

The Shake-Up: New rules in play for the NSW Legislative Council

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Abstract. In 2019, a post-election non-government majority seized the day and undertook the biggest single shake up of the rules of the NSW Legislative Council since 2004. Forty-one rules were adopted on the first day of business for the 57th Parliament. Seventeen more followed. Some give effect to procedures previously trialled, others were necessitated by the pandemic. Many were new. Primarily the House desired to further enhance its ability to scrutinise the Executive, as well as provide more opportunities for private members' business to conduct business. To achieve these objectives, a wide array of House procedures were revised, including: Questions, private members' business, committees, the conduct of business, the adjournment and parliamentary secretaries. This article outlines the context for change in 2019, details the new rules adopted between May 2019 and December 2021, and reflects on their operation. The impact of the new rules is also explored. In doing so it becomes apparent that the extent of procedural reforms and their use by members is a significant achievement for the Council.

¹ The views in this paper are those of the author and do not necessarily reflect those of the Parliament of NSW or their members. An earlier version of this paper was presented at the 2022 ASPG Conference, Victoria.

... 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

INTRODUCTION

The rules and procedures observed by parliaments serve to ensure our democratic institutions function. Given their role, the rules adopted by jurisdictions, as well as the differing approaches taken to determine them, are of common interest across parliaments. In New South Wales, the 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 resulting from the 2019 State election was the impetus for a wide ranging shake up in the 57th Parliament. This article will explore the wide array of House procedures that were

² D. Shoebridge, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, pp 135-136.

³ The House may also introduce rules which regulate proceedings via 'resolutions' or 'temporary orders'. While in New South Wales 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 A. Searle, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, pp 77-78, p 82, p 106.

⁵ D. Shoebridge, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, pp 78.

⁶ Revd F. Nile, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, pp 113.

revised between May 2019 and December 2021 by outlining the context for change in 2019, detailing the new rules adopted, and reflecting on their operation. It is hoped these insights prove useful for other jurisdictions who embark on procedural reform.

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 58 sessional orders were 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. The new rules have been far-reaching, with few areas of the operation of the House unchanged. New sessional orders have been adopted for questions, committees, private members' business, the conduct of business, the sitting pattern and parliamentary secretaries.

As a result of the wide scope of change, it is not possible for this article to individually assess each new rule 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

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.

⁷ This paper is guided by 'the great principles of English parliamentary law', as quoted and summarised in the form of six questions in D. Blunt, *Parliamentary traditions, innovation and 'the great principles of English parliamentary law'*, Parliament of NSW, presented at ANZACATT, Canberra, 2012.

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.⁹ The adoption of new Standing Orders could indeed mark this Parliament as having introduced the single most wide-ranging reform of the rules of the House.¹⁰

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 1902.¹¹ In the 57th Parliament there were 234 Standing Orders, adopted in 2004, and 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 reflects the needs of the House in that parliamentary session.¹²

From the reconstitution of the Council in 1978 until 2004, sessional orders were progressively adopted and relied on 'to cover the increasing gaps' in the Standing Orders.¹³ During this time, procedural reform could be characterised as ongoing but intermittent, with rules considered at the commencement of a parliament or as an issue arose. Simplifying and codifying this complicated body of sessional orders was the driving impetus for the 2004 revision, with only a limited number of new procedures introduced.¹⁴

⁸ See Christmas Felicitations, New South Wales, *Parliamentary Debates*, Legislative Council, 21 November 2019.

⁹ See New South Wales Procedure Committee Review of the Standing and Sessional Orders inquiry, *Review of the Standing and sessional orders*, Legislative Council, 31 March 2022.

¹⁰ Subsequent to the finalisation of this paper in December 2021, the New South Wales Legislative Council adopted new Standing Orders on 17 November 2022, approved by Her Excellency the Governor on 20 February 2023.

¹¹ *Constitution Act 1902*, (NSW) 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.

