Chapter 10

DEBATE

BEFORE THE SENATE makes decisions by means of resolutions and orders which begin as motions, that is, propositions submitted to the Senate by senators and accepted by the chair as questions to be put to the Senate (see Chapter 9, Motions and Amendments), the Senate usually debates those questions. Debate fulfils one of the primary functions of the Senate, that of informing itself and the public by deliberation before decisions are made.

Motions debatable

Every motion moved in the Senate may be debated before the question on the motion is put to a vote, except where the standing orders explicitly provide that a question is to be decided without debate.

The following motions are not debatable:

(a) formal motions (SO 66)

(b) to determine the postponement of business for which the senator in charge has lodged a postponement notification (SO 67)

(c) for the first reading of bills, except bills which the Senate may not amend (SO 112(1))

(d) for a bill to be considered an urgent bill (SO 142(1))

(e) for the chair to report progress and ask leave for the committee of the whole to sit again (SO 144(6))

(f) that an objection to a ruling by the chair requires immediate determination (SO 198(2))

(g) for an extension of time for a senator to speak (SO 189(1))

(h) for a debate to be adjourned (SO 201(2))

(i) for the closure of a debate (SO 199(1))

(j) for a senator to be suspended from the sitting of the Senate, in case of disorder (SO 203(3))

(k) for the business of the day to be called on, moved during discussion of a matter of public importance (SO 75(8)).

Committee reports, on their presentation, are also not debatable (SO 39). Special provision for debate on committee reports is made by standing order 62, and committee reports are also frequently debated by motions moved by leave.

Personal explanations and explanations of speeches made in the course of debate are not debatable (SO 190, 191).

Debate must be directed to a motion, and without a motion there can be no debate. The only exceptions to this rule are in explicit provisions in the standing or other orders of the Senate which provide that debate may proceed without a question before the chair, for example, on a matter of public importance proposed under standing order 75.

Some motions are designed as vehicles for debate without calling upon the Senate to make any decision, for example, motions to take note of documents. Such motions, however, may be the subject of amendments which call upon the Senate to make decisions (see Chapter 9 under Amendments), for example, to endorse or repudiate the contents of a document.

Sometimes motions are debated together (see Chapter 8, Conduct of proceedings, under Items of business taken together).

Right to speak

When a motion is moved by a senator and accepted by the chair the mover of the motion may speak to it, thus initiating the debate. Other senators wishing to speak in the debate seek the call of the chair to speak by rising in their places and addressing the President (SO 186(1)). The President determines which senator speaks next in the debate by granting the call to speak to a senator who has risen. Standing order 186(2) provides:

> Subject to the practices of the Senate relating to the call to speak, when 2 or more Senators rise together to speak, the President shall call upon the Senator who, in the President's opinion, first rose in the Senator's place.

The practices of the Senate referred to in the standing order were set out in the 2nd Report of 1991 of the Procedure Committee (PP 466/1991).

Presidential rulings of the past have explicitly identified the following practices:

(a) Senators are usually called from each side of the chamber alternately.

(b) The call is given to the Leader of the Government in the Senate and the Leader of the Opposition in the Senate before other senators.

(c) A minister in charge of a bill or other matter before the Senate is usually given the call before other senators.

The following practices have also been applied:

(d) An Opposition senator leading for the Opposition in relation to a bill or other matter before the Senate is usually given the call before other senators.

(e) Leaders of other non-government parties are usually given the call before other senators, subject to the foregoing practices.

(f) Senators who have a right to the call under these practices are discouraged from exercising it if that would have the effect of closing the debate when other senators wish to speak.

The Procedure Committee explained that these practices should be regarded as being applied in the order indicated, so that each practice is subject to those that precede it in the list. If interpreted in this way, the various practices are consistent with each other.

In many debates an agreed speakers' list is compiled by the party whips and provided to the chair, and senators normally seek and receive the call in accordance with the list. The Standing Orders Committee in 1974, having considered the status of this list, reported that the list is "unofficial and no curb on the President, whose duty and privilege it [is] to say which senator .... [has] a prior right to speak", and that the list could be used "on the understanding that it is unofficial and must not be referred to in debate". The Senate adopted the committee's report (3rd Report, 56th Session, PP 277/1974; 11/2/1975, J.498). The list should also be regarded as subject to each of the practices outlined above. For example, the principle of balance between parties takes precedence over the list (statement by President Calvert, SD, 15/11/2002, p. 6475).

In debate in the Senate, each senator may speak once on a motion, subject to the right of reply and the right of a senator to speak to any amendment (SO 188(1)).

The mover of a substantive motion may speak in reply at the end of a debate, and this reply closes the debate (SO 192). There is, of course, no right of reply on a non-debatable motion, nor on a procedural motion such as a motion to suspend standing orders.

The right to speak to any amendment is exercised as follows:

- when an amendment is moved to a motion, a senator who has spoken in the debate may speak again to the amendment

- a senator who has spoken after an amendment has been moved is taken to have spoken to the motion and the amendment and to have exhausted the right to speak, unless a further amendment is moved after the first amendment is resolved, in which case senators who have already spoken may speak to the further amendment

- a senator first speaking to a motion after an amendment has been moved, however, may speak only to the amendment and reserve the right to speak to the motion and move a further amendment after the first amendment is determined

- a senator who has spoken to a motion may not move an amendment, but if there is an amendment before the chair when the senator speaks the senator may foreshadow a further amendment and move it when the original amendment is determined.

The principles relating to the right of a senator to speak to an amendment which are summarised here were set out in a ruling of President Baker, Report of the President to the Standing Orders Committee, 17 August 1905, PP S1/1905.

One of those principles was that the mover of a motion should not speak in reply, thereby closing the debate (see under Reply, below), until any amendments had been determined. The rationale of this rule was to avoid senators losing the opportunity to move further amendments by the closing of the debate. The usual current practice, however, is for senators to foreshadow any further amendments during the debate, for the reply to be made before an amendment is put, and foreshadowed further amendments to be formally moved and put after the original amendment is resolved.

In committee of the whole, each senator may speak more than once to any question before the chair (SO 188(2)).

Time limits on debates and speeches

Time limits are imposed on debates in the Senate and on senators' speeches.

A senator may not speak for more than 20 minutes in any debate in the Senate (SO 189(1)).

This time limit applies to debates generally, but special time limits are imposed on particular debates and on speeches under other provisions in the standing orders, as follows:

(a) election of President (SO 6(2)):
each senator: 15 minutes

(b) motions on Selection of Bills Committee reports (SO 24A(7)):
each senator: 5 minutes
total limit: 30 minutes

(c) adjournment of the Senate (SO 54(5)):
each senator: 10 minutes
total limit: 40 minutes (See Supplement)

(d) matters of public interest at 12.45 pm on Wednesdays (SO 57(2)):
each senator: 15 minutes
total limit: till 2 pm

(e) government documents (SO 61):
on Tuesdays and Wednesdays:
each senator: 5 minutes
total limit: 30 minutes

at general business on Thursdays:
each senator: 5 minutes
total limit: 1 hour

(f) committee reports and government responses (SO 62):
each senator: 10 minutes
total limit : 1 hour

(g) motions to take note of answers after question time (SO 72(4)):
each senator: 5 minutes
total limit for all motions: 30 minutes

(h) urgency motion or matter of public importance (SO 75):
each speaker: 10 minutes
total limit: 1 hour or 90 minutes if no motions moved to take note of answers at question time

(i) first reading, non-amendable bill (SO 112(2)):
each senator: 15 minutes

(j) motions and amendments to refer bills to committees (SO 24A(7), 115(6)):
each senator: 5 minutes
total limit: 30 minutes

(k) bills declared to be urgent — allotment of time (SO 142):
each senator: 10 minutes
total limit: 1 hour

(l) motions by leave to take note of documents (SO 169(2)):
each senator: 10 minutes
total limit: 30 minutes per motion, 60 minutes for consecutive motions

(m) motions for suspension of standing orders (SO 209(4)):
each senator: 5 minutes
total limit: 30 minutes

Where the general time limit of 20 minutes applies to a debate, a senator may move that the time limit be extended by not more than 10 minutes, and that motion is put without debate (SO 189(1)). This procedure applies only to the time limit specified in that standing order, that is, the general time limit of 20 minutes, as the terms of the standing order clearly indicate. Such a motion may not be moved when other speaking time limits apply; in those circumstances a speaker's time may be extended only by leave (a motion to extend such a speaking time limit could be moved pursuant to a suspension of standing orders).

