Legislative Assembly for the Australian Capital Territory

STANDING ORDERS 200 and 201

Report of the Standing Committee
on Administration and Procedures
June 1994

RESOLUTION OF APPOINTMENT

On 7 April 1992, the Legislative Assembly for the Australian Capital Territory adopted a temporary order which established the Standing Committee on Administration and Procedures with the following terms of reference:

16A (1) A Standing Committee on Administration and Procedures shall be appointed at the commencement of each Assembly to:

(a) inquire into and report on, as appropriate:

(i) the Assembly's annual estimates of expenditure;

(ii) matters relating to the privileges of the Assembly which may be referred to it by the Assembly:

(iii) the practices and procedures of the Assembly; and

(iv) the standing orders of the Assembly;

(b) advise the Speaker on:

(i) Members' entitlements including facilities and services;

(ii) the operation of the transcription service *(Hansard);*

(iii) the availability to the public of Assembly documents;

(iv) the operation of the Assembly library; and

(c) arrange the order of Private Members' business;

(2) The Committee shall consist of the Speaker and three other members;

(3) The Speaker shall be the Presiding Member of the Committee;

(4) The committee shall have the power to consider and make use of the evidence and records of the Standing Committee on Administration and Procedures appointed during the previous Assembly; and

(5) The foregoing provisions, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders."

Membership

The Speaker (Presiding Member)
Mr W Berry, MLA
Mr G Humphries, MLA
Mr M Moore, MLA

Secretary: Mr M McRae

STANDING ORDERS 200 AND 201

Background

1. The concept of the financial initiative of the crown is said to be "a major constitutional principle' and a feature of the Westminster system. The principle of the financial initiative, which is dealt with at length in *May*, may be paraphrased as follows:

- the executive government is charged with the management of revenue and with payments for public service;
- it is a long established and strictly observed rule which expresses a principle of the highest constitutional importance that no public charge can be incurred except on the initiative of the executive government; and
- the executive government demands money, the House grants it, but the House does not vote money unless required by the government, and does not impose taxes unless needed for public service as declared by ministers of the crown.

2. In the Commonwealth, these principles are embodied in *The Constitution.* In the Legislative Assembly the financial prerogative is determined by section 65 of the *Australian Capital Territory (Self-Government) Act 1988* (the Self-Government Act) of the Commonwealth which on Self-Government in May 1989 was reflected in Standing Orders 200 and 201. In May 1989, section 65 of the Self-Government Act stated:

> **Proposals of money votes**
>
> **65. (1)** An enactment, vote, resolution or question (any of which is in this section called a "proposal") the object or effect of which is to dispose of or charge any public money of the Territory shall not be proposed in the Assembly except by a Minister.
>
> **(2)** Subsection (1) does not prevent a member other than a Minister from moving an amendment to a proposal made by a Minister unless the object or effect of the amendment is to increase the amount of public money of the Territory to be disposed of or charged.

3. Standing Orders 200 and 201, as adopted on 11 May 1989 and which have operated throughout the First and Second Assembly unamended and without any temporary order affecting them, read:

> **Money proposals submitted - without notice**
>
> 200. An enactment, vote, resolution or question, the object or effect of which is to dispose of or charge any public money of the Territory shall not be proposed in the

Assembly except by a Minister. Money proposals may be introduced by a Minister without notice.

Limitation on amendments

201. A Member, other than a Minister, may not move an amendment to a money proposal, as specified in standing order 200, if that amendment would have the effect of increasing or altering the destination of the amount of public money of the Territory to be disposed of or charged.

Although standing orders 200 and 201 have operated without amendment, they have not operated without controversy, particularly during the First Assembly.

History

The Bills

4. The controversy associated with these two standing orders first became evident in June 1990 when the Opposition who had formed a minority government for the first seven months of the Assembly's life continued to pursue the active agenda that they had set in government and strongly opposed a number of the Government's cost cutting measures. This program included the introduction of a number of private members' bills.

5. The Attorney-General (as Manager of Government Business), raised points of order in relation to standing order 200, on the presentation of a total of five private members' bills. On each occasion it was argued that the bill contravened the standing order, by clearly placing a charge on public money. The Speaker's response, after taking the point of order on notice, examining the bill and seeking a legal opinion, was to rule the majority of the bills to be out order.

6. Three of the five bills involved in the rulings, the Royal Canberra Hospital Bill 1990, the Ainslie Transfer Station Bill 1990 (both presented on 6 June 1990), and the Schools Authority (Amendment) Bill 1990 (presented on 8 August 1990) all of which sought to halt or reverse measures implemented by the Government to reduce expenditure, had motions to withdraw or discharge the bills still pending resolution on 6 June 1991 when the Opposition reformed the Government following the Assembly's withdrawal of confidence in the Chief Minister of the Alliance Government .