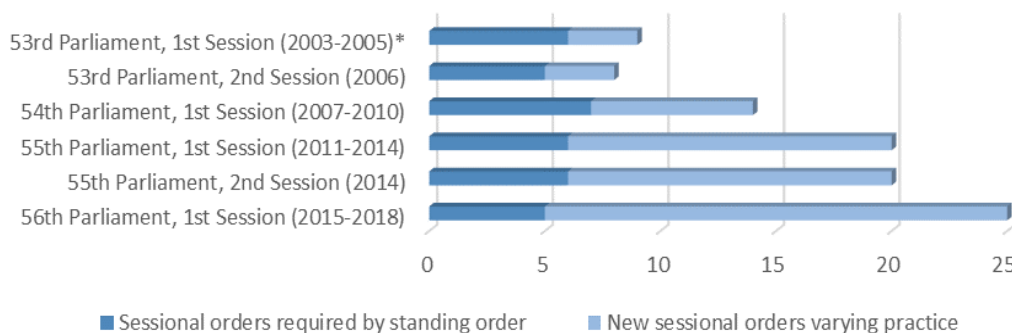
¹² While there is a solid body of precedent relating to the use of sessional orders by the Council, there have been discussions concerning their status and use in the current parliament. These issues are discussed further in V. Mignacca, *Sessional orders as a vehicle for procedural reform in the New South Wales Legislative Council*, Parliament of NSW, 2022.

¹³ M. Egan, New South Wales, *Parliamentary Debates*, Legislative Council, 5 May 2004, p 8264.

¹⁴ 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*

A similar, incremental, increase in the use of sessional orders 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 (e.g. times of meeting, 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 increasing use of sessional orders, providing a breakdown of sessional orders required by Standing Order, compared to those which varied or introduce new practices and procedures.

Figure 1. 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.¹⁵ More often, the House established committee inquiries to review an existing practice as need arose or consider a new sessional order when proposed. Thirteen such inquiries were conducted by the

Legislative Council, The Federation Press, 2018, for a comprehensive examination of the purpose, operation and development of the Council's Standing Orders.

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

¹⁵ New South Wales, *Minutes*, 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 as closed via 'guillotine' motions which required the 'question be now put' (Standing Order 9).

Procedure Committee between 2004 and 2019,¹⁶ as well as a 2016 committee inquiry into the Legislative Council Committee System.¹⁷ Particularly in 2011, at the commencement of the 55th Parliament, and in 2017 in the later part of the 56th Parliament, inquiries 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 Committee¹⁸, government responses to petitions, the operation of private members' business, and voting by 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.

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.¹⁹ 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

¹⁶ 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. Accessed at: <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=191#tab-inquiries>.

¹⁷ See New South Wales Select Committee on the Legislative Council Committee System, *The Legislative Council committee system*, Legislative Council, 28 November 2016, p vi-ix.

¹⁸ 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.

¹⁹ 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).

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, 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, with the then Leader of the Government, the Hon Don Harwin MLC, stating: 'we are taking a collaborative approach to these proposals'.²⁰ Ultimately, the Government either supported or did not oppose, all but one of the sessional orders proposed. On the first day of business for the 57th Parliament the post-election work of members bore success with 41 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.²¹ The remaining 16 sessional orders were new. All but one of these forty-one sessional orders passed 'on the voices'.²²

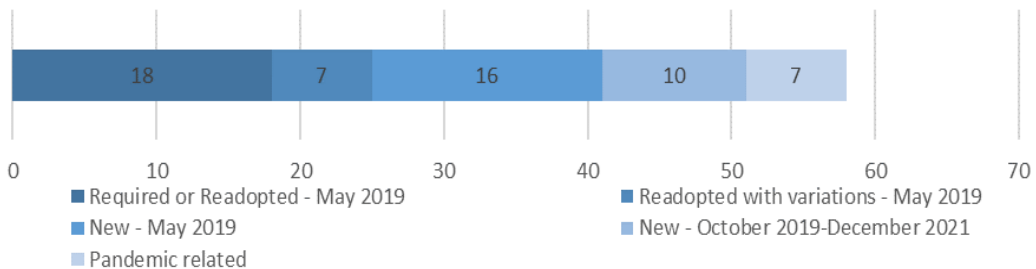
The shake-up continued throughout the 57th Parliament, with members maintaining a sustained focus on the rules and procedures of the House and continuing their efforts in procedural reform. Between May 2019 and December 2021, an additional 17 sessional orders were adopted and six sessional orders were amended. Only one, relating to the conduct of divisions during the height of the pandemic, has been rescinded. As at December 2021, 58 sessional orders had been passed, with fifty-seven still in operation.