The 20 minute limit applies to a senator speaking in reply to a general debate, and there is no provision for that limit to be extended (SO 189(2)).

In committee of the whole, a senator may not speak for more than 15 minutes on each occasion on each question, but where the speech of a senator is interrupted by this provision and no other senator rises to speak, the senator speaking may continue for a further 15 minutes (SO 189(3)). This means that if only one senator seeks the call to speak on a question there is effectively a total time limit of 30 minutes. In practice, senators are, in effect, granted extensions of time by other senators rising and seeking the call for the purpose of allowing the senator speaking to continue.

Time occupied in raising and determining points of order and in forming quorums does not affect the time allowed for a senator to speak (SO 52(7), 197(6)).

The Senate may set special time limits for particular debates by special order.

A debate which is interrupted by the expiration of a total time limit for the debate is taken to be adjourned (SO 68; see Chapter 8, Conduct of Business, under Interruption of business).

Reading of speeches

A senator may not read a speech (SO 187).

The rationale of the prohibition on the reading of speeches is that reading speeches destroys real debate, which is intended to be an exchange of views and arguments, and that if speeches are read there is greater danger of abuse of proceedings by senators delivering speeches written by others.

This prohibition is modified by well-established practices. It is not applied when a senator is formally making a statement giving the considered views of a committee, the ministry or of a party, for example, a chair of a committee making a statement on behalf of the committee, a minister delivering a second reading speech on a bill or a ministerial statement, or a senator making a statement on behalf of a party. Senators referring to intricate or technical matters may also read parts of their speeches, and, particularly in that circumstance, may refer to copious notes. It is for the chair to determine when these practices apply and whether the prohibition is breached (ruling of President McMullin, SD, 21/8/1969, p. 231).

On several occasions there were attempts to remove the prohibition on the reading of speeches and to qualify the practices whereby the prohibition is modified, but these proposals were rejected by the Senate.

Quotation of documents

A senator may quote documents during a speech, and for that purpose may read from documents.

A statement by a senator that a document is confidential does not prevent another senator quoting it (ruling of Acting Deputy President Giles, 17/6/1992, J.2473).

In quoting a document, a senator is not permitted to utter words which would not be permitted under the rules of debate if uttered in the normal course of speaking. For example, if a document

uses offensive words in relation to another senator which would not be permitted under standing order 193(3) if uttered in debate, the senator may not read those words from the document.

This principle was the subject of debate in 1979 when it was applied by a ruling by the chair. The Privileges Committee and the Standing Orders Committee were each required to report upon the principle, and both supported it as a sound principle (Committee of Privileges, 4th report, Quotation of Unparliamentary Language in Debate, 20 September 1979, PP 214/1979; Standing Orders Committee, 5th Report of 59th Session, 31 March 1980, PP 50/1980; statement by President Reid, SD, 10/8/1999, p.7112; see also statement by President Calvert, SD, 17/10/2006, p. 36). This principle ensures that senators cannot circumvent the rules of debate simply by quoting documents.

The principle applies even to Senate committee reports. A committee should not allow disorderly expressions to appear in a report, but if this occurs it is not in order to quote the expressions in debate (statements by President Calvert, SD, 11/11/2002, p. 5878; 3/8/2004, pp 25361-2).

The right of a senator to quote a document is subject to the right of the Senate to require the production of the document, and a special procedure is provided to enforce the latter right.

When a senator quotes a document, another senator, at the conclusion of the speech, may move a motion without notice that the document be produced. A minister who has quoted a document may state that the document is of a confidential nature, in which case the motion for its production cannot be moved (SO 168(1)). Because a minister may prevent a motion for the tabling of a quoted document by claiming confidentiality, in practice senators do not move motions in relation to documents quoted by ministers but ask ministers to table quoted documents. A senator who is not a minister, however, does not have this exemption, and if a motion for the tabling of a document quoted by a senator is agreed to the senator is required to table the document.

The interpretation of these provisions was twice considered by the Standing Orders Committee. In a report in 1983 the committee considered the question whether the passage of a motion requires the tabling of a document not actually in the possession of the senator who has quoted it. There were conflicting precedents. The committee observed in relation to these precedents:

> Each of the two interpretations of the procedure under the Standing Order involves difficulties. If the procedure requires the tabling only of documents actually in the immediate possession of a Senator, the intention of the Standing Order, that a Senator may be required by the Senate to produce a document which he purports to quote, so that the accuracy and context of the quotation may be ascertained, may be frustrated by a Senator simply leaving outside the Chamber any document which he wishes to quote. On the other hand, if the procedure requires the tabling of the original document regardless of whether the Senator has it in his immediate possession, a Senator is prevented from quoting anything unless he can bring it to the Chamber with him and be able and willing to table it, however voluminous, difficult to produce or confidential it may be.

The committee concluded:

> On balance, it would seem that the better interpretation, in spite of the precedents referred to, is that the procedure requires the tabling only of the document actually in the Senator's immediate possession, which means that if the quotation is contained in speech notes or a copy of the original document, it is those notes or that copy which should be tabled, and that if the Senator is quoting by memory, he is clearly unable to comply with the order of the Senate that the document be tabled. If other Senators consider that a Senator may be making unfair or improper use of quotations from a document which he is not willing to produce, or misrepresenting the contents of a document without giving the Senate an opportunity to check the quotation, these are matters which may be raised in debate.
>
> The committee recommends that the Standing Order be so interpreted in future. (2nd Report, 61st Session, 20 October 1983, PP 111/1983)

The committee's recommendation has been followed in interpreting the standing order.

In a subsequent report the committee examined the standing order in relation to the tabling of documents quoted by ministers and rulings under the standing order, and concluded:

> Those rulings and the terms of the Standing Order clearly indicate that it is intended to apply only to a document relating to public affairs which is actually quoted by a Minister in the course of the Minister's remarks, and has no application to speech notes used by a Minister. The Committee has advised Mr President to rule accordingly. (1st Report, 62nd Session, 14 November 1985, PP 504/1985)

This advice also has been followed, although ministers asked to table documents from which they have quoted often table briefing notes or speech notes.

A motion for the tabling of a quoted document may be debated, but the rule of relevance (see below) applies, so that the debate is confined to the question of whether the document should be tabled.

An order to table a document refers to the whole of the document in the possession of the senator (ruling of President Laucke, SD, 7/9/1977, pp 635-42).

The chair has no responsibility to judge the accuracy or correctness of a document tabled (ruling of President Laucke, SD, 19/5/1976, p. 1728).

Motions for the tabling of quoted documents may be moved in committee of the whole, under the rule that procedure in committee of the whole is the same as in the Senate (SO 144(7)).

Personal explanations and explanations of speeches

There are two procedures for senators to make explanations to the Senate without speaking in debate on a motion.

By leave of the Senate, a senator may explain matters of a personal nature, although there is no question before the Senate, but such matters may not be debated (SO 190). As with other procedures requiring leave of the Senate, an objection by one senator present prevents the making of a personal explanation, but leave is usually granted.

The procedure is usually employed to respond to some misrepresentation of a senator in an earlier debate in the Senate or in some other forum or publication. It is not necessary for a senator to claim to be misrepresented to use this procedure, but the explanation must relate to matters personally affecting the senator (ruling of President Givens, SD, 2/3/1917, p. 10849).

A senator who has spoken to a question before the Senate may explain, without leave, some part of the senator's speech which has been misquoted or misunderstood, but may not interrupt a senator speaking or introduce any new or debatable matter (SO 191). This right to correct misquotations, misunderstandings and, in practice, misrepresentations of a senator's words may be used only where a senator has spoken in a debate, and must be used during that debate or at the conclusion of the debate. It cannot be used to respond to matters in debates which have occurred at an earlier stage in the proceedings. It also cannot be used simply to respond to arguments raised in debate; to use the procedure a senator must claim to be misquoted, misunderstood or misrepresented. (Rulings of President Baker, SD, 2/8/1905, p. 460; 3/8/1905, p. 516.)

Relevance

In speaking to a question a senator may not digress from its subject matter (SO 194).

This rule of relevance is interpreted liberally, so as to give senators the maximum freedom in debate. If a senator appears to be speaking irrelevantly to the question, the senator should be given the opportunity to show how the remarks in question relate to that subject (ruling of President Brown, SD, 5/10/1950, p. 333).

