

Select Committee on the Legislative Council Committee System

The Legislative Council committee system

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Terms of reference

1. That this House notes that on marking the 25th anniversary of the modern committee system in the Legislative Council in 2013, the House acknowledged that the work of committees enables the Legislative Council to effectively:
 - (a) hold the Government to account,
 - (b) allow for community engagement in the parliamentary process, and
 - (c) develop sound policy for New South Wales' citizens.
2. That a select committee be established to inquire into and report on how to ensure that the committee system continues to enable the Legislative Council to effectively fulfil its role as a House of Review.

These terms of reference were referred to the select committee by the Legislative Council on 24 June 2015.

Committee details

Committee members

The Hon Scott Farlow MLC	Liberal Party	<i>Chair</i>
The Hon Mick Veitch MLC	Australian Labor Party	<i>Deputy Chair</i>
The Hon Greg Donnelly MLC	Australian Labor Party	
The Hon Trevor Khan MLC	The Nationals	
Revd the Hon Fred Nile MLC	Christian Democratic Party	
The Hon Greg Pearce MLC	Liberal Party	
The Hon Dr Peter Phelps MLC	Liberal Party	
Mr David Shoebridge MLC*	The Greens	

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* Mr David Shoebridge MLC replaced Dr John Kaye MLC as a select committee member on 12 July 2016.

Chair's foreword

The genesis of this select committee is in the recent events to mark the 25th anniversary in 2013 of the Legislative Council's modern committee system, C25. Such milestones provide an opportunity to reflect on accomplishments, as well as look to the future. Indeed, while there was much to celebrate during C25, participants also speculated as to whether the committee system would be fit for purpose for the next 25 years. With this in mind, the House established a select committee to ensure upper house committees reflected the modern Parliament and would continue to support the Legislative Council to fulfil its role as a house of review.

Parliamentary committees are one of the best means by which the public can interact with their Parliament; they are a key conduit to facilitate public engagement with policy debate, ensuring that members hear the diverse views of the community. The committee system is a source of pride for members of the Legislative Council, members often say that we do our best work in committees, bridging partisan divides to approach issues and problems with a unanimity of purpose. At the same time, some degree of partisanship is inevitable as committees play a pivotal role in holding the government to account in Westminster systems of government.

I am pleased to report that the consensus view is that the Legislative Council committee system is functioning extremely well; nevertheless, there is always room for improvement and a small number of issues were revealed by the inquiry which require further attention.

Preeminent among these is the need to enhance the Council's role in scrutinising bills and delegated legislation, a fundamental aspect of the role of an upper house. With this in mind, we have recommended the establishment of a Selection of Bills Committee, on a trial basis, to ensure more draft legislation is referred to committees for detailed consideration. The committee has also recommended that a Regulation Committee be established, again on a trial basis, which will focus on delegated legislation. Rather than replicating the work of the joint Legislation Review Committee, which scrutinises all disallowable regulations, our proposed committee would have a broader remit, focusing on substantive policy issues concerning a small number of regulations, as well as examining trends relating to delegated legislation. This is designed to ensure that the Legislative Council more effectively exercises its role in reviewing legislative instruments.

Other recommendations seek to enhance the government response process by reducing the timeframe for responses from six to three months and by encouraging committees and the House to debate these responses to ensure that the full work of committees is carried out and remains relevant.

On behalf of the committee, I would like to thank all who participated in the inquiry, including the President and the Clerk of the Parliaments, current and former members, and community and parliamentary stakeholders. Thanks also to my colleagues for their commitment to this inquiry. I would particularly like to acknowledge the late Dr John Kaye, a member of the select committee until his untimely death in May 2016. Dr Kaye was an exemplary advocate of the committee system who demonstrated how members could effectively utilise committees. Thank you also to the secretariat staff and Hansard reporters for supporting the inquiry.

This is a succinct report inspired by the work of our predecessor committee in 1986 which noted that the product of committees must be 'clear, accessible and purposeful'.

I commend this report to the House.



The Hon Scott Farlow MLC
Committee Chair

Recommendations

Recommendation 1

3

That the three Legislative Council subject standing committees: Law and Justice, Social Issues and State Development, be referred to collectively as the ‘legislation and ministerial reference committees’ (LMRCs).

Recommendation 2

3

That the Legislative Council establish a Selection of Bills Committee, on a trial basis, to consider all bills introduced into the Council or received from the Assembly. The committee would be tasked with recommending to the House:

- which bills should be referred to a committee and which of the three legislation and ministerial reference committees should examine the bill.
- the duration of the inquiry.

The membership of the committee would comprise:

- three government members, including the Government Whip, who would be the Chair
- two opposition members
- one member from each crossbench party.

The trial would commence at the start of the 2017 Spring session and conclude at the end of the 56th Parliament.

It is envisaged that the committee would refer approximately 10 bills per year.

Recommendation 3

5

That the Legislative Council establish a Regulation Committee, on a trial basis, to consider policy and other issues relating to delegated legislation. The committee would comprise:

- four government members, one of whom would be Chair
- two opposition members
- two crossbench members.

The trial would commence at the start of the 2017 Spring session and conclude at the end of the 56th Parliament.

Recommendation 4

6

That the President request the Privileges Committee to inquire into and report on procedures to be observed by Legislative Council committees for the protection of witnesses, including the adoption of Senate-style privilege resolutions.

Recommendation 5

7

That standing order 233 be amended so that government responses to committee recommendations be required within three months, and that this period can be extended to six months by provision of written correspondence from the Leader of the Government in the Legislative Council to the President, if additional time is required due to the need for inter-agency consultation.