²⁰ D. Harwin, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019 p. 78.

²¹ It is further noted that some others contained minor variations but are generally considered to be in the same form.

²² See New South Wales, *Minutes*, Legislative Council, 8 May 2019.

Figure 2. Breakdown of 57th Parliament sessional orders



The number 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:

- increased 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 on non-sitting days, including by delegating authority over specific matters to a committee or the President.

This article will explore each of these areas of change within three themes: scrutiny, private members and conducting business.²³

²³ A detailed list of each sessional order adopted in the 57th Parliament was published as an Appendix to an earlier version of this paper, presented at the 2022 ASPG Conference, Victoria. The current standing and sessional orders are published in full via the Legislative Council *Rules of the House* webpage. Accessed at: <https://www.parliament.nsw.gov.au/lc/proceduralpublications/Documents/LC%20Know%20your%20House%20Guide%202023%20WEB.pdf>.

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, ALP²⁴

...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 Party²⁵

The Legislative Council is an effective ‘House of Review’. 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. 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.²⁶ 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.

²⁴ A. Searle, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 77.

²⁵ R. Borsak, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 113.

²⁶ 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.²⁷ 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:

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

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

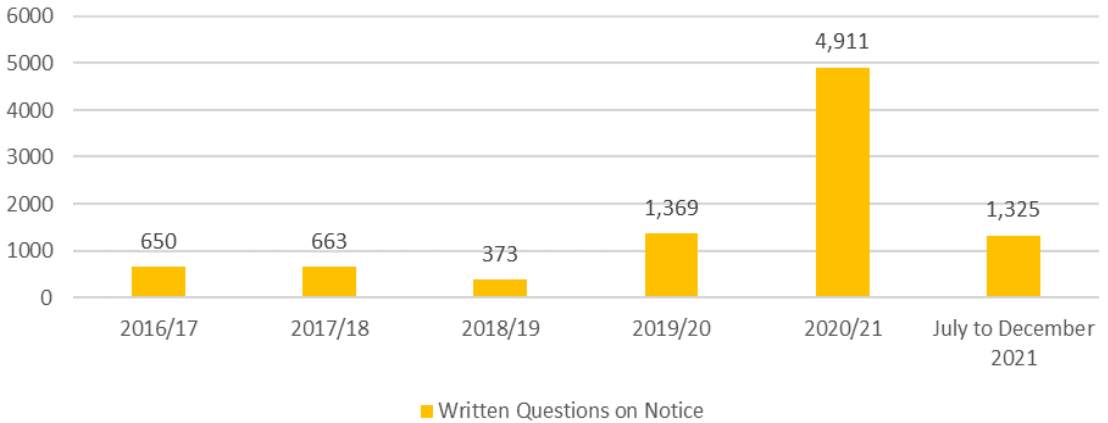
They also appear to have produced many of their intended outcomes. These sessional orders have certainly provided more opportunities for members to ask questions, seek further explanation and debate answers given.

The most 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 a two to seven

²⁷ Susan Want and Jenelle Moore, *Annotated Standing Orders of the New South Wales Legislative Council*, The Federation Press, 2018, pp 212-214.