The rule is subject to the proviso that on the motion for the address-in-reply to the Governor-General's speech (see Chapter 7, Meetings of the Senate, under Address-in-reply), any matter may be discussed. The rule also does not apply to debates in which, under the standing orders, any matter may be discussed, including debate on the motion for the adjournment of the Senate (SO 53(4)) and debate on the motion for the first reading of a bill which the Senate may not amend (SO 112(2)).

Closely related to the rule of relevance is the rule against tedious repetition. The chair may call the attention of the Senate to continued irrelevance or tedious repetition and may direct a senator to discontinue a speech, but that senator may require that the question whether the senator be further heard be immediately put to the Senate and determined without debate (SO 196). Because of the time limits applying to debates, the standing order is seldom invoked.

Anticipation rule

In debating a question before the Senate a senator must not anticipate discussion of any subject which appears on the Notice Paper, with the proviso that any matter on the Notice Paper not discussed during the preceding four weeks may be debated (SO 194).

This rule is also interpreted liberally, quite apart from the proviso, because the large amount of business usually on the Senate Notice Paper could prevent discussion on virtually any matter if the rule were strictly enforced. The rule is seldom invoked except where a senator speaking on

another matter appears to be entering upon debate on a bill which has recently come before the Senate and which is expected to be discussed within a short period of time.

References to committees

While it is generally considered inappropriate in debate in the Senate to prejudge the findings or recommendations of a committee, there is nothing to prevent debate canvassing issues which are before committees (statement by President Reid, SD, 27/10/1997, p. 8064).

Uncompleted committee of the whole proceedings on a bill, however, may not be debated (SO 119).

Sub judice convention

The sub judice convention is a restriction on debate which the Senate imposes upon itself, whereby debate is avoided which could involve a substantial danger of prejudice to proceedings before a court, unless the Senate considers that there is an overriding requirement for the Senate to discuss a matter of public interest.

The convention is not contained in the standing orders, but is interpreted and applied by the chair and by the Senate according to circumstances.

The concept of prejudice to legal proceedings involves an hypothesis that a debate on a matter before a court could influence the court and cause it to make a decision other than on the evidence and submissions before the court. A danger of prejudice would not arise from mere reference to such a matter, but from a canvassing of the issues before the court or a prejudgment of those issues.

This concept of prejudice was well explained in the context of contempt of court by the Federal Court in a case before it in 1989, in which the court restrained a state commission of inquiry from conducting a public inquiry into matters before the court in a civil action. Justice Spender explained:

> It seems to me that there are really two aspects of the question of contempt in the context of a public prejudgment. The first concerns whether the prejudgment will be likely to hinder the Court in reaching a correct conclusion. Publicity which might taint the impartiality of the jurors or which might inhibit witnesses from giving evidence are of this kind; that is to say, they have a tendency to affect whether the right result was achieved. Because jurors are less resistant than judges in resisting improper influences, considerations of this kind are of much the greater concern when there is a jury. This factor, as well as the concern of courts when a person is in jeopardy of a criminal conviction, explains the concentration of attention on the effect of public prejudgment on criminal proceedings.

The justice referred to an additional reason for restraining public prejudgment of a case:

> The second aspect of contempt in the context of public prejudgment relates not so much to whether the process is likely to be poisoned, but to the judgment itself. The first, as I said, affects whether the result obtained might not be the right result. Yet, if the effect of a public prejudgment is to undermine public confidence in that judgment, even though it does not affect the process by which that judgment is reached, that equally is a contempt. It seems to me that a public

> prejudgment of a central issue in the Federal Court proceedings would work a usurpation of the function of the Federal Court and lower the respect and authority to which its determination is entitled. (*Sharpe v Goodhew* 1989 90 ALR 221 at 240-1)

The first paragraph is a succinct statement of the rationale of the sub judice principle, a rationale it shares with contempt of court. The second paragraph is a statement of an additional dimension of contempt of court which has not been regarded as part of the rationale of the parliamentary sub judice convention; this aspect is further analysed, under Discussion of court decisions, below.

As the court suggested, the danger of prejudice to court proceedings is much greater where a jury is involved in the proceedings, because judges are unlikely to be influenced in the formation of their judgments by public or parliamentary debate (for an application of this principle, see the exchange in the Senate, SD, 11/8/1999, p. 7275). There may also be a case for apprehending a greater danger of prejudice if a matter is before a magistrate.

In earlier years there was a tendency for the chair to restrain debate in the Senate on any matter which was before a court. In the 1960s and 1970s, however, there was a change in emphasis and a greater focus on the question of whether there was a danger of prejudice to proceedings.

In 1969 President McMullin ruled:

> As a general rule the Chair will not allow references to matters which are awaiting or under adjudication in the courts if such reference may prejudice proceedings. But it does not necessarily follow that just because a matter is before a court every aspect of it must be sub judice and beyond the limits of permissible debate in Parliament. That would be too restrictive of the rights of Parliament. (SD, 20/5/1969, p. 1368)

In 1972 President Cormack stated that he had reviewed the sub judice principle, which he thought had been too restrictive in the past, and indicated the approach the Chair would take:

> The prime question I must ask myself is, I think: Is parliamentary debate likely to give rise to any real and substantial danger of prejudice to proceedings before the court? (SD, 19/9/1972, pp 907-8)

An exposition of the sub judice convention was provided by the then Minister for Justice, Senator Tate, in debate in the Senate on 30 May 1989 in which a senator sought to discuss matters relating to the 1978 Sydney Hilton Hotel bombing when a criminal prosecution was pending. (A person had been arrested and charged with criminal offences in relation to the bombing.) Senator Tate said:

> Mr President, you are faced with a very difficult situation, as indeed is the Senate. In all questions of sub judice you have to balance the absolute privilege of this place with the absolute privilege of the courts. It is a contest between the two. I think in this particular instance, the question of the Hilton bombing, the subsequent court actions and, indeed, the public inquiry, the pardon, the compensation, and the events surrounding the allegations are matters of very genuine public interest of a greater scope than attends normal trials to do with the killing of persons in our community. Unless this chamber were convinced that what Senator Dunn is speaking about could cause real prejudice to the trial in the sense of either creating an atmosphere where a jury would be unable to deal fairly with the evidence put before it, or would somehow perhaps affect a future witness in the giving of evidence, whether for the prosecution or the defence, and unless

> we thought that the matters Senator Dunn was trying to speak about were likely to cause real prejudice to the outcome of that committal proceeding or trial, I think, on balance, given the nature of the matters surrounding this whole incident over many years, that the public interest probably would allow her to continue.

The President ruled:

> I will allow Senator Dunn to continue but I would advise her that she cannot question the merit or otherwise of likely evidence that could be used in the prosecution case, because it is obvious that this would prejudice any case that came before a jury. (SD, 30/5/1989, pp 3062-5)

On a subsequent occasion, the same senator was asked to reframe her remarks when committal proceedings relating to the matter were in progress before a magistrate (SD, 27/9/1989, pp 1472-3).

This treatment of this matter illustrates the three important principles of the sub judice convention:

- there should be an assessment of whether there is a real danger of prejudice in the sense explained by Senator Tate
- the danger of prejudice must be weighed against the public interest in the matters under discussion
- the danger of prejudice is greater when a matter is actually before a magistrate or a jury.

It would be an undue restriction on the freedom of the Senate to debate matters of public interest if debate were to be restrained simply on the basis that matters may come before a court in the future. Thus the fact that writs have been issued, which does not necessarily mean that proceedings will ensue, does not give cause for the sub judice convention to be invoked (ruling of President Sibraa, SD, 10/5/1988, p. 2224).

In 1979 debate on a motion which sought an inquiry into prosecution evidence in a case then before a magistrate was not permitted (SD, 13/11/1979, pp 2162-7).

A point of order was taken on 15 August 1991 to the effect that a notice of motion given by a senator was contrary to the principle relating to matters which are sub judice. The basis of the point of order was that the notice of motion was making allegations against a person who was the subject of criminal proceedings, which proceedings were mentioned in the notice but which were not connected with the allegations. This point of order raised an interesting question of principle, as it may be possible to prejudice the trial of a person by making allegations against that person which are not connected with the matters at issue in the criminal proceedings. The President, in accordance with the less restrictive interpretation of the sub judice principle in recent years, ruled that so long as the notice did not refer to the merits of the legal proceedings it was in order (15/8/1991, J.1372).

A significant and difficult case involving the sub judice convention was the Westpac documents case.