Recommendation 6

9

That governments fulfil their obligations under standing order 233 by:

- providing government responses to reports tabled towards the end of a previous parliament
- ensuring that government responses always include details regarding what action, if any, the government proposes to take in relation to each recommendation.

Recommendation 7

10

That the sessional order relating to standing order 232 make explicit that the day and time on which motions for consideration or adoption of reports of committees takes precedence, includes debate on government responses.

Recommendation 8

10

That standing order 233 be amended to require standing committees to consider a government response at the next available meeting.

Recommendation 9

12

That hearings for the 2017-18 Budget Estimates inquiry be held over two separate weeks, from 9.30 am until 6.30 pm in late August/early September 2017 and February 2018, to trial increasing the duration of Budget Estimates hearings.

Recommendation 10

12

That the general purpose standing committees be renamed as follows:

- Portfolio Committee No. 1 – Premier and Finance
- Portfolio Committee No. 2 – Health and Community Services
- Portfolio Committee No. 3 – Education
- Portfolio Committee No. 4 – Legal Affairs
- Portfolio Committee No. 5 – Environment and Land Use
- Portfolio Committee No. 6 – Planning and Transport.

Recommendation 11

15

That the allocation of portfolios to the portfolio committees be as follows:

Portfolio Committee No. 1 – Premier and Finance

Premier, Western Sydney, Treasury, Industrial Relations, Finance, Services and Property, Innovation and Better Regulation, The Legislature.

Portfolio Committee No. 2 – Health and Community Services

Health, Mental Health, Medical Research, Women, Prevention of Domestic Violence and Sexual Assault, Family and Community Services, Social Housing, Disability Services, Ageing, Multiculturalism.

Portfolio Committee No. 3 – Education

Education, Early Childhood Education, Aboriginal Affairs, Skills, Regional Development, Small Business, Trade, Tourism and Major Events, Sport.

Portfolio Committee No. 4 – Legal Affairs

Attorney General, Justice and Police, Arts, Racing, Corrections, Emergency Services, Veterans Affairs.

Portfolio Committee No. 5 – Environment and Land Use

Industry, Resources and Energy, Primary Industries, Lands and Water, Environment, Heritage.

Portfolio Committee No. 6 – Planning and Transport

Planning, Transport and Infrastructure, Roads, Maritime and Freight, Local Government.

Recommendation 12

17

That Legislative Council staff undertake training in community engagement methods, including the use of social media, to enhance their ability to engage with stakeholders and the broader community.

Conduct of inquiry

The terms of reference for the inquiry were referred by the Legislative Council on 24 June 2015.

The select committee released a discussion paper on 10 November 2015 which highlighted key issues of importance to members and encouraged stakeholder views on various questions that had been developed in response to these issues.

The select committee received 20 submissions (see Appendix 1 for a list of submission authors).

The select committee held one public hearing on Friday 29 April 2016 at Parliament House in Sydney (see Appendix 2 for a list of witnesses).

The select committee conducted two private roundtable meetings with the Hon Don Harwin MLC, President of the Legislative Council and Mr David Blunt, Clerk of the Parliaments, on 29 May and 22 August 2016 to discuss potential recommendations.

Inquiry related documents are available on the select committee's website, including submissions, the hearing transcript, answers to questions on notice.

Proposals for change

This report sets out the select committee's proposals to ensure upper house committees continue to support the Legislative Council to fulfil its role as a house of review. The report may be read in conjunction with the select committee's discussion paper, published in November 2015 and available at Appendix 3.

Our proposals draw on the submissions and oral evidence to the select committee's inquiry, as well as two private roundtable discussions to which the President of the Legislative Council, the Hon Don Harwin and the Clerk of the Parliaments, Mr David Blunt were also invited. The evidence received by the select committee indicates that the Legislative Council committee system is working well and generally meeting its objectives.¹ Nevertheless, a small number of issues emerged during the inquiry requiring further attention. These include the perceived need for the Legislative Council to play a more significant role in legislative scrutiny, the framework for committee powers, the duration of Budget Estimates hearings and the efficacy of the government response process.

Legislative scrutiny

- 1.1 There was general agreement among submission authors and witnesses that Legislative Council committees should play a greater role in scrutinising bills and regulations. Indeed, this issue was also raised during the C25 seminar marking the twenty-fifth anniversary of the committee system, and by former members participating in the Council's oral history project.² Furthermore, not long after the select committee released its discussion paper, the Chief Justice of the Supreme Court of NSW, the Hon Tom Bathurst AC, provided a somewhat sobering assessment of the state of legislative scrutiny in New South Wales at the opening of the Law Term.³
- 1.2 The following section examines the select committee's proposals to enhance legislative scrutiny by trialling a Selection of Bills Committee and establishing a stand-alone Regulation Committee.

Substantive examination of bills via a selection of bills committee

- 1.3 There was broad consensus that Legislative Council committees should play a greater role in the *substantive* review of bills than is currently the case.⁴ This is distinct from the *technical* review

¹ Submission 1, NCOSS, p 3; Submission 6, Law Society of NSW, p 1; Submission 17, Australian Lawyers Alliance, p 4; Submission 19, The Greens NSW, pp 1-2.

² David Clune, *Keeping the Executive honest: the modern Legislative Council Committee System*, Part one of the Legislative Council's Oral history project, September 2013.

³ Michaela Whitbourn, 'Basic legal rights are at risk: chief justice', *Sydney Morning Herald*, 5 February 2016, p 19.