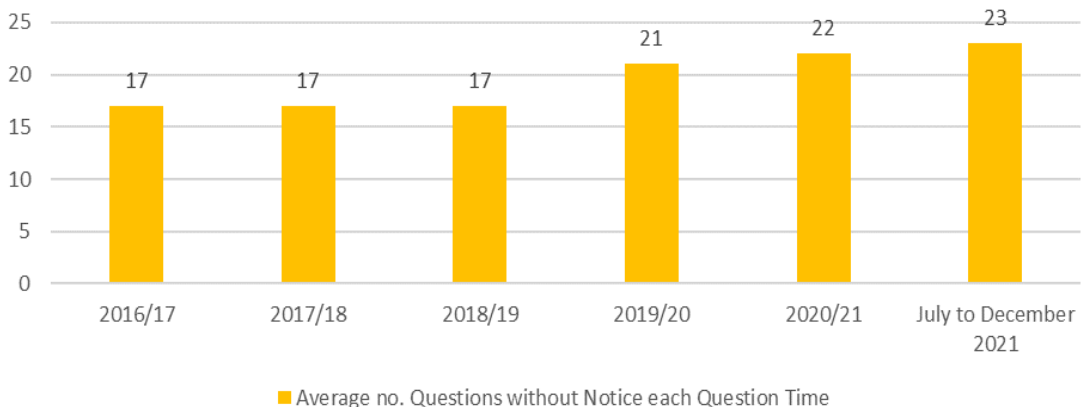
time increase in the number of questions asked annually in the 57th Parliament compared to the 56th Parliament.

Figure 3. Written Questions on notice 2016/17 – July to December 2021



There has also been an increase in the average number of questions asked in the House each Question Time, from 17 to 23. One contributing factor in this regard is the shorter time frames for supplementary answers, from three minutes down to two. Where three primary questions with answers would take twelve minutes, one primary question and two supplementary questions with answers takes ten. The modest increase is therefore unsurprising as the duration of Question Time has remained the same at one hour.

Figure 4. Questions Without Notice 2016/17 – July to December 2021



The new sessional orders also reduced timeframes for the submission of answers from 35 down to 21 days. This has been successful in shortening the time members must wait for an answer, improving the timeliness of the response. The Council has enjoyed strong compliance with answer timeframes by consecutive governments, and the current Government has consistently met the new reduced timeframes. While already historically rare, in this parliament no minister has been called to account for non-compliance for a failure to provide a response within the timeframe.²⁸

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 encourage ministers to 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.²⁹ In some instances members have sought information not forthcoming via questions by seeking to order State papers under Standing Order 52. 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, not create them.³⁰

Committees

The Council committee system is a much-valued mechanism through which members scrutinise the policies and actions of the executive. Informed by the 2016 inquiry on the Legislative Council Committee System,³¹ and to meet members' objectives for greater equity between the operation of the House and its committees, twelve

²⁸ 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.

²⁹ See The Hon. Adam Marshall, New South Wales, *Parliamentary Debates*, Legislative Council, 20 October 2021.

³⁰ See e.g. 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.

³¹ See New South Wales Select Committee on the Legislative Council Committee System, *The Legislative Council committee system*, Legislative Council, 28 November 2016, p vi-ix.

sessional orders were adopted relating to committees—nine of which were new.³² Key sessional orders relating to committees include:

- a framework for committees to order State papers under Standing Order 208 (new)
- a requirement that, if 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)
- provisions to debate government responses to committee reports (new), and
- a ‘Selection of Bills Committee’, which reports to the House each sitting week with recommendations on whether new bills should be referred for a short inquiry by a standing committee (re-adopted following a 2018 trial).³³

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 timeframe 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 could be debated simultaneously. Other minor operational issues relating to the bill restoration process contained in the Selection of Bills Committee resolution were also raised.

The sessional order providing committees with a framework to order 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 committee powers in this regard are uncertain and accordingly, documents should only be

³² 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.