On 12 February 1991 President Sibraa made a statement in response to conflicting submissions which had been made to him by a senator and by Westpac Banking Corporation on the question of whether the senator should be allowed to disclose in the Senate documents belonging to Westpac. The question for determination was whether the disclosure of the documents in Senate proceedings should be prevented under the sub judice principle. The President stated that disclosure of the documents could be prejudicial to legal proceedings, in that it could terminate proceedings whereby Westpac was seeking the suppression of the documents on the basis of legal professional privilege. He indicated that, having weighed the contrary factors of prejudice to the legal proceedings and the right of the Senate to debate a matter of public interest, he had determined that disclosure of the documents in proceedings of the Senate should not be permitted. The President stated:

> The very subject matter of the case immediately before the courts, and in respect of which the sub judice claim is made, is the question as to whether the documents involved should be suppressed: to disclose the documents now would ipso facto abort that case. No clearer example of real and present danger to current legal proceedings could be imagined: indeed, it is not merely a matter of the present proceedings being prejudiced, but rather a particular litigant's rights being denied absolutely (SD, 12/2/1991, p. 356).

This ruling was disputed in debate on 14, 20 and 21 February and 5 March 1991. On 7 March 1991 the President withdrew the prohibition on the disclosure of the documents after they had been disclosed in the South Australian Parliament and subsequently published with the concurrence of Westpac. The documents were tabled on that day and debated on 13 March 1991.

Important features of the case were:

- the prejudice which was to be apprehended by disclosure of the documents in proceedings in the Senate was of an unusual character: such disclosure could render the court proceedings undertaken by Westpac ineffectual, in that the court would be unlikely to order the suppression of documents which had been tabled in the Senate and thereby made public

- the apprehension of prejudice, however, appeared to be greatly diminished by a judgment of the New South Wales Supreme Court in continuing a temporary suppression order on the documents, in that the court indicated that publication of the documents in the Senate would not necessarily terminate the action to have the documents permanently suppressed, and would not prevent further publication of the documents by the press being treated as contempt of court (For an explicit rejection of this approach in respect of documents likely to be disclosed in Parliament, see *New Zealand Post Ltd v Prebble* 2001 NZLR 360.)

- although matters contained in the documents might also be prejudicial to future proceedings, there were no such proceedings actually before the courts

- the matter was unquestionably one of great public interest, relating to the conduct of a major bank and its treatment of many clients

- any restriction on debate in the Senate under the sub judice principle could have been temporary only, in that when the court proceedings were concluded there would no longer be any impediment to the disclosure in the Senate of the documents in question, even if Westpac were successful and the courts suppressed all future publication of the documents; a document which is the subject of legal professional privilege and a document the suppression of which has been ordered by a court may be disclosed in parliamentary proceedings with complete impunity because neither the law nor any parliamentary rule prevents such disclosure.

In the President's ruling there was a suggestion that consideration should be given to the question of whether the Senate should permit the disclosure in its proceedings of a document which is the subject of legal professional privilege. There is no parliamentary rule, in the Senate or in other comparable Houses, that material which is the subject of legal professional privilege cannot be disclosed in proceedings.

The ruling also referred to other proceedings which might be prejudiced by the disclosure of the documents. No other proceedings were on foot at that time. The sub judice principle hitherto has been strictly limited to proceedings actually in progress, and to apply it to expected or possible proceedings would be to restrict debate to a degree not previously contemplated.

The ruling in this case was essentially based on balancing the apprehended prejudice to court proceedings against the public interest in the matter in question and the freedom of the Senate to debate matters of public interest. Because of the peculiar circumstances of the case, the ruling is unlikely to offer guidance in future cases.

In 1997 the Senate postponed an inquiry into the conduct of Senator Colston on the basis that it might interfere with police inquiries and possible subsequent criminal proceedings against him (7/5/1997, J.1855-6).

In 1998 the President prevented Senator Colston placing before the Senate material which would have prejudiced the trial of charges of fraud laid against him (ruling of President Reid, SD, 6/4/1998, p. 2134; 7/4/1998, J.3649).

In response to an order for production of documents relating to the waterfront dispute in 1998, the government refused to produce the documents on the ground that the documents were relevant to actions pending in the Federal Court between the parties to the dispute (SD, 28/5/1998, pp 3378-9). Advice by the Clerk of the Senate suggested that this apparent invocation of the sub judice convention was not well founded (Economics Legislation Committee, estimates Hansard, 2/6/1998, pp E124-8).

Debate should not be constrained under the sub judice convention in relation to a matter concerning the internal affairs of the Senate (ruling of President Cormack, SD, 8/4/1974, pp 704-5). In 1998 the President suggested that, while the sub judice convention was not applicable, in that there was no trial before a jury and therefore little possibility of prejudice to proceedings, debate should not canvass the merits of a petition before the Court of Disputed Returns (SD, 3/12/1998, p. 1239). This suggestion was based on the need for comity between the Senate and the Court.

The sub judice convention does not have application to matters before royal commissions and other commissions of inquiry. In the past rulings were made to the effect that matters before royal commissions should not be canvassed, but these rulings are not consistent with the subsequent emphasis on the danger of prejudice to court proceedings. A royal commission is not a court, its proceedings are not judicial proceedings, it does not try cases and it is unlikely that a royal commissioner would be influenced by parliamentary debate. Criminal prosecutions may arise from evidence taken before royal commissions, but the sub judice convention should not be invoked until such time as such prosecutions are before the courts. Thus it has been ruled that the sub judice convention does not arise in relation to inquiries by a state commission (ruling of President Laucke, SD, 15/11/1978, p. 2079; also SD, 19/10/1977, pp 1489-1505; 11/10/2000, p. 18288). In 1983 a senator was allowed to comment directly on evidence presented to a Commonwealth royal commission without any invoking of the sub judice convention (SD, 20/9/1983, p. 763). Similarly, proceedings of, and evidence before the Western Australian Royal Commission into Use of Executive Power were extensively canvassed in debate in August and September 1995 without any attempt to restrain that debate. (See also the transcript of the estimates hearing of the Employment, Workplace Relations and Education Legislation Committee, 3/6/2002, pp 63-5, 76-80; references to the royal commission on the building industry, SD, 4/3/2003, pp 9009-10.)

An inquest by a coroner, although an administrative inquiry and not a judicial proceeding, is not in the same category as executive-government appointed inquiries, and may be prejudiced by parliamentary debate, particularly where a jury is involved. Although the sub judice principle as such does not apply, the chair therefore discourages the canvassing in debate of issues before a coroner (observations by President Sibraa, SD, 17/11/1993, pp 3026, 3028). Extensive public discussion of a matter, however, may weaken the case for restraint on the part of the Senate (observation by Acting Deputy President McGauran, SD, 4/5/1994, p. 237).

The sub judice convention is regarded as applying to proceedings in committees. If, however, a committee has been directed by the Senate to inquire into a particular matter, the convention cannot be invoked in the committee to prevent the inquiry. Committees have the capacity to avoid any prejudice to legal proceedings by hearing evidence in camera. See also Chapter 16, Committees, under Privilege of proceedings. For judicial proceedings on matters which have been the subject of parliamentary inquiry, see Chapter 2, Parliamentary Privilege, under Power to conduct inquiries. (For a committee refraining from an inquiry while a coroner concluded an examination of a matter, see the case of the Rural and Regional Affairs and Transport Legislation Committee's inquiry into the search for the *Margaret J*, Chapter 16, Committees, under Disclosure of evidence and documents.)

A factor in the future application of the sub judice principle by the Senate may well be the changed attitude of the courts in recent times to public discussion of matters pending in legal proceedings. The courts are now less concerned about such public discussion, having concluded that "in the past too little weight may have been given to the capacity of jurors to assess critically what they see and hear and their ability to reach their decisions by reference to the evidence before them" (*R. v Glennon* 1992 173 CLR 592 at 603; see also *John Fairfax v District Court of NSW*, 2004 61 NSWLR 344).

Discussion of court decisions

Reference was made (above, under Sub judice convention) to the additional dimension of contempt of court, as expounded by a justice of the Federal Court in *Sharpe v Goodhew*, which has not been regarded as part of the basis of the sub judice convention. This is the consideration of principle raised by comments on the decisions and judgments of courts which do not affect the process by which those decisions and judgments are reached but which may affect public confidence in judgments.

