

## Looking to the future

### Evolution of the anticipation rule

- 3.1 The history of the anticipation rule in the House of Representatives was addressed in chapter 1 and its increasing liberalisation in chapter 2.<sup>1</sup> In general, the evolution of the anticipation rule in other Parliaments has also been marked by a less stringent application of the rule.

### Practice in other Parliaments

- 3.2 The anticipation rule is no longer strictly observed in the Canadian House of Commons and is not observed at all in relation to questions:

At one time, Members were also prohibited from asking a question during Question Period if it was in anticipation of an Order of the Day; this was to prevent the time of the House being taken up with business to be discussed later in the sitting. In 1975, the rule was relaxed in regard to questions asked during Question Period when the Order of (the) Day was either the Budget debate or the debate on the Address in Reply to the Speech from the Throne, as long as questions on these matters did not monopolize the limited time available during Questions Period. In 1983, the Speaker ruled that questions relating to an opposition motion on a Supply day motion could also be put during Question Period. In 1997, the Standing Committee on Procedure and House Affairs recommended, in a report to the House, that questions not be

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1 See paras 1.26 ff and 2.24 ff.

ruled out of order on this basis alone. The Speaker subsequently advised the House that the Chair would follow the advice of the Committee.<sup>2</sup>

- 3.3 The application of the rule has also been less strictly observed in the United Kingdom House of Commons. Having noted that the rule came to be observed from the middle of the 19<sup>th</sup> century, Erskine May notes:

A century and a half later, and without any explicit decision of the House, it has begun to lose significance and is now much less of a trap for the unwary than it was only a few years ago.<sup>3</sup>

- 3.4 The more liberal application of the rule in the New South Wales Legislative Assembly is noted in Chapter 2, particularly in relation to questions.
- 3.5 Oral advice from the clerk of the New Zealand House of Representatives is that the anticipation rule is rarely used in that House.<sup>4</sup>

## Proposals for a new approach to the anticipation rule

### Why is a new approach needed?

- 3.6 A commenter on procedures used in the United Kingdom House of Commons noted:

No system of procedure can be perfect. For one thing, it must always be adapting itself to new problems and is inevitably more or less out of date. Besides at best it cannot be more than a balance between advantages and disadvantages.<sup>5</sup>

- 3.7 This is particularly true of the anticipation rule. While the application of the rule has certainly never been perfect, the increasing use of it to prevent discussion on particular issues indicates that the time has come to consider a better approach.
- 3.8 The submission from the Clerk of the House proposed three options for the committee's consideration: the retention and vigorous enforcement of

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2 Marleau and Montpetit, *House of Commons Procedure and Practice*, p. 477.

3 *Erskine May's Parliamentary Practice*, 23<sup>rd</sup> edn, p. 4.

4 Discussion with Mr David McGee, Clerk of the House of Representatives, January 2005.

5 Campion, G. F. M., *An introduction to the procedure of the House of Commons*, 3rd edn, London: Macmillan, 1958, p. 47.

the current rules; abolishing the rule altogether; and amending the current rules.<sup>6</sup>

3.9 In relation to the first option the Clerk noted that

... the evolution noted in House practice to date, which is paralleled in other jurisdictions, seems to make this unfeasible as a long-term proposition ...

3.10 The committee agrees with this view.

### **Proposal to abolish the rule altogether**

3.11 This option is described by the Clerk of the House in his submission as an approach which is recommended in terms of ease of application. He considers that this may well be achieved in the longer term but does not favour it at the present time.<sup>7</sup>

3.12 The committee agrees that this may be an option for the future but like the Clerk, favours a more gradual approach to improving House practices. In considering the possible future abolition of the rule, the committee notes that the intention of the rule to support the efficient conduct of the House's business is protected by a number of complementary standing orders and practices of the House. The decision to support the retention of the rule at this stage does not reflect a concern that the good governance of the House would be at risk.

### **Proposal to more clearly define the current rules**

3.13 The Manager of Opposition Business made several suggestions for clarifying the future application of the anticipation rule and these were carefully considered by the committee.

3.14 The first suggestion is that a statement or explanation which clearly articulates the purpose of the rule should be compiled, taking account of the timetable of the House and its Committees. It should refer to both the Notice Paper and the daily program (known as the blue schedule or the "Blue"). The object of this statement should be to ensure that there is no constraint on debate, accountability, or the ability to ask questions, arising from a narrow application of the rule.

3.15 In relation to this suggestion the committee notes that several Speakers' rulings over the past twenty years have purported to articulate the

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6 Submission from the Clerk of the House, p. 7.