³³ New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 113.

produced to orders made by the House under Standing Order 52.³⁴ Since its adoption, committees have sought to use the power on two occasions. In the first instance no documents were provided.³⁵ In the second, documents were provided on a ‘voluntary basis’.³⁶ To ensure committees are not impeded by this impasse, members have relied on Standing Order 52 and utilised the powers of the House on behalf of the committee.³⁷ This has at times delayed the evidence available to a committee, and also resulted in greater complexity in the work undertaken by members, who have increasingly drawn on the powers and processes of committees and the House concurrently, 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 has been more effective. While past practice was generally very good, it was not without issue,³⁸ and the non-compliance mechanism was introduced to address concerns that not all responses adequately or directly addressed each recommendation. To December 2021, 58 government responses had been received. On two occasions the Government 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 at the time, pending receipt of the response to the final report.³⁹ In the second instance, the Government advised prior to

³⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 106.

³⁵ See New South Wales, *Minutes*, Legislative Council, 24 March 2020, p 855, item 26 and New South Wales, *Minutes*, Legislative Council, 12 May 2020, p 855, item 22. In response to an order by New South Wales, 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.

³⁶ New South Wales, *Minutes*, Legislative Council, 12 October 2021, p 2443.

³⁷ 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.

³⁸ 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.

³⁹ New South Wales, *Minutes*, Legislative Council, 23 May 2020, p 948.

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. A process to continue each month until a response was received.⁴⁰

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 undertook relatively low levels of legislative review compared to other jurisdictions.⁴¹ 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—in short it ‘selects bills’ for inquiry.⁴² The Committee also recommends which committee should undertake the inquiry, the stage a bill should be referred from and the timeframe of the inquiry. The recommendations of the Committee are usually adopted by the House without amendment or debate and proved to be a more efficient mechanism than the existing practice of referring a bill at the conclusion of the second reading debate.⁴³

The Selection of Bills process has also created greater links between committees and the House relating to legislative review. Inquiries into referred bills allow detailed consideration of the provisions of the bill by members and public stakeholder engagement. While the short length of the inquiry ensures legislation is not unduly delayed, it does not allow for a detailed report, or exhaustive findings or recommendations, as expected from other inquiries. Instead, a recommendation is made to the House on whether the bill should proceed. It is expected that the key issues raised during the inquiry will be acknowledged and addressed during any further consideration of the bill.

⁴⁰ New South Wales, *Minutes*, Legislative Council, 12 October 2021, p 2430, 16 November 2021, p 2713.

⁴¹ Select Committee on the Legislative Council Committee System, New South Wales, *Parliamentary Debates*, Legislative Council, 4 April 17.

⁴² New South Wales, *Minutes*, 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.

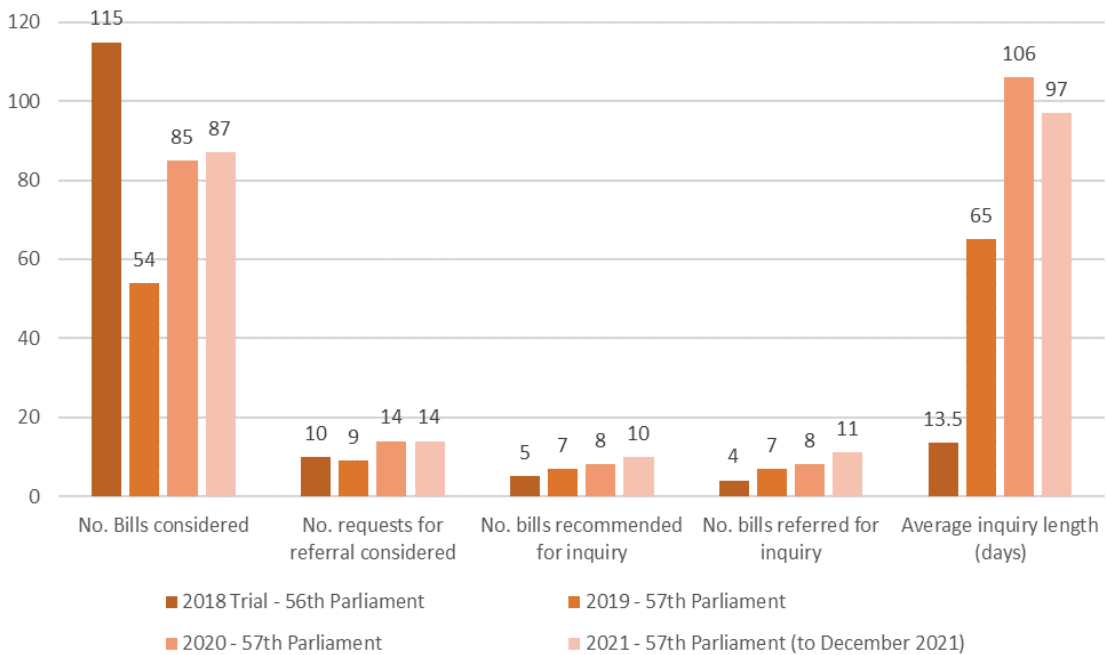
⁴³ See Standing Rules and Orders of the Legislative Council (NSW) standing order 140(2)(c).