Remarks may be made in the Senate notwithstanding that, if made outside the Senate, they could constitute contempt of court under the principle set out in that part of the judgment. There is no restriction on debate in the Senate involving critical comment on the decisions or judgments of courts; the only relevant limitation is that contained in standing order 193, which prohibits offensive words against a judicial officer (see below, under Rules of debate). Thus in 1973 Acting Deputy President Marriott ruled that it is in order to comment on a judgment but that no reflection can be made on the integrity of the judiciary (SD, 5/4/1973, p. 887). This would apply to critical comment before or after a decision or judgment, although what Justice Spender called prejudgment would obviously make it more likely that the sub judice convention could be applicable, and as a matter of comity between the legislature and the judiciary, the Senate and senators should not seek to tell courts what judgments they should make.

In 1969 the Senate debated a motion to censure a Senate minister on the ground that he had suggested in debate in the Senate that a person was guilty of an offence, a charge relating to which had been dismissed by a court. The motion was negatived. During debate on the motion reference was made to judicial authority to the effect that public criticism of the actions of courts is not unlawful provided that such criticism is not made in malice or in an attempt to impair the administration of justice (SD, 19-20/8/1969, pp 130-62, 177-201).

Rules of debate

In speaking in debate a senator addresses the President, or the Chair of Committees in committee of the whole (SO 186(1)). Other senators are referred to in the third person and are not addressed directly (ruling of President Givens, SD, 15/7/1925, p. 1018). The rationale of this long-established parliamentary mode of speaking is that it acknowledges the role of the chair in applying the processes of orderly debate and guards against any tendency to lapse into offensive language.

Certain institutions and categories of office-holders are specially protected by the standing orders against offensive words and personal reflections (SO 193). This protection is extended to:

- a vote of the Senate, except where a motion is moved for a vote to be rescinded
- the monarch, the Governor-General and governors of states
- both Houses of the Parliament and the houses of the state and territory parliaments

- senators, members of the House of Representatives and members of state and territory parliaments

- judicial officers.

The rule that a senator must not reflect on any vote of the Senate except for the purpose of moving its rescission (SO 193(1)) is seldom invoked. Senators are not prevented in practice from saying that a decision of the Senate was wrong. The rule could be invoked against gross abuse of a past decision of the Senate, which would amount to reflections on the Senate itself. (See Supplement)

The monarch, the Governor-General and governors of states must not be referred to disrespectfully in debate, or for the purpose of influencing the Senate in its deliberations (SO 193(2)). This rule is founded upon the need for mutual respect between the branches of government and between the Commonwealth and state governments, and on the requirement that the holders of these offices remain above political disputation. This prohibition is more restrictive than the injunction against "offensive words …. imputations of improper motives …. [and] personal reflections" against senators and the members of other Houses contained in paragraph (3) of the standing order. The prohibition on references "for the purpose of influencing the Senate in its deliberations" is clearly designed to prevent statements seeking to enlist the supposed support or opposition of the Governor-General to a cause. It could also cover such things as citing the Governor-General as an example to be avoided. (For a resolution calling on the Governor-General to resign, or, if he does not, for the Prime Minister to advise the withdrawal of his commission, see 15/5/2003, J.1818-20.)

The rule against offensive words, imputations of improper motives and personal reflections directed to members of either House of the Commonwealth Parliament or to members of state and territory parliaments (SO 193(3)) is designed to ensure comity and mutual respect between houses of parliaments and between the Commonwealth and state and territory parliaments, and to ensure that debate between those who are by virtue of their offices the principal participants in political debate is conducted in the privileged forum of Parliament without personally offensive language.

The protection of judicial office-holders under the standing order is based on the need for comity and mutual respect between the legislature and the judiciary, and the requirement that judicial officers be protected from remarks which might needlessly undermine public respect for the judiciary. The protection, however, does not prevent criticism of the judgments or decisions of courts (rulings of President Laucke and acting Deputy President Robertson, SD, 31/5/1979, pp 2424, 2427-8, 19/3/1980, p. 779; also Standing Orders Committee, 5th Report of 59th Session, 31 March 1980, PP 50/1980, p. 5; see also under Discussion of decisions of courts, above). It would also not apply to proceedings on a properly framed motion for the removal of a federal judge under section 72 of the Constitution (see Chapter 20, Relations with the Judiciary).

In 2002 a senator (who was a parliamentary secretary) was censured by the Senate for recklessly making unsubstantiated allegations against a justice of the High Court, after the Deputy President ruled that his remarks were contrary to standing order 193. The Deputy President observed that senators should not make allegations of misconduct against judicial

officers unless initiating action under section 72 of the Constitution for their removal (13/3/2002, J.165; 19/3/2002, J.216-7).

Former holders of the protected offices are not protected (ruling of President Sibraa, SD, 19/12/1988, p. 4484).

Members of another house are entitled to the protection provided by standing order 193(3) when their house has been dissolved for an election and they are technically not members. It would be anomalous if the protection provided by the standing order were to cease simply because a house has been dissolved for election. There would also be the anomalous distinction between a lower house which has been dissolved and an upper house which has not and the members of which would continue to attract the protection. Therefore members of a house which has been dissolved continue to attract the protection of the standing orders until such time as the successor house meets. Members who retire or are defeated at the election then cease to attract the protection when their successors are in office. New members returned in an election are not protected until they take their seats, but nor are they protected as non-member candidates during an election.

It is for the chair to determine what constitutes offensive words, imputations of improper motives and personal reflections under this standing order. In doing so, the chair has regard to the connotations of expressions and the context in which they are used (statement by Deputy President West, SD, 25/8/1999, p. 7731; by President Calvert, SD, 27/3/2003, p. 10408).

All suggestions that members have lied, that is, deliberately and knowingly made untrue statements, are disorderly. Remarks to the effect that senators' statements are untrue or misleading are not necessarily out of order; for the chair to intervene there must be some implication that a senator has deliberately or knowingly made untrue statements. It is for the chair to judge whether that implication is present in any particular instance. (Statements by President McMullin, SD, 31/10/1967, p. 1891; by Deputy President, 15/10/1991, pp 1992-3; by President Sibraa, 9/12/1992, p. 4595; 26/5/1993, pp 1340-1; 8/12/1993, p. 4162; by President Beahan, SD, 27/11/1995, pp 3929-30.)

It has been held that it is not in order to refer to a senator's religion in debate (statement by President Calvert, referring to ruling by President McMullin, SD, 8/11/2005, pp 20, 35-6).

For the quotation of documents which contain disorderly expressions, see above, under Quotation of documents.

It is not for the chair to judge the accuracy or truthfulness of senators' statements (rulings of President Givens, SD, 28/2/1917, p. 10672; 25/7/1917, p. 415; statement by President Sibraa, 14/12/1992, pp 4809-10). Statements by senators about matters of fact, including statements about persons protected by the standing orders, do not amount to offensive words merely on the basis that they are alleged to be false; that is a matter for refutation in debate, and not a question of order for the chair (statement by President Beahan, SD, 1/9/1994, pp 801-2). Similarly, statements about the policies of parties which are alleged to be incorrect are matters for correction in debate, not subjects for ruling by the chair (statement by President Calvert, SD, 4/12/2006, pp 37-8).

The chair may require the withdrawal of words which offend against the standing order, and a refusal to withdraw words at the direction of the chair constitutes disorder and may be subject to action by the chair (see under Disorder, below).

The chair normally does not require the withdrawal of words unless the chair has determined that they are contrary to the standing order, but if a senator finds a remark personally offensive, the chair may require its withdrawal to preserve the dignity of debate (rulings of President Turley, SD, 6/9/1911, p. 98, 1/11/1911, pp 2053, 2069, 29/11/1911, p. 3307, 14/12/1911, p. 4452, 1/11/1912, p. 5005; of President Hayes, 9/6/1939, p. 1581; of President Brown, 22/3/1944, p. 1713; of President Mattner, 10/9/1952, p. 1173).

A distinction has been drawn between statements about governments and statements about particular members or groups of members of Commonwealth or state parliaments. It has been ruled that remarks may be made about a government generally which would be unparliamentary if made about a particular member or group of members, although President Sibraa observed that it is a difficult distinction to make and that perhaps it is a distinction which should not be made (SD, 26/5/1993, p. 1340; 18/11/1996, p. 5402).

Where expressions are used which are open to an interpretation that makes them contrary to the standing orders, the Chair may ask the senator speaking to clarify their meaning and intention, and, if that meaning and intention is not contrary to the standing orders, may allow the senator to proceed on that basis without withdrawing the words in question (statement by President Reid, SD, 18/3/1997, p. 1655).

The chair discountenances the making of otherwise prohibited allegations against protected office-holders by the device of reporting such allegations while not adopting them (statement by President Calvert, SD, 27/8/2002, p. 3778).