7. The remaining two bills were the Human Rights Bill 1990 and the Landlord and Tenant (Rental Bonds) Bill 1990 (both presented on 12 September 1990). The Speaker's ruling on the Human Rights Bill 1990 also resulted in a motion that the bill be withdrawn. Following debate the motion to withdraw the bill was itself withdrawn as a consequence of the Speaker withdrawing his ruling. No ruling was made in relation to the Landlord and Tenant (Rental Bonds) Bill 1990. As a result of the Opposition regaining Government, all the bills at the centre of the controversy were discharged from the *Notice Paper* on 21 June 1991.

The Legal Opinions

8. After the first point of order was taken on 6 June 1990, the application of standing orders 200 and 201 and thus the financial initiative of the executive became an issue of considerable importance amongst the Members of the Assembly and the predecessor of this Committee - the Standing Committee on Administration and Procedures of the First Assembly. The question of how strictly standing orders 200 and 201 should be interpreted became the focus of the Committee's inquiry.

9. Establishment of precedent in parliamentary practice is significant for future generations of the Assembly and therefore should not be entered into without forethought and advice. The first Standing Committee on Administration and Procedures recognised this responsibility in conducting its inquiry into the interpretation of standing orders 200 and 201. The Committee held discussions with officers of the Government Law Office on possible options to alter standing orders 200 and 201 and section 65, following the provision by that Office of legal opinion. It also sought, after considering a background paper, an additional legal advice provided by Macphillamy Cummins and Gibson on the application of standing orders 200 and 201.

10. The two opinions highlighted a divergence in views on the interpretation of the standing orders. The first, based on a strict and literal reading of both section 65 and standing orders 200 and 201 held that any bill the purpose of which had the effect of disposing of or charging public money of the Territory contravened the standing orders. The second view and that supported by the opinion from Macphillamy Cummins and Gibson was that the provisions of section 65 and the standing orders were merely designed to give expression to the concept of the financial initiative of the executive Government. Therefore, a law would only have the effect of disposing of or charging public money if it included a standing appropriation provision. That is, that legislation posed no legal liability to expend money even if its purpose fell within an exiting appropriation. Hence, it is only private Members' bills (or amendments) where there is a provision for a standing appropriation providing a distinct authorisation for payment of monies that contravenes the standing orders. This interpretation would clearly admit those private Members' bills which had been ruled out of order by applying the strict interpretation. A further opinion from the Government Law Office refuted this view.

11. The Committee considered the two opinions and concluded that the opinion of the Commonwealth Attorney-General should be sought. It accordingly wrote to the Chief Minister on 23 November 1990, requesting that the Commonwealth Attorney-General provide advice on the matter. The Chief Minister's response to this letter informed the Committee that the Government itself, had sought advice from Queens Counsel and that it would be premature to consult with the Commonwealth until this advice was provided. The Queens Counsel's opinion was presented to the Assembly on 13 December 1990, the same day that the Committee presented an interim report on *Standing Orders 200 and 201 and their interpretation* which called on the Chief Minister to forward the Committee's request of 23 November to the Commonwealth Attorney-General forthwith. That request was forwarded on 11 January 1991.

12. The opinion from the Queens Counsel, Mr D. F. Jackson, provides a useful additional focus on the issue, but does not provide any definitive statements. His

opinion holds that section 65 had "its conceptual origins in provisions such as section 56 [of *The Constitution*]" but he points out that the terms of the two sections differ and queries whether this difference in terminology is of any real significance. Having indicated that different minds may well take different views, he concludes that section 65 should be read as it stands, not as an equivalent of section 56 of the Constitution. The problem is then to discern whether the object or effect of the proposal, if implemented, is to dispose of or charge public money of the Territory. In determining that question there are "...elements of characterisation (and degree) involved..." (Opinion, RF Jackson, QC, p.6).

