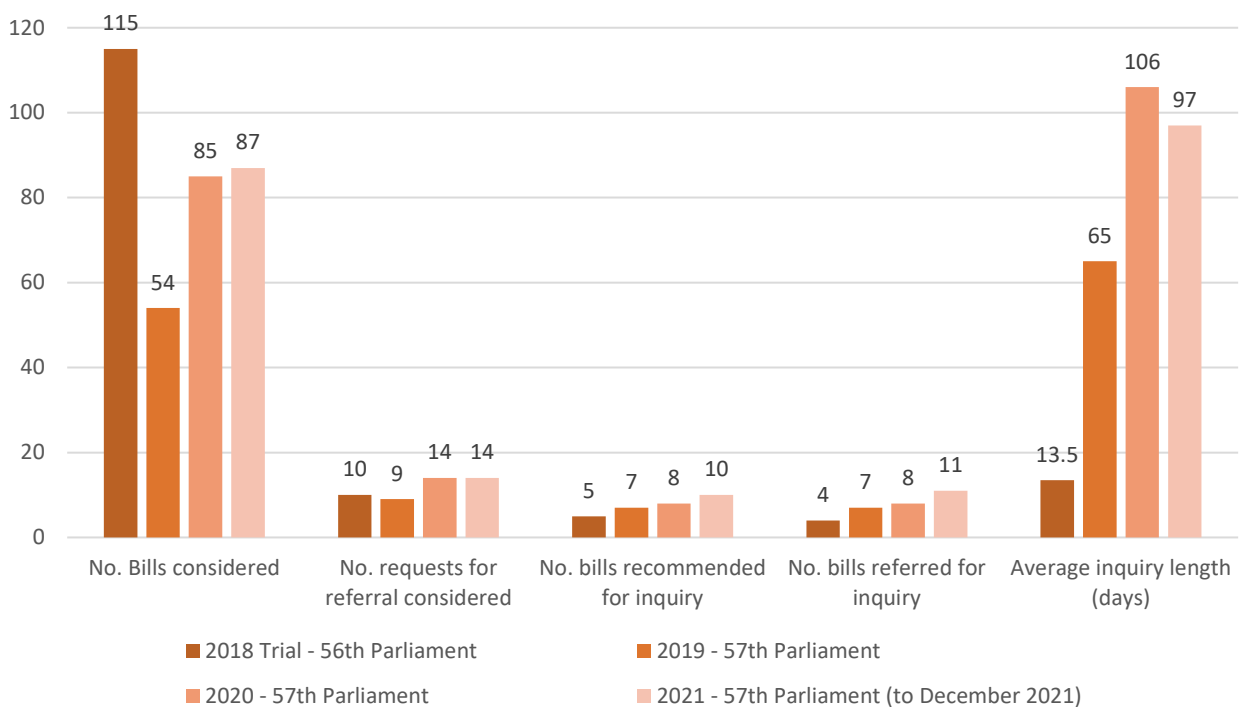
In a 2018 self-evaluation report on the effectiveness of the Selection of Bills Committee process, the then Chair, the Hon Natasha Maclaren-Jones MLC (Government), noted the success of the trial:

"While the four [2018] inquiries referred by the Selection of Bills Committee were conducted within short timeframes, they provided opportunities for members to examine the detail and purpose of proposed legislation and for the public to have their say.

The trial ... has allowed members to harness the strength of the committee system to assist them in their role as legislators, thus fostering a respectful culture in the House in which legislative scrutiny is embraced."⁴³

The ongoing success of the Selection of Bills Committee process in the 57th Parliament is evidenced by the volume of legislation referred for inquiry and report via this mechanism. Between May 2019 and December 2021, twenty-six bills were referred via this process. The graph below compares the work of the Committee during the 2018 trial and each year in the current Parliament since to date.

Chart: Selection of Bills Committee comparison, 2018 and 57th Parliament to date (2019-2021)⁴⁴



⁴³ Selection of Bills Committee, Legislative Council, Parliament of NSW, [Evaluation of the Selection of Bills Committee trial](#), November 2018, p vi.