7 Submission from the Clerk of the House, p. 7.

purpose of the rule but this has not prevented the use of the rule primarily as a tactic for stifling discussion. It is not considered likely that a new articulation of the intention and purpose of the anticipation rule will address this difficulty.

- 3.16 Ms Gillard further suggested that the rule should be strictly applied to matters currently under debate or scheduled for debate within the next 24 hours. This could be achieved by placing greater emphasis on the “Blue” program than the Notice Paper, because it is a more reliable indicator of the day’s program.
- 3.17 The committee agrees that the use of the “Blue” as an indication of the House’s intention would provide better guidance to the House on what matters should be encompassed by the anticipation rule. The committee supports a narrowing of the scope of the anticipation rule to matters likely to be debated in the immediate future. The “Blue” is one (but not the only) means of ascertaining what these matters might be.
- 3.18 However, it should not be assumed that all difficulties would be removed. First, the “Blue” is an unofficial document, subject to last minute changes and not an infallible guide to the business of the House on a particular day. Also, “matters currently under debate” is an imprecise concept. Further, this suggestion is unlikely to address the real problem – that Members seeking to prevent discussion of a particular matter would use the rule when it suited (particularly at Question Time) and ignore it at other times.
- 3.19 The Manager of Opposition Business also proposed that the distinction between incidental and substantive reference to a matter be used by the Chair in applying the rule. The committee considers this a good suggestion and notes that this is what recent Chairs have tended to do.
- 3.20 Finally, Ms Gillard called for an application of the rule in a way that would not limit the ability of the Opposition to hold the Government accountable at Question Time. At the same time, having regard to the public aspect of Question Time, the application of the rule should not allow any political party to use “a lax application of the rule for political gain”. The committee considers that this is probably what successive Speakers have attempted to do. The practicalities of the political contest that is Question Time make it extremely difficult to achieve this objective. A great deal of the content of Question Time is aimed at providing political gain to one side or the other.
- 3.21 In this context the committee notes that other standing orders which inhibit the use of Question Time for unfair political advantage are not as

strictly observed as they might be. In particular, the committee considers more attention should be paid to standing order 98(d)(ii) which prevents Ministers using Question Time (instead of the period for ministerial statements) to announce government policy.

- 3.22 It is noted that Ms Gillard's suggestions all relate to improving the application of the rule rather than changing the rule or the standing orders supporting it.

## Proposals to change the current rules

- 3.23 The Clerk of the House proposed the modification of the general rules so that they are more easily interpreted and enforced by the Chair.<sup>8</sup> One approach would be to remove altogether standing order 100(f) – the rule relating to questions – and amend current standing order 77 to clarify the fact that it did not apply to questions and answers. The Clerk favours this option on the grounds that it would

accommodate the realities of evolving needs and demands on the House, in particular by building on the distinction between the value of the rule in respect of ordinary business, and in respect of Question Time.<sup>9</sup>

- 3.24 Arguments in favour of this proposition include the fact that ceasing to apply the anticipation rule to Question Time removes a cause of dissatisfaction with the rule while not undermining core values such as protecting the time of the House. Preventing anticipation during debates on bills, amendments and motions is more important in terms of supporting the core purposes of the rule than preventing questions and answers which anticipate other business.

## What problems need solving?

### The Speaker's statement of 6 December 2004

- 3.25 The committee notes that the Speaker's statement focuses almost entirely on problems in applying the current anticipation rule in the context of Question Time. The option to remove the application of the rule from Question Time [see para 3.23 above] would address these difficulties.

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8 Submission from the Clerk of the House, p. 7.

9 Submission from the Clerk of the House, p. 8.

## Other problems

- 3.26 The submissions to the inquiry drew attention to other problems which cause concern, particularly the wide ranging nature of the current expression of the rule. The committee considers that a narrowing of the rule is necessary in order to allow the rule to be applied with integrity.

## Conclusions and recommendations

### Getting the balance right

- 3.27 The committee is concerned to find a workable balance between the principles underlying the anticipation rule and the need to ensure that the rule is not used to avoid scrutiny by restricting debate.
- 3.28 The committee is also concerned to ensure that any change to the standing orders does not give unfair political advantage to either government or opposition. In relation to Question Time, the removal of the anticipation rule would give governments increased opportunity to interest the media and public in legislation currently before the House, but equally, it would give oppositions increased opportunity to challenge forthcoming legislation.
- 3.29 The committee notes that Question Time has become a focus for both governments and oppositions and considers that removing barriers to particular questions serves the public by providing information on important matters. This does not mean that ministers should use Question Time to announce government policy. Indeed, the committee supports a stricter application of standing order 98(d)(ii) and considers that this would be even more desirable should the anticipation rule no longer apply during Question Time.<sup>10</sup>
- 3.30 The committee proposes two amendments to the standing orders to achieve the balance referred to in paragraph 3.28 and notes that the amendments are interdependent.