This increased use of committee and House processes was discussed in the 2018 self-evaluation report on the effectiveness of the first Selection of Bills Committee. The then Chair, the Hon Natasha Maclaren-Jones MLC (Government), noted that the Committee ‘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.’⁴⁴

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 each year since 2018.

⁴⁴ New South Wales, Selection of Bills Committee, *Evaluation of the Selection of Bills Committee trial*, Legislative Council, November 2018, p vi.

Figure 5. Selection of Bills Committee 2018 - 2021⁴⁵



While much of the impact of the new rules regarding committees was as intended, the scale at which members have interlinked House and committee processes was not anticipated. 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 for legislative review, and to scrutinise the executive. This change is evidenced by the work of members in scrutinising 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 this change has also been a consequence of the challenge to the power of committees to order State papers, these two examples go well beyond the use of Standing Orders 208 and 52, and show how the already assertive Council has approached scrutinising the executive in the 57th Parliament.

⁴⁵ 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.

Parliamentary Secretaries

The NSW Constitution provides for the appointment of Parliamentary Secretaries as part of the Executive, to perform functions as determined by the Premier.⁴⁶ 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, some members became concerned that parliamentary secretaries were being allocated tasks that went beyond their intended ‘secretary’ function without being subjected to appropriate accountability.⁴⁷ In response, in May 2019 the House adopted sessional orders which allowed for increased scrutiny of parliamentary secretaries and limited their participation as private members.⁴⁸ This included:

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

While the new sessional orders were passed on the voices, the Government disagreed 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 ‘inappropriate’ and the House was cautioned to have ‘realistic expectations’ about the outcomes of the new rules.⁴⁹

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. For example, certain committees are exempt from the restrictions relating to Chairs and the new rules do not exclude all participation as a private member, with parliamentary secretaries continuing to conduct private members’ business and contribute to other debates. The new rules have had a particular impact on government backbench members, whose

⁴⁶ *Constitution Act 1902* (NSW) Part 4A

⁴⁷ Parliamentary Secretary, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 102.

⁴⁸ 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.

⁴⁹ New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 102.

opportunity to perform duties previously undertaken by parliamentary secretaries, such as asking government questions or acting as committee chairs, has expanded.

The new sessional order allowing Questions to parliamentary secretaries 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, who is employed by parliament to support her work as a member and not a ministerial employee. This question was ruled out of order as it did not relate to her official public duties or those of her minister.⁵⁰

While overall these restrictions mirror long observed conventions followed by Ministers, this is the first time they have been formalised in the rules of the House or applied to parliamentary secretaries. 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*⁵¹

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

⁵⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 30 May 2019, pp 84-85.