⁴⁴ These statistics cover bills referred for inquiry through the Selection of Bills Committee process only. It is noted that the House continued to refer a small number of bills each year during the second reading through the existing rules contained in standing order 140.

While much of the impact of the new rules was as intended, an unexpected change has been the scale at which members have interlinked the opportunities available in the House and committees in order to scrutinise the executive. In the current parliament, the new rules, in combination with the cohesiveness in voting by the non-government majority, has seen House and committee processes being used in tandem in order to scrutinise the executive. This change is evidenced by the work of the House in scrutinising the executive on water management issues (floodplain harvesting), or the funding and allocation of government grants. On both of these issues the mechanisms available in the House and those available via committee inquiries were utilised by members. While in some other instances this change may have been a consequence of the challenge to the power of committees to order the production of documents, these two examples go well beyond the use of standing orders 208 and 52, and show how the already assertive Council has scrutinised the executive in the 57th Parliament.

Parliamentary Secretaries

The NSW Constitution Act 1902 provides for the appointment of Parliamentary Secretaries as part of the Executive, to perform functions as determined by the Premier.⁴⁵ In the Council, standing order 25 provides that parliamentary secretaries are able to "act as a Minister in all respects, except in relation to answering questions". In practice this allowed parliamentary secretaries to act both as private members and also in support of a minister, but critically, not be held accountable for the executive. Throughout the 56th Parliament, members became concerned that the Government was allocating tasks to parliamentary secretaries that went beyond their intended function as a 'secretary', but were not subjected to appropriate accountability.⁴⁶ In response, in May 2019 the House adopted sessional orders which increased scrutiny of parliamentary secretaries and limited their participation as private members.⁴⁷ The new rules included:

- restricting parliamentary secretaries from asking questions, making private Members' Statements or being Chairs and Deputy Chairs of certain committees, and
- Questions to parliamentary secretaries.

While the new sessional orders were passed on the voices, the Government did not agree with their rationale. The Government argued that parliamentary secretaries had no legal responsibilities and 'do not take part in the decision-making process in the same way as ministers', who are responsible to Parliament for their portfolio areas. The breadth of restrictions was considered to be to be 'inappropriate' and the House was cautioned to have 'realistic expectations' about the outcomes of the new sessional orders.⁴⁸

In operation, these sessional orders have not been utilised to the same extent as other new rules and their impact and application has been varied. Regarding the new restrictions, government backbench members now perform some duties previously undertaken by parliamentary secretaries, such as asking government questions or acting as committee Chairs or Deputy Chairs. There are also limits to the restrictions. For example, it is noted that certain committees are exempt from the restrictions relating to Chairs, and while prevented from making members' statements, parliamentary secretaries have continued to conduct private members' business and contribute to debates.

⁴⁵ Constitution Act 1902, Part 4A

⁴⁶ New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), p

⁴⁷ It is noted that the House also expanded the scope of Budget Estimates to allow parliamentary secretaries to be invited to attend hearings. Attendance and participation in budget estimates hearings has been limited.

⁴⁸ New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), p 102.

The new sessional order allowing Questions to parliamentary secretaries in Question Time, has been rarely used. On 30 May 2019 two questions were asked of the Parliamentary Secretary for Cost of Living. The first related to government action on cost of living pressures and the Emergency Services Levy. The Parliamentary Secretary took the question on notice, providing a written deferred answer on 20 June 2019. The second question related to her staff, an employee of the parliament and allocated according to her position as a member of the House. This question was ruled out of order as it did not relate to her official public duties or those of her minister.⁴⁹

Overall these restrictions and practices somewhat mirror long observed conventions followed by Ministers. However, this is the first time they have been applied to parliamentary secretaries to this extent and specifically provided for in the rules of the House. The key question in relation to the current sessional orders and parliamentary secretaries in the Council is about the balance of these restrictions. Does the role they play warrant direct scrutiny and the curtailment of their rights as private members? If so, to what extent? If not, in what form should accountability occur?