⁴ Submission 1, NCOSS, pp 3-4; Submission 6, Law Society of NSW, p 3; Evidence Mr John Evans PSM, Former Clerk of the Parliaments, Department of the Legislative Council, New South Wales, 29 April 2016, p 12. Note: Since 1997 only 11 bills have been referred to committees for inquiry and report. This contrasts with Queensland and New Zealand where virtually all bills are referred to a committee and the Australian Senate where approximately 180 bills were referred to committees in the previous parliament.

of all bills introduced in the New South Wales Parliament as to whether they trespass unduly on personal rights and liberties. This type of scrutiny is currently undertaken by the joint statutory Legislation Review Committee administered by the Legislative Assembly.

- 1.4** The key question the select committee grappled with was how the House could undertake this task given the relatively small number of members available to participate in such inquiries, concerns about whether it might impede the government's legislative program as well as the likely staffing/budgetary implications.
- 1.5** The select committee eventually agreed that a Selection of Bills Committee should be established on a trial basis, modelled on the Selection of Bills Committee operating in the Australian Senate.⁵ The trial would commence at the start of the 2017 Spring session until the closure of the 56th Parliament. It is proposed this committee would meet at least once every sitting week to consider all bills introduced into the Council or received from the Assembly. The committee would be tasked with recommending to the House:
- which bills should be referred to a committee and to which committee
 - the duration of the inquiry.
- 1.6** The membership of the committee would comprise:
- three government members, including the Government Whip, who would be the Chair
 - two opposition members
 - one member from each crossbench party.
- 1.7** The committee would be established by resolution of the House, for a trial period. It is envisaged that the committee would work on a consensus basis, in the knowledge that any disagreements would eventually find their way to the House. A mechanism whereby genuinely urgent legislation could be considered without committee scrutiny would need to be identified.
- 1.8** It is expected that this committee might refer approximately 10 bills per year; however this is not considered a firm cap, rather we are conscious of the impact this work will have in terms of members' time, staffing and other resources. It is proposed that these bills would be referred to one of the three subject standing committees: State Development, Social Issues and Law and Justice, to be known collectively as legislation and ministerial reference committees (LMRCs), to reflect their additional role.

Legislation and ministerial reference committees

- 1.9** The LMRCs would continue to receive most of their references from ministers on any policy or legal matter relevant to their remit, but would also receive references from the House (via the Selection of Bills Committee) to inquire into bills.
- 1.10** The New South Wales Legislative Council is the only upper house in Australia to provide for ministerial referrals. This unique feature of the modern committee system is very much valued by members of all political persuasions who see it as a valuable opportunity to work with

⁵ Adoption of this proposal would not preclude the referral of bills by an amendment to the second reading motion as happens from time to time in the Council.

ministers to develop more effective policy on what are often quite complex and challenging social and legal issues.⁶

- 1.11** The select committee does not propose making any changes to the membership of these committees. That is, each committee would continue to have six members: three government members, of whom one would be the chair; two opposition members and one crossbench member. In addition the Law and Justice Committee would continue to be the designated committee under s 27 of the *State Insurance and Care Governance Act 2015* to supervise the operation of the insurance and compensation schemes under workers compensation and accident legislation.

Recommendation 1

That the three Legislative Council subject standing committees: Law and Justice, Social Issues and State Development, be referred to collectively as the 'legislation and ministerial reference committees' (LMRCs).

Recommendation 2

That the Legislative Council establish a Selection of Bills Committee, on a trial basis, to consider all bills introduced into the Council or received from the Assembly. The committee would be tasked with recommending to the House:

- which bills should be referred to a committee and which of the three legislation and ministerial reference committees should examine the bill.
- the duration of the inquiry.

The membership of the committee would comprise:

- three government members, including the Government Whip, who would be the Chair
- two opposition members
- one member from each crossbench party.

The trial would commence at the start of the 2017 Spring session and conclude at the end of the 56th Parliament.

It is envisaged that the committee would refer approximately 10 bills per year.

Substantive examination of regulations

- 1.12** From 1960 to 1987 all regulations were reviewed by a Legislative Council committee. In 1987 this role was assumed by a joint committee. It remained in operation until 2003 when its role was subsumed by the current joint Legislation Review Committee, which is responsible for reviewing both regulations and bills. The select committee heard throughout the inquiry that

⁶ Merrin Thompson, 'Through the lens of accountability: referral of inquiries by ministers to upper house committees', *Australasian Parliamentary Review*, Autumn 2013, Vol. 28(1), 97–108.

combining both functions in the one committee was inefficient and that the scrutiny of regulations was gradually diminishing.⁷

- 1.13** The Hon Ron Dyer MLC, a former chair of the Subordinate Legislation Committee, believes this function should be undertaken by an upper house committee, as occurs in the Senate, because of its role as a house of review. He suggested that the culture of the lower house was not conducive to effective scrutiny:

Another relevant aspect is that the culture or disposition of the Legislative Assembly could be said to be antipathetic to either a legislation or regulation review function. The lower house is where governments are made or unmade and where the executive arm of government is stronger and arguably dominant. Most ministers are located in the Assembly and the general tendency is to put bills through the house quickly and with little time reserved for quiet reflection.⁸

- 1.14** The select committee believes that the Legislative Council should play a greater role in the scrutiny of delegated legislation via the establishment, on a trial basis, of a Regulation Committee.

- 1.15** Rather than replicating the work of the joint Legislation Review Committee which reviews *all* disallowable regulations, the proposed committee would take an innovative approach to its role, by focusing on the substantive policy issues regarding a small number of regulations of interest as well as trends relating to delegated legislation.