It is sometimes suggested that it is not disorderly to use offensive words against groups of members of either House as distinct from individually named members. There is no basis for this suggestion in the rules of the Senate. On the contrary, offensive words against a group of members of either House may be regarded as a worse offence than directing such words to an individual member (rulings of President Baker, SD, 14/9/1905, pp 2246-7; 19/9/1906, pp 4839-40; President Givens, 7/12/1916, pp 9496-8; President Kingsmill, 21/5/1931, p. 2154; 15/7/1931, p. 3864; 21/10/1931, p. 962; President McMullin, 9/3/1967, p. 450; President Sibraa, 10/12/1991, p. 4509; 26/5/1993, p. 1340-1; President Beahan, 30/8/1995, p. 694; President Calvert, 17/8/2006, p. 76; 28/2/2007, pp 76-7).

The chair does not wait for a senator to object to offensive words, but intervenes and requires the withdrawal of expressions which the chair regards as clearly contrary to the standing order.

Withdrawal of offensive words is accepted by the Senate, and a senator is not entitled to refer to them or debate them subsequently (ruling of President Givens, SD, 11/12/1913, p. 4115).

Occasionally suggestions are made that disorderly remarks should be expunged from the Hansard transcript of debate, but this step has not been taken in recent times. Although committees, under the Senate's Privilege Resolutions, are required to consider the

expungement of irrelevant evidence adversely reflecting on other persons (see Chapter 17, Witnesses, under Protection of witnesses), such a step is regarded as undesirable because it alters the record without altering what has actually occurred in the course of the proceedings. This is more undesirable in the case of the Senate when proceedings may be reported in print and broadcast on radio and television, and when it is considered that Hansard should be as nearly as practicable an accurate record of debate.

The Chair of Committees in committee of the whole has the same authority to enforce standing order 193 as the President, but disorder in the committee can be dealt with only in the Senate (SO 144(7)).

The expression "unparliamentary language" is used generically to refer to remarks which are contrary to the various prohibitions in standing order 193. The term is also used to refer to words which may be regarded by the chair as unacceptable in debate even when they are not directed to any of the protected institutions or office-holders listed in the standing order. (See statement by President Reid, SD, 15/5/2002, p. 1631.)

The standing orders do not give any protection against offensive words or personal reflections to persons who are not explicitly protected by standing order 193. The Senate has, however, adopted procedures to allow such persons to respond to remarks made about them in the Senate (see Chapter 2, Parliamentary Privilege, under Abuse of parliamentary immunity: right of reply; for the right of witnesses to respond to adverse evidence, see Chapter 17, Witnesses).

On two occasions it was ruled that reflections should not be made on the heads of state of friendly foreign nations (rulings of President McMullin, SD, 16/2/1956, p. 23; of President Cormack, 19/3/1974, p. 361). These rulings, while reflecting a British House of Commons rule, have no basis in the standing orders. They have not been repeated and it is unlikely that they would now be followed.

The rules concerning language in debate may be modified by motions which necessarily require such modification for their determination. Where a motion to censure a minister directly accuses the minister of knowingly giving false information the rule against allegations of lying is not enforced to that extent. Similarly, if a motion were to be moved for an address to remove a judge, it could hardly be expected that the judge would be protected from adverse reflections in debate on the motion. (SD, 14/8/2003, p. 13726. For a resolution calling on the Governor-General to resign, or, if he does not, for the Prime Minister to advise the withdrawal of his commission, see 15/5/2003, J.1818-20.)

A statement or denial made by a senator must be accepted by the Senate (rulings of President Gould, SD, 31/10/1907, pp 5374, 5385, 9/8/1907, p. 1691; of President Lynch, 28/9/1932, p. 785; of President Cormack, 30/8/1973, p. 327; of President O'Byrne, 11/7/1974, p. 101).

It was formerly the practice to refer to the House of Representatives as "the other place"; avoidance of direct reference was a means of ensuring avoidance of any improper reflections. This custom is now generally not observed.

Matters relating to the conduct of senators in debate are also the subject of the Senate's Privilege Resolutions (see Chapter 2, Parliamentary Privilege). Resolution 9 enjoins senators to exercise their freedom of speech in the Senate with regard to the rights of persons outside parliament and not to make statements reflecting adversely on such persons without proper evidence. Resolution 5 provides for the publication by the Senate of responses by persons who have been adversely affected by references about them in the Senate.

Declarations of interests

In 1994 the Senate adopted an order which required a senator to declare any relevant interest which the senator had in the subject matter of a debate. This order formalised a long-established practice whereby senators declared any interests during debate, and such declarations are recorded in the Journals. (See also Chapter 6, Senators, under Pecuniary interests.) The requirement to declare interests in debate and when voting was abolished in 2003, but senators may still declare interests.

Interruption of speaker

A senator who is speaking in debate may not be interrupted by another senator except to call attention to:

- a point of order
- a question of privilege suddenly arising in relation to the proceedings before the Senate
- the lack of a quorum (SO 81, 197(1)).

When a question of order or a matter of privilege is raised in this way, the business before the Senate is suspended until the chair determines the question (SO 197(3)). This procedure is seldom invoked in relation to a matter of privilege, and is usually used to raise a point of order arising out of the remarks of the senator speaking. When a point of order is raised the senator speaking sits down. The President may hear argument from senators on the point of order, and may determine it forthwith or at a later time (SO 197(4), (5); see below, under Questions of order).

Time taken in raising and determining a point of order does not come out of the time for a senator to speak or the time for a debate (SO 197(6)).

For the calling of quorums, see Chapter 8, Conduct of Proceedings, under Quorum.

The procedures of the Senate do not allow a motion that a senator be no longer heard (ruling of President McMullin, SD, 12/11/1959, p. 1475). Such motions are used in the House of Representatives to "gag" individual speakers even though they have the call from the chair to speak.

Interjections

Interjections by other senators when a senator is speaking are technically contrary to standing order 197 and disorderly. In practice, interjections which are not disruptive are tolerated, particularly if they facilitate the exchange of views and arguments in debate.

A senator has the right to be heard in silence, however, and the chair will protect from interjections a senator who asks to be protected (rulings of President Givens, SD, 1/10/1920, p. 5234, 17/8/1922, p. 1426; also statements by President O'Byrne, 27/2/1975, p. 523, 16/10/1975, p. 1217).

The old parliamentary practice of interjecting "hear, hear" as a sign of approbation is tolerated, but applause is disorderly.

New senator's first speech

Special conventions of debate apply to the first speech of a new senator. It is expected that the Senate chamber will be well attended for a first speech, and that the new senator will be heard without interjection or interruption. The corollary of this convention is that a first speech should not directly criticise other senators or otherwise provoke interjections or points of order. It is customary for other senators to congratulate a new senator on a first speech.

In recent years there has been a practice of passing a special order to allow senators to make their first speeches without any question before the chair. In the past it was the practice to rearrange business to bring on some item of business for the occasion of new senators' first speeches so that those senators would not be unduly restricted by the requirement of relevance. Orders of the day for the resumption of adjourned debates on matters such as the address-in-reply to the Governor-General's opening speech and motions to take note of budget statements were often employed for this purpose.

Conduct of senators

To facilitate the orderly process of debate, certain rules of conduct apply to senators in the Senate chamber.

It is the responsibility of the President to maintain order in the Senate (SO 184(1)), and for this purpose the chair ensures that the conduct of senators during proceedings in the Senate is not disruptive of those proceedings.

When a question of order is raised, the senator speaking sits down and the President determines the question of order (SO 197(4), (5)). In addition to calling for order, the President may stand, in which case the senator speaking must sit down and the Senate must be silent (SO 184(2)). Senators must not move about the chamber when the President is putting a question to the Senate (SO 184(3)).

On entering or leaving the chamber a senator must acknowledge the chair (SO 185(1)). This is done by a bow or nod to the chair. A senator may not pass between the chair and a senator who is

speaking or between the chair and the table (SO 185(2)). Senators must not stand in the chamber unless seeking the call to speak (SO 185(3)).