Sessional orders relating to private members' day

"... the crossbench and the Opposition form well over half of this Chamber and will require time to deal with private members' business. This amendment ... will increase the tools available to a diversified Parliament to raise issues in the public interest."

—Mr David Shoebridge, *The Greens*⁵⁰

Private members' business

The operation of private member's business under the current standing orders has been the subject of intermittent review since 2011, with reforms seeking to address ongoing concerns that private members' business was conducted inefficiently, which in effect, stymied consideration of motions.

In 2011 the provisions of standing order 44 were expanded to allow private members' motions to be considered by the House without debate. Under the 'formal motion' provisions, should there be no objection, the President puts the question on a motion to the House for determination without amendment or debate. While this facilitated two-to-three times the number of private members' motions being agreed to each year, it wasn't a remedy for the inefficient conduct of private member's day wherein only a relatively small number of motions were debated each year.⁵¹ To address this inefficiency, from June 2015 the House has used an alternative procedure, whereby members would negotiate the order of business and at the commencement of each private members' day a formal motion would be adopted to give effect to the agreement. This practice became known as the "Whip's List" and indeed brought about a rise in the number of private members' motions debated.⁵²

In May 2019, members sought further improvements to the operation of private members' day in order to facilitate more opportunities for members to conduct business. Further, in 2020, the rules were further reformed to ensure these objectives were fully realised. To December 2021 the House has:

- readopted provisions relating to formal motions under standing order 44,

⁴⁹ New South Wales, *Parliamentary Debates*, Legislative Council, 30 May 2019, p

⁵⁰ New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), p 78.

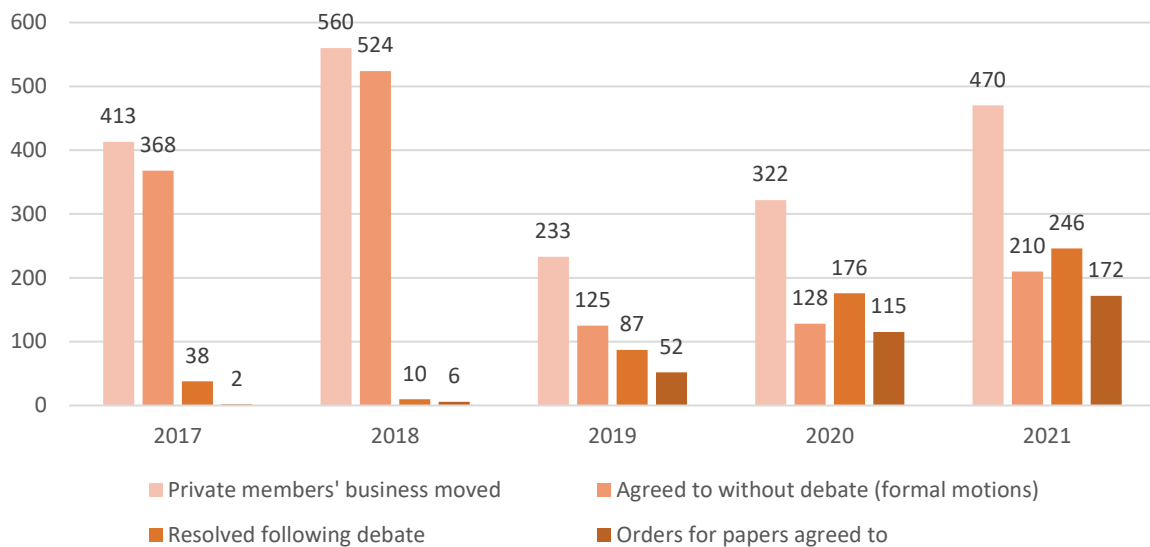
⁵¹ See Steven Reynolds, Deputy Clerk, Legislative Council, Parliament of NSW [Cane Toads, Notices of Motion and the Law of Unintended Consequences](#), 60th CPA Conference, 2014 for a detailed discussion on the impetus and impact formal motions under standing order 44.

⁵² *Minutes*, NSW Legislative Council, 4 June 2015, p 191.