- 1.16** This remit reflects an increasing perception in the academic literature that the ‘old divide’ between technical scrutiny of regulations - checking for violations of civil liberties and rule of law principles - and reporting on the policy or substantive content of a regulations, is no longer valid.⁹ As Aronson argues:

As substantive legislation is increasingly to be found not in primary acts but in subordinate legislation, one must question how much meaning will remain in the standard scrutiny criterion that certain matter is not appropriate for subordinate legislation. The whole point of skeleton acts is that they do indeed leave for subordinate legislation many rules that will fundamentally change the law, or which are lengthy and complex, or which are designed to effect radical attitudinal or relationship changes.¹⁰

- 1.17** The committee would comprise eight members, four of whom would be government members, one of whom would be the Chair; two opposition and two crossbench members. The trial would commence at the start of the 2017 Spring session until the closure of the 56th Parliament.

⁷ Submission 6, Law Society of NSW, pp 5-6; *Hansard*, NSW Legislative Council, 5 April 2006, p 22060 (Don Harwin); Submission 9, State Parliamentary Labor Party, p 5.

⁸ Submission 3, Hon Ron Dyer MLC, p 2.

⁹ Mark Aronson, ‘Subordinate legislation: lively scrutiny or politics in seclusion’, *Australasian Parliamentary Review*, Spring 2011, Vol 26 (2) p 4.

¹⁰ Mark Aronson, ‘Subordinate legislation: lively scrutiny or politics in seclusion’, *Australasian Parliamentary Review*, Spring 2011, Vol 26 (2) p 11.

- 1.18 This committee, with its potentially very broad subject matter, would be assisted by including two crossbench members rather than one. This will not only share the workload, it will also allow for a broader range of views to be considered in what will likely be an important oversight role.
- 1.19 The committee would be staffed by a director and full time inquiry manager and a part time administrative officer. The committee may seek specialist, independent legal advice, on an ad hoc basis. Thus budget supplementation might be required to fund these additional costs.

Recommendation 3

That the Legislative Council establish a Regulation Committee, on a trial basis, to consider policy and other issues relating to delegated legislation. The committee would comprise:

- four government members, one of whom would be Chair
- two opposition members
- two crossbench members.

The trial would commence at the start of the 2017 Spring session and conclude at the end of the 56th Parliament.

Privileges legislation, the *Parliamentary Evidence Act 1901* and committee resolutions

- 1.20 The select committee's discussion paper flagged our intention to examine whether Legislative Council committees have adequate powers to undertake their inquiry role. However, this part of our remit has been overtaken by recent events. In June 2016, the President tabled correspondence from the Premier noting the government's in principle agreement with the recommendations made in 2014 by both Houses' Privileges Committees in relation to members' ethics. The Premier requested that the two Houses work together to provide a single set of recommendations.
- 1.21 The President also tabled a response to the Premier's letter from himself and Madam Speaker, agreeing to the Premier's request and noting that the Houses should take this opportunity to resolve a number of related areas of uncertainty regarding parliamentary privilege, in particular the absence of comprehensive privileges legislation in New South Wales. Noting that the Presiding Officers are continuing to examine these issues, committee members will be interested to follow developments and to contribute to this process once draft legislation is available.

Senate-style privilege resolutions for the protection of witnesses

- 1.22 The discussion paper also mooted the possible introduction of Senate-style privileges resolutions for the protection of witnesses.

- 1.23** The *Parliamentary Evidence Act 1901* includes significant punitive powers that may be exercised in relation to recalcitrant witnesses. Although Legislative Council committees act judiciously to protect their inquiry participants, there are no formal, publicly available procedures such as exist in the Senate to ensure witnesses are accorded proper process and fair treatment.
- 1.24** The Australian Senate adopted privilege resolutions in 1988 following the enactment of the *Parliamentary Privileges Act 1987* (Cth). This includes two types of resolutions on procedures for the protection of committee witnesses: one for general Senate committees and another for the Privileges Committee. The general Senate committees' resolution details a number of matters such as the publication of evidence, the giving of *in camera* evidence and adverse mention. Both resolutions are attached at Appendix 4.
- 1.25** A recent paper argued that either in lieu of, or complementary to, statutory enactment of parliamentary privileges in New South Wales, the Legislative Council should consider adopting similar resolutions to the Senate that are 'well thought-through, fair and transparent.'¹¹ Several inquiry participants supported this course of action, including the NSW Ombudsman who stated that:
- In our view, enhanced guidance and procedures on matters such as the publication of evidence and the giving of evidence in camera would strengthen the committee system, improve its efficiency and provide a fairer process for all.¹²
- 1.26** There is no impediment to the select committee making recommendations regarding the introduction of such resolutions, as these would assist committees regardless of whether a privileges Act or a modern version of the *Parliamentary Evidence Act*, are eventually introduced. The select committee therefore recommends that the President request the Privileges Committee to inquire into and report on procedures to be observed by Legislative Council committees for the protection of witnesses, including the adoption of Senate-style privilege resolutions.

Recommendation 4

That the President request the Privileges Committee to inquire into and report on procedures to be observed by Legislative Council committees for the protection of witnesses, including the adoption of Senate-style privilege resolutions.

Government responses

- 1.27** The inquiry identified four key concerns regarding government responses: that the timeframe to receive responses is too long; responses are sometimes provided after the deadline; there is executive resistance to providing responses after an election; and government responses do not receive adequate attention from the House or committees. The select committee's suggestions to enhance the government response process are outlined below.

¹¹ Beverly Duffy and Sharon Ohnesorge, 'Out of step? The New South Wales Parliamentary Evidence Act 1901' *Public Law Review*, Vol 27/1 2016.

¹² Submission 7, NSW Ombudsman, p 3.