It is not in order for senators to hold up newspapers or placards in the chamber or display items such as badges with slogans (rulings of President Sibraa, SD, 9/12/1992, pp 4526-7; of President Reid, 21/10/1999, p.10177; 21/6/2001, p. 24881). Senators may not have on their desks items which are objectionable to other senators (ruling of President Kingsmill, SD, 24/5/1932, pp 1231, 1239). It is similarly not in order to wear in the chamber T-shirts or other clothing bearing slogans (ruling of President Calvert, SD, 19/3/2003, p. 9664). The basis of these rulings is that, not only is the holding up of placards with slogans disruptive of orderly debate, but it would allow senators to intervene in debate other than by receiving the call from the chair and participating in debate in accordance with the rules of the Senate. It would be highly undesirable to have debate in the Senate reduced to the level of displaying placards with slogans. The wearing of clothing, such as T-shirts, with slogans is the same in principle as displaying placards or badges with slogans and is objectionable and disorderly on the same grounds.

The use of dictaphones in the chamber has been discountenanced by the Chair (SD, 17/8/1993, pp 24-5). Other equipment such as portable computers may be used if there is no disruption of proceedings.

It is disorderly for a senator to smoke or eat in the chamber (ruling of President Givens, SD, 24/8/1923, p. 3493).

It is considered discourteous for a senator to leave the chamber immediately after finishing a speech, in that the next speaker may comment on the senator's speech as part of the exchange of debate, and it is proper for senators to hear each other's views.

Advisers attending on senators in the places reserved for advisers in the chamber are required to behave with decorum and not disturb proceedings (ruling of President Sibraa, 8/12/1993, J.942; statement by chair 22/2/1994, J.1289). Subject to that requirement, senators are entitled to have whomever they choose as their advisers in their advisers' benches (SD, 2/12/2005, p. 10).

Questions of order

In accordance with the President's responsibility to maintain order in the Senate (SO 184(1)), the President rules on questions of order and applies and interprets the standing orders and rules and practices of the Senate. This responsibility is not confined to occasions when questions of order are raised by senators in accordance with standing order 197; the chair may draw attention to a question of order and rule on it without awaiting a point of order by a senator.

The President may hear argument on a question of order and may determine it at once or at a later time (SO 197(5)).

A ruling by the President on a question of order must be complied with. It is the equivalent of an order of the Senate unless and until it is dissented from or altered by the Senate (rulings of President Baker, SD, 4/10/1906, p. 6089; of President Gould, 18/10/1907, p. 4909).

A point of order raised by a senator must not be used to make a debating point but should relate to some question of order (rulings of President Givens, SD, 8/7/1915, p. 4700, 19/8/1915, p. 5871, 25/9/1917, p. 2632, 19/6/1924, p. 1399; of President Sibraa, 2/12/1991, p. 3742). The chair does not deal with hypothetical points of order or points which have already been determined (rulings of President Baker, SD, 1/10/1906, p. 5765, 28/9/1906, p. 5646).

In committee of the whole the Chair of Committees has the same authority to make rulings as the President in the Senate (SO 144(7)).

Objection to ruling of the President

All rulings of the President are subject to appeal to the whole Senate. There are two methods by which the Senate may overturn a ruling of the President.

First, by motion on notice, moved and dealt with in accordance with the normal rules relating to the conduct of business, the Senate may, by a special resolution or order, change the ruling or the procedure on which the ruling is based.

Secondly, the Senate may dissent from a President's ruling, and a procedure is provided whereby a motion of dissent may be moved at the time when a ruling is made.

A senator who objects to a ruling of the President may immediately state that objection. The objection must be put in writing, and a motion moved that the Senate dissent from the President's ruling. Debate on that motion is adjourned till the next sitting day unless the Senate decides, on a motion moved without notice and put without debate, that the question requires immediate determination (SO 198).

If a motion of dissent is adjourned till the next day of sitting it is the practice to place it first on the Notice Paper for that day (Notice Papers 9/7/1919, 16/7/1919, 26/9/1938, 3/11/1938, 16/5/1950, 16/9/1952, 12/5/1970, 20/5/1970, 17/8/2005, 15/9/2005). The motion may be postponed and discharged (20/5/1970, J.113; 21-22/10/1970, J.363, 370; 29/10/1970, J.400).

If a motion of dissent is adjourned the disputed ruling stands and applies to the proceedings. The matter under consideration may, however, be adjourned until the motion of dissent is determined (ruling of President Gould, 30/10/1908, J.60-1).

If it is decided that a motion of dissent requires immediate determination, it is usual for debate to occur on the motion, which is then put to a vote of the Senate. Normally a motion of dissent is determined immediately.

On a motion to dissent from a President's ruling the greatest latitude of discussion is allowed. The President may participate in the discussion in order to clarify the ruling or respond to points which have been made (ruling of President Baker, SD, 31/10/1905, p. 4262; also statement by President Baker, 4/9/1903, p. 4630-1).

The Chair of Committees rules on questions of order in committee of the whole (SO 144(7)), but if a senator objects to a decision of the Chair of Committees, this is reported to the Senate. The President then determines the matter by making a ruling, after hearing senators in relation to the objection, and, unless objection is taken to the President's ruling, the committee of the whole resumes (SO 145).

Disorder

A senator is guilty of an offence if the senator:

(a) persistently and wilfully obstructs the business of the Senate;

(b) is guilty of disorderly conduct;

(c) uses objectionable words, and refuses to withdraw such words;

(d) persistently and wilfully refuses to conform to the standing orders; or

(e) persistently and wilfully disregards the authority of the Chair (SO 203(1)).

The President may report to the Senate that a senator has committed an offence; this is known as "naming" the senator.

A senator who has been reported as having committed an offence is called upon to make an explanation or apology. It is open to the chair to accept the explanation or apology (see, for example, ruling of Acting Deputy President Aulich, SD, 25/6/1992, pp 4626-37). If the explanation or apology is not acceptable, a motion may be moved that the senator be suspended from the sitting of the Senate, and that motion must be put and determined without any amendment, adjournment or debate (SO 203(3)).

If an offence is committed in committee of the whole, the Chair of Committees reports the matter to the President, the Senate resuming for that purpose (SO 203(2)).

If two or more senators are reported for offences, separate suspension motions are moved (4/3/1932, J.28; 30/5/1972, J.1024).

The suspension of a senator is for the remainder of that day's sitting, but if a senator commits a second offence in the same calendar year the suspension is for seven sitting days, and for any subsequent offences within a calendar year a suspension is for 14 sitting days. A senator who has been suspended from the sitting of the Senate may not enter the Senate chamber during the period of the suspension (SO 204).

The suspension of a senator from the sitting of the Senate does not prevent the senator attending a meeting of a Senate committee, and does not affect any of the senator's other entitlements.

On 19 December 1991 the suspension of a senator was rescinded after debate on the incident leading to the suspension (19/12/1991, J.1985-6, 1990).

A senator who leaves the chamber after being reported for an offence may be ordered to return (18/10/1962, J.156; 9/5/1968, J.71; 22/4/1971, J.534). A senator who wilfully disobeys an order of the Senate may be ordered to attend the Senate and may be taken into custody (SO 206).

The Senate may impose a greater penalty on a senator by special order if the Senate considers that course appropriate (statement by President McMullin, 9/5/1968, J.72). The power of the Senate to punish contempts under section 49 of the Constitution and the *Parliamentary Privileges Act 1987* extends to senators (see Chapter 2, Parliamentary Privilege).

The procedures relating to disorder are salutary in that the responsibility for maintaining order is imposed on the whole Senate, rather than the chair or any other particular authority. This principle is reflected in the rule that any senator may move a suspension motion, and the Senate must vote on it.

Suspensions of senators for disorder are now very rare in the Senate.

Adjournment of debate

A senator may move in the course of a debate, but not so as to interrupt a senator speaking, that the debate be adjourned. This motion may not be moved by a senator, other than a minister, who has spoken in the debate (SO 201(1), (6)). In practice a senator is allowed to make a few explanatory remarks before moving the adjournment of a debate. The motion for the adjournment of the debate must be put without debate or amendment (SO 201(2)).

An alternative method of adjourning a debate is for the senator speaking to seek leave to continue the senator's remarks. If leave is granted, this is the equivalent of the passage of a motion for the adjournment of the debate.

When a debate is adjourned, by motion or by the granting of leave for a senator to continue the senator's speech, the resumption of the debate is an order of the day for the next day of sitting, unless a further motion is carried fixing another time for the resumption of debate (SO 201(3)). The motion to fix another time for the resumption of the debate, unlike the motion for the adjournment of the debate, is open to debate and amendment; an amendment may be moved to fix a time other than the time proposed in the motion, and that amendment may be debated. Debate on the amendment, however, is confined to the question of the time to be fixed (ruling of President Cunningham, SD, 25/3/1943, p. 2344). The motion for the adjournment of a debate and a motion to fix a time for the resumption should be moved separately (ruling of Acting Deputy President Teague, SD, 4/5/1992, pp 2242-3). (For a debate on a motion to fix the time for resumption of debate, see 10/3/2004, J.3126, 3134.)