- formally suspended the standing orders that determined the precedence of private members' business via a draw (SOs 184 and 185) in preference for the Whip's List process,
- re-scheduled private members' day to the middle of the sitting week (Wednesday) to allow for a full private member's day which frequently continues until midnight (previously private members' day was scheduled (under SOs 40 and 32) on Thursday until 3.30 pm), and
- introduced a 'short form' format for debate, which allows general motions (those not for bills) to be moved with a 30-minute overall debate limit, rather than the full two hour debate limit.

The impact of the new provisions on the volume of work now considered each private members' day has been remarkable. The current Whips' List regularly prioritises thirty items of business, compared to the four items given precedence in that first List in 2015. While this prior agreement has greatly improved the organisation of private members' day, the increased time for debate and 'short form' debates are of equal importance. On a Wednesday, private members business now enjoys precedence for approximately 9.5 hours of the current sitting week—compared to the 3.5 hours provided for on a Thursday in 2018. Coupled with short form debates, private members' day now regularly considers ten to twenty motions via debate, with as many as twenty-four motions having been debated on a number of occasions. As detailed in the chart below, in 2017 and 2018 less than ten and two per cent of motions respectively were debated, whereas since 2020 this is now over fifty per cent.

Chart: Consideration of private members business 2017 to 2021



Alongside the increased opportunities for private members' to conduct business—the key driver for change—there are also broader impacts resulting from the new sessional orders. While detailed exploration is not possible in this paper, it is worth noting some trends which have emerged in the work of the current parliament. These include:

- a sharp and increasing rise in the number of motions agreed to which order the production of documents from the government under standing order 52 (see 'orders for papers' in the chart above), many of which are agreed to following statements by the mover and a government representative, or as formal motions without debate,
- a rise in private members' bills being considered, partly a consequence of bill introductions being afforded priority in the Whips' List process,

- general motions which acknowledge community achievements, or seek to address current issues, are more likely to be considered by the House as formal motions without debate, and
- shorter debate times and an increased agenda in some instances have constrained the contributions of members.

Assessing these trends would provide valuable insights on the broader impact of the new sessional orders relating to private members business. This would greatly assist in considering key questions about the nature of the current reforms—Is this reform critical to ensuring members fulfil their representative roles, and hold the executive to account? Do the new sessional orders ensure equity of opportunity for all private members? Could business now be too orderly?

Members' statements

The new sessional orders also introduced an opportunity for 'Members' Statements'—a 30-minute wide-ranging debate each private members' day. Operating similar to the daily adjournment debate, during Members' Statements members (who are not ministers or parliamentary secretaries) may speak once, for up to three minutes, on any matter of their choosing. There have been approximately 380 statements given by members in the 57th Parliament to December 2021.

Sessional orders relating to the conduct of business

The sitting pattern

"...people have asked, "How can members of Parliament make good and sound decisions when you are so exhausted?"...it is just not proper or sensible to be debating things at those extreme hours of the day..."
—Mr Adam Searle, ALP-Opposition⁵³

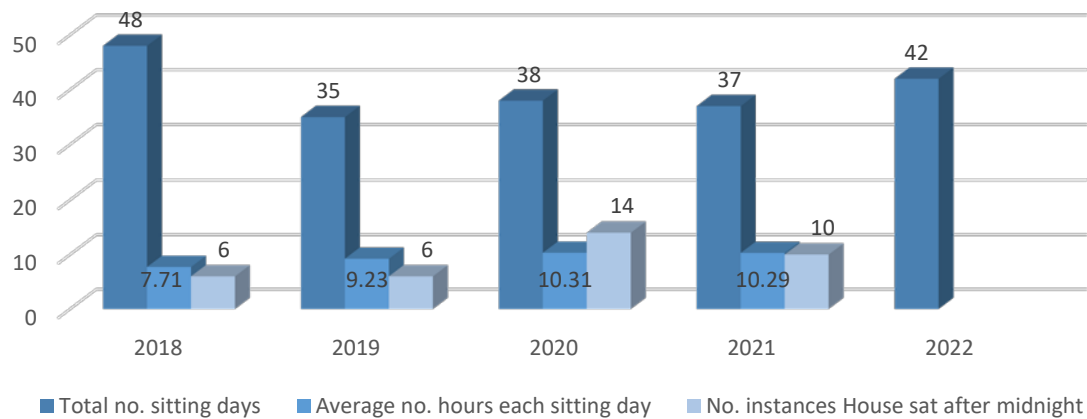
The pattern of business and the hours kept by the House has been an area over time where members have expressed strong views that the House should not frequently sit past midnight nor should it keep hours that disadvantage regional members. To address these concerns, as noted above, private members day has been rescheduled on Wednesday from Thursday to ensure all members are able to fully participate in a full day of private members business. Additionally, the House introduced a 'hard adjournment' whereby business is interrupted and the House automatically moves to adjourn at midnight.