Failed Amendments of Standing Orders 200 and 201

13. Despite the proliferation of legal opinions, it was always recognised by all concerned that the final responsibility for the interpretation of the standing orders lay with the Assembly itself. Nor did it appear that at any stage those Members who sought to have the standing orders interpreted in a more liberal manner also sought to alter the financial initiative of the executive beyond that which operates in the Federal sphere. Efforts to clarify the interpretation of standing orders 200 and 201 by seeking amendments to these standing orders were based on that very concept. Those amendments moved by Mr Berry (in Opposition) on 15 August 1990 were:

> Delete existing 200 and replace with -
>
> "No proposal for the appropriation of any public moneys shall be proposed in the Assembly except by a minister. Such proposals may be introduced by a Minister without notice."
>
> Amend 201 by deleting from the first line "a money" and inserting "an appropriation". (Minutes of Proceedings, No. 69, p 281)

14. These amendments, if passed, would have ensured that the standing orders and therefore the financial initiative of the executive operated in a manner similar to the financial initiative exercised by the Commonwealth executive. The Government of the day argued against the motion on the basis that to pass it would be contrary to the terms of section 65 of the Self-Government Act and to do so would "risk our [Assembly] laws being passed contrary to the Federal law..." (Mr Collaery, *Hansard*, 15 August 1990, p 2842).

15. The Opposition of the day believed that:

> It is an opportunity for this House to assert its views of its supremacy and its legislative powers..." (Mr Connolly, Hansard, 15 August 1990, p 2844).

16. The amendments were negatived on a vote.

The Issues

17. The interpretation of standing orders 200 and 201 was the subject of much activity during the period that the Members of the Australian Labor Party occupied the Opposition benchers. The issues involved are central to the role of private members and oppositions to be active participants in the democratic process. The rights of private members to advance proposals for consideration and decision,

however must be balanced with the need of the Executive to maintain control over the monies of the territory.

18. A private Member has the opportunity, provided by standing orders, to participate in all the Assembly's proceedings. However, the only opportunity that these Members have to initiate debate on a topic of his or her own choosing and to obtain a distinct vote on it is during Private Members Business. It is natural that private Members would wish the procedures available to them to initiate business to be as broad as possible without intruding upon the financial initiative of the Executive.

19. The operation of the Westminster system as it has developed in Australia and has been secured in the Constitution is to place the financial initiative with the executive government. The responsibility for proposing increases in expenditure or in taxation lies with the executive and they are accountable to the electorate for their management.

Resolution

20. Throughout the debate on the interpretation of standing order 200 and 201, there has been a general acknowledgment that the standing orders are inextricably linked with section 65 of the Self-Government Act. The point of contention was whether that section was written to reflect the powers of the executive as established under section 56 of *The Constitution* or whether the intention was to further limit the powers of private Members to initiate business. These concerns were flagged with the Commonwealth in 1991 (in response to the Standing Committee on Administration and Procedures' interim report). That letter to the Commonwealth Minister for the Arts, Sport, the Environment, Tourism and Territories also raised the possibility of amending that section of the Self-Government Act. On 18 January 1994, those amendments were enacted when the Governor-General proclaimed the Arts, Environment and Territories Legislation Amendment Act 1994. Section 65 now reads;

> **Proposals of money votes**
>
> **65. (1)** An enactment, vote or resolution ("**proposal**") for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister.
>
> **(2)** Subsection (1) does not prevent a member other than a Minister from moving an amendment to a proposal made by a Minister unless the amendment is to increase the amount of public money of the Territory to be appropriated.

21. The intention of the amendment is clear when read in conjunction with the explanatory memorandum which was presented when the Bill was introduced into the Commonwealth Parliament. The relevant section of the Explanatory Memorandum states:

> <u>Subsections 65(1) and (2)</u>: amended to ensure that the initiative of the Government in introducing legislation into the Assembly on financial matters is no greater or less than that of the Commonwealth Government under section 56 of the Constitution. The reference in the present section 65 to the 'object or effect' of a proposed law, and absence of

reference to 'appropriation', suggests that section 65 covers proposals to increase the Territory's possible financial liabilities without actually appropriating public moneys. This is not intended.

22. The Commonwealth Parliament has in passing this amendment laid to rest the central concern in the interpretation of standing orders 200 and 201. It is now perfectly clear that the powers the Assembly's private members have in relation to the initiation of business reflect those granted to their Commonwealth counterparts by *The Constitution*. However, standing orders 200 and 201 do not reflect these amendments and as they are still couched in terms of the old section, it is possible that the strict interpretation applied in the past may continue. To ensure that this does not occur the Committee **recommends** that standing orders 200 and 201 be amended to read:

Money Proposals submitted - without notice

200. An enactment, vote or resolution for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister. Such proposals may be introduced by a Minister without notice.

Limitations on Amendments

201. A member, other than a Minister, may not move an amendment to a money proposal, as specified in standing order 200, if that amendment would increase the amount of public money of the Territory to be appropriated.

Roberta McRae OAM MLA
Presiding Member
7 June 1994