Timeframe for responses

- 1.28** Under Legislative Council standing order 233, government responses are due six months after a report is tabled. Several inquiry participants urged the select committee to adopt the approach taken in some other jurisdictions, including the Senate, which require responses within three months.¹³
- 1.29** The Clerk noted the impact of relatively recent changes to the approval process on the time it takes to prepare a government response:
- As I understand, some years ago the requirement was put in place internally within government for government responses to either be signed off by Cabinet, or at the very least, by the Premier, adding some time to the development of responses.¹⁴
- 1.30** Under Premier's Memorandum M2012-14, issued in 2012, if the recommendations in a committee report are particularly significant, a whole-of-government response will need to be coordinated by the Department of Premier and Cabinet for endorsement by the Premier; where the recommendations do not raise significant policy issues, agencies still need to factor in enough time for the response to be cleared by the Department of Premier and Cabinet before the relevant minister submits it to Parliament.¹⁵
- 1.31** We recognise the benefit of a considered government response and the need for inter-agency consultation. However, there is considerable benefit in obtaining prompt responses from the government, especially in those cases where a committee was brought into existence to address a pressing public issue. To strike a balance between these competing goals we are recommending that the standard timeframe for government responses be three months, but that can be extended by notice provided to the President from the Leader of the Government in the Legislative Council to six months where the government has determined it is unable to address the recommendations in that timeframe due to the need for inter-agency consultation.

Recommendation 5

That standing order 233 be amended so that government responses to committee recommendations be required within three months, and that this period can be extended to six months by provision of written correspondence from the Leader of the Government in the Legislative Council to the President, if additional time is required due to the need for inter-agency consultation.

¹³ Submission 17, Australian Lawyers Alliance, p 2; Submission 19, The Greens NSW, p 4; Evidence, Mr Evans, 29 April 2016, p 14; Submission 20, Mr Neil Laurie, Clerk of the Parliament, Queensland Parliamentary Service, Legislative Assembly, appendix B.

¹⁴ Evidence, Mr David Blunt, Clerk of the Parliaments, Department of the Legislative Council, 29 April 2016, p 4.

¹⁵ Premier's Memorandum M2012-14, *State Submissions to Inquiries including NSW Statutory and Parliamentary Committees, Inquiries initiated by the Commonwealth Parliament, Government Responses to Public Accounts Committee Reports and Other Reviews*, NSW Department of Premier and Cabinet, 8 November 2012, <http://arp.nsw.gov.au/m2012-14-state-submissions-inquiries-including-nsw-statutory-and-parliamentary-committees-inquiries>(accessed on 7 November 2016).

Late responses

- 1.32** While acknowledging the generally good record of governments in responding to Legislative Council committee recommendations, the Clerk noted a trend, beginning in the 53rd Parliament (2003), for governments to provide correspondence prior to the six-month deadline, indicating that a response would be delayed. The Clerk suggested that the government's more extensive approval process may in some cases account for this delay.¹⁶
- 1.33** The obligation to provide a timely government response is a requirement of the House and failure to meet the deadline is a possible contempt. Governments need to fulfil their obligations to the House, as well as to the inquiry participants who put time and effort into Legislative Council inquiries.
- 1.34** Correspondence advising of a delay to a government response has a somewhat ambiguous status. While it tends to be treated like a government response, that is, it is received by the Clerk, circulated to committee members, published on the committee's web page and tabled in the House, it does not technically meet the requirements under the standing order. Because it looks like a government response, standing order 233(4) tends not to be triggered. Under this standing order, the President is to report to the House when any government response has not been received within the six month deadline.
- 1.35** So should the receipt of this correspondence circumvent the triggering of standing order 233(4)? On rare occasions, there may be very good reasons for a government response to be delayed, therefore rejecting such correspondence outright may not be appropriate. But where the rationale for delay is not acceptable, members should seek to draw attention to this fact, using any number of devices, both procedural and political, to express their dissatisfaction. Recommendations 7 and 8 which are discussed later in this report, will assist in this regard and help to maintain the generally very good record of governments responding to Legislative Council committee reports in a timely manner.

Resistance to providing responses after an election, and responding to each recommendation

- 1.36** The Clerk raised two other concerns regarding government responses. First, a resistance by incoming governments to provide responses to reports tabled towards the end of the previous parliament. This occurred in 2011 when the government - on the advice of the Department of Premier and Cabinet - asserted that there was no obligation to provide a response.¹⁷
- 1.37** The House disputed this argument, agreeing to a motion asserting that, as the Legislative Council is a House of continuing effect, the obligation to provide responses to Legislative Council committee reports was not obviated by the expiration of the Legislative Assembly. All of the outstanding responses were eventually received.¹⁸ The Clerk suggested that a statement

¹⁶ Evidence, Mr Blunt, 29 April 2016, p 4.

¹⁷ Letter from Hon Duncan Gay, Deputy Leader of the Government and Minister for Roads, to Ms Lynn Lovelock, Clerk of the Parliaments, 7 September 2011.

¹⁸ Submission 16, Department of the Legislative Council, New South Wales, p 7.

from the select committee reinforcing the view expressed by the Council in 2011 might help to address such matters into the future.¹⁹

- 1.38** The second issue relates to non-compliant responses. Under the standing order the government is required to address each recommendation made by the committee. On occasions, particularly in relation to contentious policy issues, a government has provided a broad statement, rather than a response to each recommendation. Recommendation 6 encapsulates the select committee's aspirations in relation to both of these issues.