Ironically, the hard adjournment has become the default adjournment and business is frequently conducted up until the midnight interruption. This has resulted in more occasions on which the House sits late and consequently a steady and significant lengthening of the average sitting day has occurred in the current parliament. As shown in the chart below, the House sat after midnight on 10 occasions in 2021 and the average number of hours sat each day has risen to 10.3 hours per day.⁵⁴

⁵³ New South Wales, *Parliamentary Debates*, Legislative Council, [8 May 2019](#), p 80.

⁵⁴ While the pandemic has certainly disrupted the sitting calendar, for the most part the House rescheduled many of the days lost due to lockdowns and the lengthened days cannot in the main be considered a consequence of the pandemic.

Chart: Sitting days and hours 2018 to 2021, and scheduled days for 2022



Conducting business

The third and final objective of members which drove procedural reform via sessional orders in May 2019, was to gain efficiencies in the consideration of business. Key initiatives in this regard have sought to take better advantage of non-sitting days to both aid the conduct of business on sitting days, as well as ensure members do not have to wait for the next sitting day in order to manage or progress certain items business.

While such practices were not uncommon in previous parliaments, the 57th Parliament has greatly expanded the scope and acceptability of such procedures. Initiatives in this regard have been underpinned by a degree of respect and collaboration across the chamber in regards to the role of members and their right to conduct business in a timely manner. Key sessional orders include:

- the Selection of Bills Committee process which gives consideration to inquiry references prior to the sitting of the House (discussed earlier),
- the Whips List process which negotiates the order of private member's business prior to the sitting of the House (discussed earlier),
- permitting written questions to be asked each business day rather than each sitting day (discussed earlier),
- delegating authority to allow members and the President to agree to applications by the Government to vary the scope of orders for papers made under standing order 52 (new), and
- delegating authority to the Privileges Committee to resolve disputed claims of privilege made over documents returned to orders for papers (previously only used prior to prorogation).

With the exception of the authority delegated to the Privileges Committee, in each of these instances the House has ensured it has final authority via a resolution of the House to give effect to the delegated or informal agreements. While the House has exercised its retained right to debate and amend proposed resolutions, in the main, the collaboration by members outside the House has resulted in resolutions being adopted by the House without amendment or debate.⁵⁵ These practices have resulted in efficiencies on the floor of the House, with resolutions relating to which bills should be referred for inquiry, the conduct of business on private members day, and agreements to vary the scope of orders made under standing order 52 being agreed to in a matter

⁵⁵ Six amendments have been proposed in the House 2019, 2020 and 2021 to vary resolutions to adopt the recommendations of the Selection of Bills Committee. Only one has been successful. See *Minutes*, NSW Legislative Council, [11 May 2021](#), p 2148, item 8.

of minutes. As discussed earlier in relation to committees and private members' business, this efficiency in the conduct of business and diversification in the means by which business is considered has certainly assisted the current Parliament to pursue in extraordinarily busy and complex agenda and ensure business is conducted in as timely a manner as possible.

Final remarks

" This year ... we have consider[ed] how we can do our job as a House of review better. Many of the things that we have started doing ... have made our Chamber more able to do its job for the people of New South Wales. I hope most members have that view. I will not say that everything we have done has been in that category, but I will have the opportunity to return to that subject on another occasion."