### Retaining a general rule against anticipating debate

- 3.31 The committee favours retaining the general rule as expressed in standing order 77 but amending the standing order so that the rule applies to

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<sup>10</sup> See also para 3.22.

debates only. This change would keep the valuable elements of the rule but discard the aspects which cause disruption without supporting the efficient conduct of business.

- 3.32 For the purposes of this recommendation, the committee is using the definition of debate in *House of Representatives Practice* to indicate argument for and against a question:

The proceedings between a Member moving a motion and the ascertainment by the Chair of the decision of the House constitute a debate. A decision may be reached without debate. In addition, many speeches by Members which are part of the normal routine of the House are excluded from the definition of debate, because there is no motion before the House.<sup>11</sup>

- 3.33 The committee notes that by applying standing order 77 only to debates, the anticipation rule would not apply to proceedings with no question before the House including questions and answers, Members' statements in the House or Main Committee and a number of other items.
- 3.34 The proposed change to standing order 77 would also exempt matters of public importance (MPIs) from the rule as they are discussions and not debates. House practice already exempts the MPI from the anticipation rule in that Members are not prevented from anticipating the subject matter of the MPI during other business.
- 3.35 Most proceedings which would be exempt from the anticipation rule if it applied only to debates, occur during specified times or periods of the day (under standing order 34). The change therefore would not undermine the principle of saving the time of the House which is one of the objectives of the anticipation rule.
- 3.36 The committee also considers that standing order 77 should be amended to provide more guidance to the House in relation to the anticipated matter being brought on within a reasonable time. The concept of "reasonable time" should be more focussed in order to prevent misuse of the rule. In this regard the committee notes the important role of the daily "Blue" as a guide to what is likely to come before the House on a particular day.<sup>12</sup>
- 3.37 In addition, the rule should be applied to prevent substantial discussion of a subject (item) listed on the Notice Paper but not to inhibit incidental reference to the subject matter. This concept is already becoming part of

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11 *House of Representatives Practice*, 4<sup>th</sup> edn, p. 469

12 Also, see para 3.18.

House practice but is not enshrined in the standing orders. Including it in the relevant standing order might prevent Members seeking to prevent discussion for a technical and not a substantive reason.

- 3.38 The committee considers that the proposed changes should be introduced on a trial basis for the remainder of the 41<sup>st</sup> Parliament. As the anticipation rule is an occasional rather than constant issue in House proceedings, a shorter trial might not allow a proper evaluation.

### Recommendation 1

**The committee recommends that standing order 77 be replaced by the following sessional order:**

**“During a debate, a Member may not anticipate the discussion of a subject listed on the Notice Paper and expected to be debated on the same or next sitting day. In determining whether a discussion is out of order the Speaker should not prevent incidental reference to a subject.”**

### Discarding the rule as it applies to Question Time

- 3.39 If recommendation 1 is accepted then the anticipation rule would cease to apply to Question Time because questions and answers are not debates. The removal of standing order 100(f) would complement the changes proposed in recommendation 1. Again, the anticipation rule should cease to apply during Question Time for the remainder of the session to allow an evaluation of the change. In relation to Question Time, discarding the anticipation rule would not undermine the important principles enshrined in the anticipation rule.<sup>13</sup>
- 3.40 This does not mean that the change would encourage pre-empting substantive debates during Question Time. The Chair already has the power to ensure that questions are not debated (standing order 100(a)).<sup>14</sup> In relation to answers, Chairs are unlikely to permit substantive discussion on a matter listed for debate even though the rules for answers are less focussed than those for questions.
- 3.41 In terms of one of the objectives of the anticipation rule, – to avoid wasting the time of the House by allowing topics to be debated more than once – the time allocated to Question Time is not dependent on the subject of the questions and answers.

<sup>13</sup> See paras 1.4 ff in chapter 1 of this report.

<sup>14</sup> The reference to debate in standing order 100 does not relate to the technical definition of the word.



**Recommendation 2**

**The committee recommends that for a trial period the anticipation rule not apply to questions and answers and that consequently, standing order 100(f) be suspended for the remainder of the session.**

- 3.42 The committee considers that the recommended changes will remove the unhelpful aspects which have arisen in applying the anticipation rule while retaining the general rule as it applies to substantive pre-emption of scheduled debate.

Margaret May MP

Chair

14 March 2005