A motion to fix a time for the resumption of a debate which has been adjourned under standing order 201(3) does not extend to altering the routine of business under the standing orders, for example, by giving a general business item a precedence it would not otherwise have, or circumventing the ability of the government under standing order 65 to specify the order on the Notice Paper of its items of business on a day. It is not in order to move a motion

that, for example, debate on an adjourned item be resumed at 2 pm on a day, or that debate on a general business item be resumed before government business is called on on a day.

A senator on whose motion a debate is adjourned is entitled to be first heard on the resumption of the debate (SO 201(4)), but is not obliged to exercise this entitlement, and may speak later in the debate.

If a motion for adjournment of a debate is negatived, the senator moving that motion may speak later in that debate (SO 201(5)).

A senator granted leave to continue the senator's remarks who does not speak when the debate is resumed has forfeited the right to speak (ruling of President Givens, SD, 23/7/1924, p. 2327).

A debate which is interrupted by a suspension of the sitting of the Senate is resumed when the sitting resumes as if there had been no interruption (ruling of President Baker, SD, 20-1/9/1906, pp 5010, 5092).

Closure of debate

A motion may be moved in the course of a debate, but not so as to interrupt a senator speaking, that the question be now put. That motion must be put and determined without debate or amendment, and if it is carried the question before the Senate is then put and determined immediately without further debate or amendment (SO 199). This procedure provides an opportunity for the Senate to decide that debate should conclude and the question before the Senate be determined. It is known colloquially as the "gag".

The closure motion cannot be moved by a senator other than a minister who has spoken in the debate or who has previously moved the closure (SO 199(3)). In practice a senator is allowed to make a few explanatory remarks before moving the closure.

The motion may be directed only to the question before the chair, so that, if the question is for an amendment to be agreed to, it is only that question which is put without further debate, and debate on the main question may continue.

The closure may be moved in committee of the whole, but may not be repeated within 15 minutes after it has been moved (SO 144(6)).

A senator who has moved the closure, if that motion is negatived, may speak later in the debate; this practice is based on an analogy with the rule applying to the adjournment of debate.

Reply

A senator who has moved a substantive motion may speak in reply, and this reply closes the debate (SO 192). There is no right of reply in relation to a procedural motion or in relation to an amendment.

Motions which are open to debate but regarded as procedural in character and therefore not subject to the right of reply include motions for the suspension of standing orders, for an instruction to a committee of the whole and for the recommittal of a bill (ruling of President Gould, SD, 1/10/1909, p. 4021). Two of the elements of the composite motion under standing order 113(2) are regarded as procedural (see Chapter 12, Legislation, under Initiation).

Where two or more senators are joint movers of a motion, any one of them, but only one of them, may exercise the right of reply by speaking for a second time.

The chair will not call a senator to speak in reply if there is any other senator who has not spoken and who seeks the call to speak.

While the purpose of the reply is to respond to matters raised in debate, a senator speaking in reply can introduce relevant matter which has not been referred to in debate (ruling of President Baker, SD, 2/6/1904, p. 1854).

A senator who speaks in reply on behalf of another senator does not close the debate (ruling of President Brown, SD, 11/4/1946, p. 1358). A senator who moves a motion on behalf of another, however, may also speak in reply, and the mover of a motion may reply where another senator has moved the motion on the mover's behalf. Thus a speech by the minister in charge of a bill in response to the debate on the second reading is regarded as closing the debate, even though another minister moved the motion for the second reading. In this circumstance, it is the minister who moves the motion who acts on behalf of another.

Where motions are moved together, or items of business are taken together, by leave or by special order, each of the movers of motions so amalgamated may speak in reply (14/4/1988, J.628; 23/11/1988, J.1143-4; 27/11/2000, J.3584-6).

Question read

A senator may require the question to be read at any time during a debate but not so as to interrupt a senator speaking (SO 195). This procedure was virtually obsolete until revived in 1996 (SD, 18/10/1996, p. 4485; 29/10/1996, p. 4660). The Chair may decline to have the question read if it has been circulated to senators in print, which is now usually the case (ruling of President Calvert, SD, 15/9/2003, p. 15079). (See Supplement)

Question put

When senators who wish to speak in a debate have done so, the President puts the question to the Senate and the Senate votes on the question. The putting of the question by the President ends the debate (SO 200).

In putting the question the President calls for the ayes and noes, and declares the chair's opinion of the result by declaring whether the ayes or the noes have it. This opinion may be challenged by two or more senators who are in the minority as declared by the chair by calling "divide", and a vote by division then ensues (see Chapter 11, Voting and Divisions).

Dividing the question

The President may divide a complicated question (SO 84(3)). A question is divided only if the parts of the question are capable of a distinct decision by the Senate. This may be done where preliminary words in a motion have to be understood as preceding each part of the motion (16/3/1988, J.557) (See Supplement). In practice, the chair divides a question which is capable of being divided at the request of any senator, so that no senator is compelled to vote for or against two or more proposals in relation to which they may wish to vote differently (statement by Acting Deputy President Vanstone, SD, 12/11/1991, pp 2940-2). This procedure is particularly used where, by a previous decision, distinct questions, such as questions for the passage of different bills, have been combined. If a senator moves an amendment to one question which has been combined with another question, the amendment and the distinct questions are put separately (3/12/1985, J.684-5, 687-8; 4/12/1985, J.694-5, 696-8; 16, 17, 21/10/1986, J.1320, 1323, 1324-5, 1340-3). The chair may decline to divide a question if the request is not made for the purpose of protecting the right of a senator to vote differently on the component questions (statement by President Reid, SD, 23/6/1999, p. 6133; request to divide a question declined on the stated principle: SD, 25/9/2001, p. 27835; SD, 2/12/2005, pp 205-6). Unless this principle is adhered to, a limitation of time could be subverted by divisions on every question and amendment before the chair, in some cases resulting in hundreds of divisions.).

Debating Opportunities and Time Limits

Bills

1° of non-amendable bill	15 mins	SO 112(2)
2°	20 mins	SO 189(1)
In committee	15 mins	SO 189(3)
(+ possible extension of 15 mins)		
3°	20 mins	SO 189(1)
Selection of Bills Committee—adoption of report	5 mins	SO 24A(7)
(**limit for debate:** 30 mins)		
Reference of a bill to committee	5 mins	SO 115(6)
(**limit for debate:** 30 mins)		

Committee reports and government responses

(Opportunities for debating documents and reports)

Motions relating to report on Wednesday or Thursday	10 mins	SO 62(4)
(**limit for debate:** 1 hr)		
Resumption (*Thursday*)	10 mins	SO 62(1)
(**limit for debate:** 1 hr)		

Debate

General	20 mins	SO 189(1)
Extension of time (*possible*)	10 mins	SO 189(1)
In committee	15 mins	SO 189(3)
In reply	20 mins	SO 189(2)

Documents (General)

Motions moved by leave	10 mins	SO 169(2)
(**limit for debate:** 30 mins per motion, 1 hr for all motions)		

Government documents—consideration

(Opportunities for debating documents and reports)

Motion to take note (*Tuesday and Wednesday*)	5 mins	SO 61(3)
(**limit for debate:** 30 mins)		
Resumption (*Thursday*)	5 mins	SO 61(3)
(**limit for debate:** 1 hr)		

Matters of Public Importance/Urgency

(Matters of public importance and Urgency)

All speakers	10 mins	SO 75(7)
(**limit for debate:** 1 hr, or 90 mins if no motions are moved after question time to take note of answers)		

Discussion of matters of public interest

15 mins SO 57(2)

Questions (Questions)

Without notice		
Asking question	1 min	SO 72(3)
Answering question	4 mins	SO 72(3)
Supplementary question	1 min	SO 72(3)
Answering supplementary	1 min	SO 72(3)
Debate on motions relating to answers	5 mins	SO 72(4)
(**limit for debate:** 30 mins)		

Suspension of standing orders

(Suspension of standing orders)	5 mins	SO 209(4)
(**limit for debate:** 30 mins)		

Debate for the election of the President of the Senate

15 mins SO 6(2)

Adjournment of the Senate

10 mins SO 54(5)

(**limit for debate:** 40 mins, except for Tuesday which has no limit on debate)