—*The Hon. Don Harwin, then Leader of the Government in the Legislative Council, Liberal Party*⁵⁶

When presenting to the 49th Presiding Officers and Clerks Conference in New Zealand in July 2018, the Clerk of the NSW Legislative Council, remarked that the work of the 56th Legislative Council so far that year, in establishing new committees and progressing matters relating to cabinet information and orders for papers, had taken an already assertive House of Review and ensured it would never be the same again. With hindsight, the sentiments of 2018 seem a significant understatement, but the events that followed the 2019 election and their impact, while building on the work of the 56th Parliament, could not have been foreseen. The 57th Parliament has been transformative for parliamentary practice and procedure and has provided a busy, immensely interesting and complex parliamentary session. The current cohort of members have sought to enhance and utilise the standing orders, powers and privileges of the House in a way perhaps not seen since the *Egan cases*. The new sessional orders and the procedural reform they introduced have been a true achievement for the 57th Parliament. So committed is this cohort of members to procedural reform, the standing orders were referred to the Procedure Committee for a once in a generation review. Needless to say, the extent of procedural reform in this parliament is not over yet, it will be fascinating to see what further changes are made in the months ahead.

⁵⁶ New South Wales, *Parliamentary Debates*, Legislative Council, 21 November 2019, [Christmas Felicitations](#).

Appendix: Sessional orders of the 57th Parliament May 2019 to December 2021

Table 1: New sessional orders introduced in May 2019 following the general election

Sessional Order Title	Related standing order (SO)	Details
Parliamentary secretaries	SO 25	Adopted 8 May 2019.
Interruption of business	SO 32 SO 46	Adopted 8 May 2019.
Members' Statements	SO 48	Adopted 8 May 2019; amended 26 February 2020.
Questions to Ministers and other members	SO 64	Adopted 8 May 2019.
Supplementary questions and written answers, next sitting day	SO 64	Adopted 8 May 2019.
Rules for questions, answers to be directly relevant	SO 65	Adopted 8 May 2019.
Timeframe for providing answers to questions and lodgement of written questions	SO 66 SO 67	Adopted 8 May 2019.
Take note of answers to questions on notice	SO 67	Adopted 8 May 2019; amended, 19 June 2019; amended 7 August 2019; amended 22 August 2019.
Short form motions	SO 186	Adopted 8 May 2019.
Conduct of visitors	SO 196	Adopted 8 May 2019.
Powers of committees – Visits of inspection	SO 208	Adopted 8 May 2019.
Orders for the production of documents by committees	SO 208	Adopted 8 May 2019.
Chair and Deputy Chair	SO 211	Adopted 8 May 2019; amended 18 November 2020.
Substitute members	SO 218	Adopted 8 May 2019.
Electronic participation in committee proceedings	SO 218	Adopted 8 May 2019; amended 24 March 2020.
Government responses	SO 233	Adopted 8 May 2019.

Table 2: New sessional orders introduced from October 2019 to December 2021 (including those related to the pandemic)

Sessional Order Title	Related standing order (SO)	Details
Election of President	SO 12	Adopted 17 March 2021.
Minister to be present in the House	SO 34	Adopted 14 October 2021.
Postponement of a scheduled meeting	SO 35	Adopted 24 March 2020. (COVID-19 Pandemic)
Recall of House	SO 36	Adopted 24 March 2020. (COVID-19 Pandemic)
Administrative procedures in the chamber		Adopted 12 May 2020. (COVID-19 Pandemic)
Communication of orders for papers	SO 52	Adopted 9 June 2021.