Recommendation 6

That governments fulfil their obligations under standing order 233 by:

- providing government responses to reports tabled towards the end of a previous parliament
 - ensuring that government responses always include details regarding what action, if any, the government proposes to take in relation to each recommendation.
-

Insufficient attention to responses by the House and committees

- 1.39** Despite representing a critical end point to the inquiry process, government responses are rarely discussed in committee meetings or debated in the House, as noted by several inquiry participants. The Greens NSW suggested that motions to take note of government responses should become a regular part of debate in the House, with a specific time assigned for such debates as occurs in relation to committee reports.²⁰

- 1.40** The Clerk advised that when standing order 41 was drafted in 2004 it was envisaged that committee reports *and* government responses would be debated.²¹ According to the standing order:

The House must appoint the day and time on which motions for consideration or adoption of **reports of committees** of the House and any **government responses** on such reports are to take precedence.²²

- 1.41** However, the sessional order to give expression to the standing order states:

That, notwithstanding anything contained in the standing orders, during the present session and unless otherwise ordered, debate on **committee reports** is to take precedence after questions on Tuesdays until 6.30 pm.

- 1.42** The Clerk speculated that members may not have utilised the standing order to debate government responses because they are not mentioned in the sessional order. He suggested adding the words 'and any government responses' to the sessional order. He also noted that there were other mechanisms by which a government response could be the subject of

¹⁹ Evidence, Mr Blunt, 29 April 2016, p 4.

²⁰ Submission 19, The Greens NSW, p 4.

²¹ Evidence, Mr Blunt, 29 April 2016, p 5.

²² Legislative Council standing order 41 [emphasis added].

subsequent debate, including the provision under standing order 57 which allows for a member to move that upon the tabling of a document, a motion may be made that a day be appointed for its consideration.²³ Indeed one of the select committee members recently created a precedent by utilising the procedure to move a take note debate on an Auditor-General's report.²⁴

- 1.43** The select committee agrees that government responses should be debated in the House. Accordingly, we recommend that the sessional order relating to standing order 232 make explicit that debate on committee reports includes *government responses*.
-

Recommendation 7

That the sessional order relating to standing order 232 make explicit that the day and time on which motions for consideration or adoption of reports of committees takes precedence, includes debate on government responses.

- 1.44** One way to ensure committee members give due attention to government responses is to amend standing order 233 to require standing committees to consider a government response and decide whether the committee should take any further action, as proposed by the Australian Lawyers Alliance: 'The relevant committee should convene to consider the government response and either initiate a debate, have further submissions or sessions, or simply have the response noted.'²⁵
-

Recommendation 8

That standing order 233 be amended to require standing committees to consider a government response at the next available meeting.

Budget Estimates

- 1.45** Budget Estimates is an integral aspect of the Council's scrutiny role. The select committee re-affirms the existing view that Budget Estimates is an important function in holding the Executive to account, both for the policy decisions of ministers, and for the implementation of those policies by officials. We recognise that their importance lies, chiefly, with the opposition and crossbench, but we also equally recognise that government members may wish to investigate legitimate concerns about the administration of departments and agencies.
- 1.46** In recent years, Budget Estimates has consisted of one substantive week (five days) of hearings in August/September. A week is set aside a few months later for supplementary hearings. The initial hearings are scheduled for up to four hours with time for questions

²³ Evidence, Mr Blunt, 29 April 2016, p 5.

²⁴ While moving a take note motion to consider a document is a longstanding practice of the Council, an amendment agreed to by the House in 2015 further clarified the procedure by providing for debate of one hour's duration on such a motion.

²⁵ Submission 17, Australian Lawyers Alliance, p 2.

divided evenly between the parties, although at this years' inquiry no government questions were asked.

- 1.47** Many inquiry participants argued that more time was needed to allow for a detailed analysis of the budget and the activities of government agencies. Several stakeholders urged the adoption of the Senate model, where hearings are much longer in duration and held three times a year.²⁶
- 1.48** It should be noted that no other Australian state employs the Senate's Budget Estimates process. The process in New South Wales is unique among Australian states, being the only Budget Estimates process that includes all members of the Legislative Council.
- 1.49** By comparison, Victoria has a joint Public Accounts and Estimates committee, comprising eight members (two drawn from the Legislative Council) and is chaired by a Government member. Their Estimates process lasts nine days.
- 1.50** In Tasmania, Budget Estimates is conducted by two Legislative Council committees, with six members each, over a four day period. In South Australia, this role is undertaken by two Legislative Assembly committees. These committees are chaired by Government members, and the inquiry is conducted over five days.
- 1.51** Western Australia utilises an Estimates & Financial Oversight Committee, constituted of five members of the Legislative Council which is chaired by a cross-bench member. They conduct hearings over five days.
- 1.52** In Queensland, Australia's only unicameral state Parliament, there are seven estimates committees, comprising six members each with a Government Chair. Estimates hearings are held over seven days.
- 1.53** The select committee considered various options for increasing the time allocated to estimates, including that hearings be conducted:
- annually, over five days, from 9.00 am until 11.00 pm
 - annually, over seven days, from 9.30 am until 6.30 pm
 - bi-annually in August and again in February after the mid-year Budget review
 - three times per year, from 9 am until 11 pm, as per the Australian Senate.²⁷
- 1.54** In the Australian Senate, only Senate ministers attend Budget Estimates hearings whereas in New South Wales, ministers from both Houses attend voluntarily. If a minister from the Council refuses an invitation to attend before the committee, the Council can compel the minister's attendance but cannot compel the attendance of a minister of the Legislative Assembly.²⁸ Many members of the select committee indicated that it was important that

²⁶ Submission 9, State Parliamentary Labor Party, p 2; Submission 1, NCOSS, p 4; Submission 19, The Greens NSW, p 4.