⁵¹ New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 78.

ongoing concerns that private members' business was conducted inefficiently and 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, unless a member objects, the President puts 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 was not a remedy for the inefficient conduct of private member's day wherein only a relatively small number of motions were debated each year.⁵² To address this inefficiency, in June 2015 members began informally negotiating the order of business for private members' day. At the commencement of the sitting the House would adopt a motion 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 each day.⁵³

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

- readopted provisions relating to formal motions under Standing Order 44
- formally suspended the Standing Orders that determined the precedence of private members' business via a draw (Standing Orders 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 members day which frequently continues until midnight (previously private members' day was scheduled (under Standing Orders 40 and 32) on Thursday until 3.30 pm), and

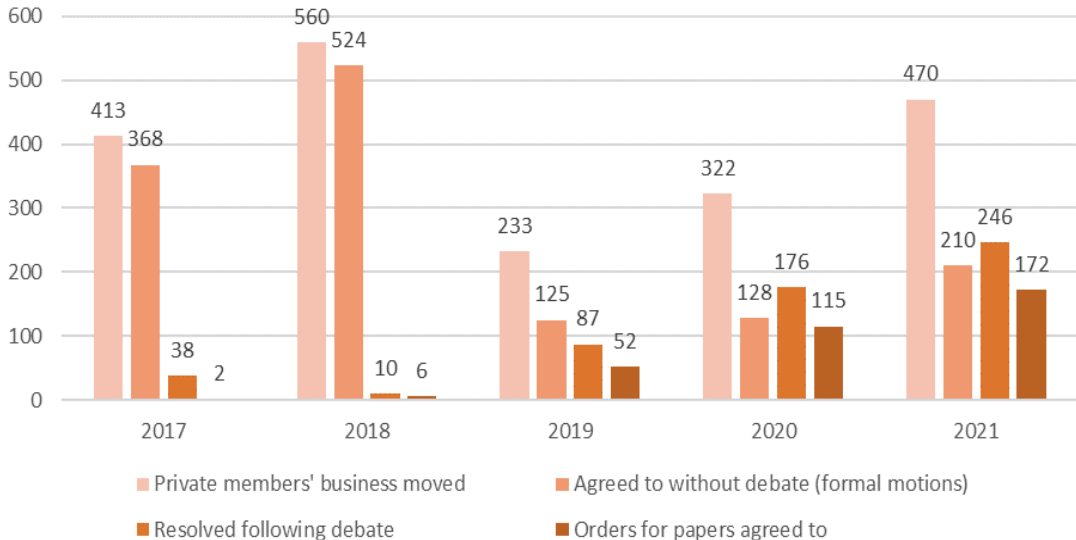
⁵² See Steven Reynolds, *Cane Toads, Notices of Motion and the Law of Unintended Consequences*, Parliament of NSW, presented at 60th CPA Conference, 2014 for a detailed discussion on the impetus and impact formal motions under Standing Order 44.

⁵³ New South Wales, *Minutes*, Legislative Council, 4 June 2015, p 191.

- 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 private members’ business considered has been remarkable. The current Whip’s List regularly prioritises thirty items of business, a significant increase from the first list in 2015, which gave precedence to four items. While the Whip’s List has greatly improved the organisation of private members’ day, 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—compared to the 3.5 hours previously provided on a Thursday. Coupled with ‘short form’ 30-minute debates for motions, at least ten items of business are now debated each private members’ day, 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.

Figure 6. Private members’ business 2017 - 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, including:

- a sharp and increasing rise in the number of motions which order State papers under Standing Order 52 (see ‘orders for papers’ in the chart above), many of which pass following statements by the mover and a government representative, or as formal motions without debate
- a rise in private members’ bills being considered, a consequence in part of the Whip’s List affording bill introductions priority
- general motions which acknowledge community achievements or current issues, are more likely to be considered as formal motions without debate, and
- shorter debate times and an increased agenda have constrained the contributions of members in some instances.

Assessing these trends would provide valuable insights on the broader impact of the new sessional orders relating to private members’ business and 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 have become too orderly?

Members’ statements

The new sessional orders also introduced ‘Members’ Statements’—a 30-minute wide-ranging debate each private members’ day. During this debate, members who are not ministers or parliamentary secretaries, may speak once, for up to three minutes, on any matter of their choosing. There were approximately 380 Members’ Statements 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 houses of the day...