Variations to the scope of an order for papers	SO 52	Adopted 10 November 2020.
Privileges Committee and Independent Legal Arbitrator Reports	SO 52	Adopted 6 August 2020.
Privileges Committee and Independent Legal Arbitrator Reports	SO 52	Adopted 24 March 2020. (COVID-19 Pandemic)
Remote participation		Adopted 12 October 2021. (COVID-19 Pandemic)
Electronic petitions		Adopted 19 October 2021.
Conduct of divisions (Stand up divisions)		Adopted 2 June 2020. (COVID-19 Pandemic)
Conduct of divisions (Walk through divisions)		Adopted 12 October 2021, expired 19 October 2021. (COVID-19 Pandemic)
Suspension of standing orders 184 and 185	SO 184 SO 185	Adopted 3 June 2020.
Committee evidence	SO 222	Adopted 17 March 2021.
Consideration of Chair's draft reports	SO 227	Adopted 20 November 2019.
Debate on Committee reports and Government responses	SO 232	Adopted 18 March 2021.

Table 3: Sessional orders first introduced 2004-2018 and re-adopted 8 May 2019 (including those with variations)

Sessional Order Title	Related standing order (SO)	Details
Adjourning the House in the absence of a Quorum	SO 29 SO 30	First introduced in 2007, re-adopted 8 May 2019.
Conduct of business	SO 37	First introduced in 2015, re-adopted 8 May 2019.
Formal motions	SO 44	First introduced in 2007, re-adopted 8 May 2019.
Tabling of reports and other documents when House not sitting	SO 55	First introduced in 2009, re-adopted 8 May 2019 with minor changes to clarify operation.
Consideration of a document	SO 57	First introduced in 2015, re-adopted 8 May 2019 with minor changes to clarify operation and a variation to provide additional time limits to the mover of the motion.
Government response to petitions	SO 68	First introduced in 2014, re-adopted 8 May 2019 with a variation to clarify the role of the Leader of the Government in the Council in the administrative and non-compliance provisions.
Lapsed questions, resumption of debate following loss of Quorum	SO 106	First introduced in 2009, re-adopted 6 May 2015.
Votes of members with the care of a child	SO 113	First introduced in 2016, re-adopted 8 May 2019 with minor changes to clarify operation.
Cut-off dates for government bills in the Budget and Spring sitting periods		Introduced routinely since 2002 as temporary orders containing a specific cut-off date each sitting period, re-adopted with a variation 8 May 2019 as a sessional order which applies "within the last two sitting weeks" of each sitting period.

Time limits to debate on government bills		First introduced in 2011, re-adopted 8 May 2019 with a variation to provide additional speaker time for the first crossbench member.
Selection of Bills Committee—Resolution		First introduced 23 November 2017, re-adopted 8 May 2019 with minor changes to clarify operation.
Instructions to committee of the whole	SO 141 SO 172 SO 180	First introduced in 2015, re-adopted 8 May 2019 with minor changes to clarify operation.
Passing of bill through all stages	SO 154	First introduced in 2015, re-adopted 8 May 2019.
Substituting an item in the order of precedence	SO 185	First introduced in 2011, re-adopted 8 May 2019; suspended 3 June 2020.
Expiry of private members' business notices of motions	SO 185	First introduced in 2011, re-adopted 8 May 2019.
Debate on private members' motions	SO 186	First introduced in 2011, re-adopted 8 May 2019 with a variation to the procedures for the interruption of debate.
Postponement of items in the order of precedence	SO 188	First introduced in 2011, re-adopted 8 May 2019.
Suspension of standing and sessional orders	SO 198	First introduced in 2009 (varied in 2011), re-adopted 8 May 2019.
Pecuniary interest	SO 210 (10)	First introduced in 2007, re-adopted 8 May 2019.
Participation by members of the House and others	SO 218	First introduced in 2015, re-adopted 8 May 2019.

Table 4: Sessional orders required by and complement a standing order (including those with variations)

Sessional Order Title	Related standing order (SO)	Details
Interruption for adjournment (midnight)	SO 32	Adopted 8 May 2019 with a variation to provide for a hard adjournment at midnight.
Sitting days	SO 35	Adopted 8 May 2019; amended 26 February 2020.
Scheduling of Government and General business	SO 40	Adopted 8 May 2019; amended 26 February 2020.
Scheduling and duration of debate on committee reports and government responses	SO 41 SO 232	Adopted 8 May 2019 with a variation to provide for debate on government responses.
Time for questions without notice	SO 47	Adopted 8 May 2019.