²⁷ Members acknowledged, that under this model, as with supplementary estimates, ministers would be unlikely to attend a second (or third) round of hearings.

²⁸ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), pp 497-498.

ministers from both Houses still presented before Budget Estimates and as such the move to a Senate Estimates model without ministers attending was not seen as preferable.

- 1.55** The select committee re-affirms the existing view that Budget Estimates should be conducted with a primary view to obtaining information. It is a well-established convention that ministers attend the initial Budget Estimates hearings and be prepared to answer questions about policy and administration, and officials should be prepared to answer questions on the administration of those policies. If a minister is unable to attend a supplementary hearing, he or she should make reasonable efforts to find a replacement from the Executive, so that officials are not left in a position where they are required to justify policy decisions (as opposed to the implementation of those policies).
- 1.56** While a majority of select committee members supported increasing the time available for questioning, there was no consensus as to the preferable option. While some members advocated for a full Senate model, there would still clearly be benefit in holding two, one week sessions of Budget Estimates, one in February and one in late August/early September (except in the February preceding a General Election).
-

Recommendation 9

That hearings for the 2017-18 Budget Estimates inquiry be held over two separate weeks, from 9.30 am until 6.30 pm in late August/early September 2017 and February 2018, to trial increasing the duration of Budget Estimates hearings.

Re-branding the general purpose standing committees

- 1.57** Engaging citizens in the parliamentary process is a key objective of committees and thus any means to enhance peoples' understanding of the legislature should be supported. In our view the name: 'general purpose standing committee' (GPSC) does not adequately describe the remit of these committees and we should identify a more apt title. It is therefore proposed to rename the GPSCs to 'portfolio' committees, followed by a brief description of the key portfolios for each committee. So for example, GPSC No. 1 would become Portfolio Committee No. 1 – Premier and Finance, GPSC No. 2 would become Portfolio Committee No. 2 – Health and Community Services, and so forth. We have sought to align these titles as much as possible with state government clusters.
-

Recommendation 10

That the general purpose standing committees be renamed as follows:

- Portfolio Committee No. 1 – Premier and Finance
 - Portfolio Committee No. 2 – Health and Community Services
 - Portfolio Committee No. 3 – Education
 - Portfolio Committee No. 4 – Legal Affairs
 - Portfolio Committee No. 5 – Environment and Land Use
 - Portfolio Committee No. 6 – Planning and Transport.
-

- 1.58** As part of this re-branding exercise we also suggest re-allocating portfolios to allow for greater congruence between the name of a particular committee and the portfolios allocated to it, noting of course that portfolio names change from time to time, as do their allocation to specific committees. (see Table 1) In re-allocating portfolios we have ensured that ministers only need to appear before one committee, this will mean, like with the current GPSC system, the allocation of portfolios to portfolio committees will need to be revised after a ministerial reshuffle.

Table 1 Proposed allocation of portfolios between the six 'portfolio' committees

Premier & Finance (1)	Health & Community Services (2)	Education (3)	Legal Affairs (4)	Environment & Land Use (5)	Planning & Transport (6)
Premier	Health	Education	Attorney General	Industry, Resources and Energy	Planning
Western Sydney	Mental Health	Early Childhood Education	Justice and Police	Primary Industries	Transport and Infrastructure
Treasury	Medical Research	Aboriginal Affairs	Arts	Lands and Water	Roads, Maritime and Freight
Industrial Relations	Women	Skills	Racing	Environment	Local Government
Finance, Services and Property	Prevention of Domestic Violence & Sexual Assault	Regional Development	Corrections	Heritage	
Innovation and Better Regulation	Family and Community Services	Small Business	Emergency Services		
The Legislature	Social Housing	Trade, Tourism and Major Events	Veterans Affairs		
	Disability Services	Sport			
	Ageing				
	Multiculturalism				

Recommendation 11

That the allocation of portfolios to the portfolio committees be as follows:

Portfolio Committee No. 1 – Premier and Finance

Premier, Western Sydney, Treasury, Industrial Relations, Finance, Services and Property, Innovation and Better Regulation, The Legislature.

Portfolio Committee No. 2 – Health and Community Services

Health, Mental Health, Medical Research, Women, Prevention of Domestic Violence and Sexual Assault, Family and Community Services, Social Housing, Disability Services, Ageing, Multiculturalism.

Portfolio Committee No. 3 – Education

Education, Early Childhood Education, Aboriginal Affairs, Skills, Regional Development, Small Business. Trade, Tourism and Major Events, Sport.

Portfolio Committee No. 4 – Legal Affairs

Attorney General, Justice and Police, Arts, Racing, Corrections, Emergency Services, Veterans Affairs.