—Mr Adam Searle, ALP⁵⁴

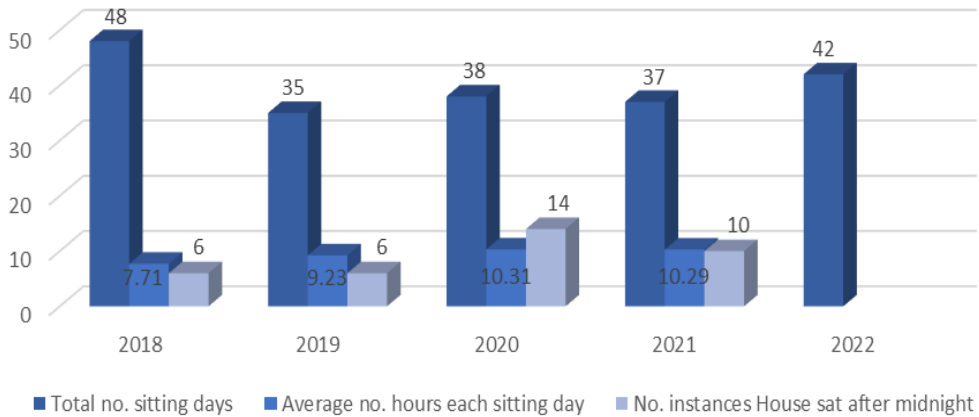
The pattern of business and the hours kept by the House has been an area over time where members have expressed strong views that the House should not frequently sit past midnight nor should it keep hours that disadvantage regional members. To seek to address these concerns private members day was rescheduled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

Ironically, the hard adjournment has become a default, with business frequently conducted until the midnight interruption. The House now sits late on more occasions and consequently a steady and significant lengthening of the average sitting day has occurred. 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.⁵⁵

⁵⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 80.

⁵⁵ 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.

Figure 7. Sitting days and hours 2018 - 2021, scheduled days 2022



Conducting business

The third and final objective which drove procedural reform 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 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 regarding 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 Whip's 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)
- delegated authority to members and the President to consider applications from the Government to vary the scope of orders for State papers made under standing order 52 (new), and

- delegated authority to the Privileges Committee to resolve disputes over claims of privilege made on returned State papers (previously only used prior to prorogation).

With the exception of the delegated powers to the Privileges Committee, the new rules were designed to ensure the House retained final authority, with a resolution ultimately required to give effect to any delegated or informal agreements. While there are examples of the House exercising its retained authority, in the main, the collaboration by members outside the House has resulted in resolutions being passed without amendment or debate.⁵⁶ The resulting efficiencies on the floor of the House, now see resolutions referring bills for inquiry, determining the conduct of business on private members' day, or varying the scope of orders for State papers, being passed in a matter 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.

LOOKING AHEAD

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 Party⁵⁷

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

⁵⁶ 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 New South Wales, *Minutes*, Legislative Council, 11 May 2021, p 2148, item 8.

⁵⁷ Christmas Felicitations, New South Wales, *Parliamentary Debates*, Legislative Council, 21 November 2019.

56th Legislative Council had taken an already assertive House of Review and ensured it would never be the same again. With hindsight, these sentiments, widely held in 2018, understated what was to follow. The significant changes to the rules of the House introduced following the 2019 election and their impact, while indeed built on the work of the 56th Parliament, were not expected or foreseen. The 57th Parliament has been transformative for parliamentary practice and procedure and has provided a busy, immensely interesting and complex parliamentary session. The members of the 57th Parliament sought to enhance and utilise the Standing Orders, powers and privileges of the House in a way perhaps not seen since the *Egan* cases.⁵⁸ The new sessional orders and the procedural reform they introduced have been a true achievement for the 57th Parliament. So committed was this cohort of members to procedural reform, the Standing Orders were referred to the Procedure Committee for a once in a generation review. This review ultimately led to the formal adoption of new rules in February 2023. It will be fascinating to see what impact these changes will have into the future, and what lessons the Legislative Council's approach may hold for other jurisdictions who consider significant procedural reform.

⁵⁸ See e.g. Gerard Carney, *Egan v Willis and Egan v Chadwick: The Triumph of Responsible Government*. The Federation Press: 2007, p. 298.