Portfolio Committee No. 5 – Environment and Land Use

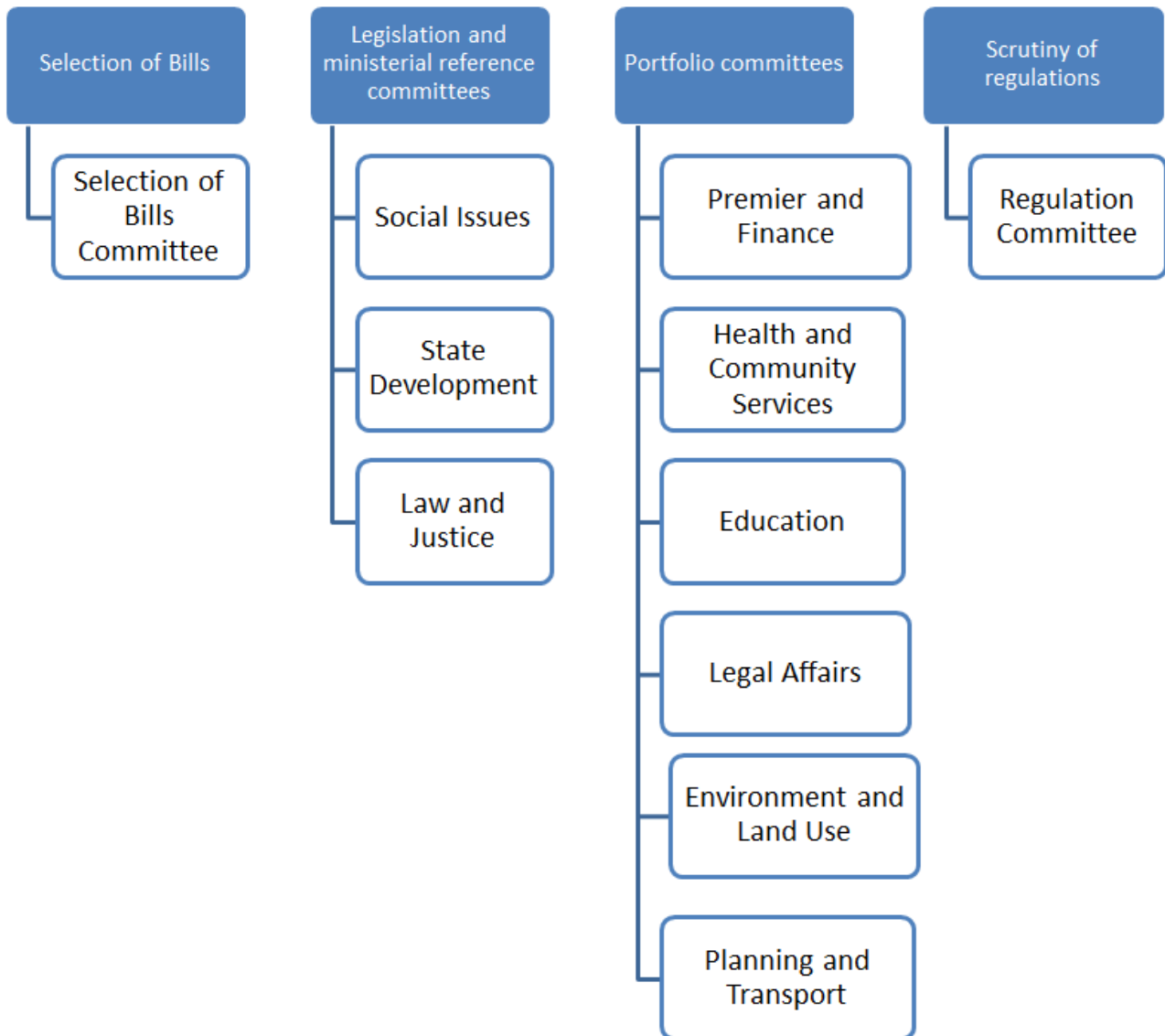
Industry, Resources and Energy, Primary Industries, Lands and Water, Environment, Heritage.

Portfolio Committee No. 6 – Planning and Transport

Planning, Transport and Infrastructure, Roads, Maritime and Freight, Local Government.

1.59 Table 2 sets out the proposed restructure of the committee system, which includes the new Selection of Bills and Regulation Committees, and the renamed standing committees.

Table 2 Revised Legislative Council Committee Structure



Community engagement

- 1.60** Chapter 5 of the select committee's discussion paper includes an overview of the Legislative Council's innovative engagement methods. Inquiry participants reflected positively on community engagement practices undertaken by committees.²⁹ In particular, several members noted how important it was that committees undertake site visits and hearings in regional areas and that this should continue to be a focus of upper house committees.
- 1.61** Nevertheless, two issues were identified during our consultations requiring further exploration: first, whether committee hearings should feature closed captioning and second, whether the Legislative Council should employ a dedicated officer to manage community engagement, including social media activities.
- 1.62** While the committee would welcome the captioning of proceedings in the chamber and committees, we are cognisant of the significant resource implications of such an initiative. The operating costs for captioning would be in the vicinity of between \$800,000 and \$1,000,000 per year which does not include infrastructure costs. To maximise the utility and justify the cost of captioning, the Parliament would need to set up a video-on-demand service to allow past broadcasts to be viewed at any time, such as exists in the federal Parliament. Without this service captions could only be viewed during the live stream. The select committee believes this important matter should be revisited in the near future.
- 1.63** While access to a media professional with social media expertise would be very welcome, it would involve considerable additional resources. The select committee is confident that appropriate, targeted training could assist committee staff to more effectively utilise social media and other innovative methods, to engage with stakeholders.

Recommendation 12

That Legislative Council staff undertake training in community engagement methods, including the use of social media, to enhance their ability to engage with stakeholders and the broader community.

²⁹ Submission 6, Law Society of NSW, p 6; Submission 10, Hon Mark Pearson MLC, p 2; Submission 12, Professor Rodney Smith, p 5.

Appendix 1 Submissions

No	Author
1	New South Wales Council of Social Service (NCOSS)
2	Western Australia Legislative Council
3	The Hon Ron Dyer
4	Department of the Senate
5	Department of the House of Representatives
6	The Law Society of NSW
7	NSW Ombudsman
8	Office of the Valuer General
9	NSW State Parliamentary Labor Party
10	The Hon Mark Pearson MLC, Animal Justice Party
11	New South Wales Council for Civil Liberties
12	Professor Rodney Smith
13	The Hon Kevin Rozzoli AM
14	New South Wales Bar Association
15	Office of the Legislative Assembly, Australian Capital Territory
16	Department of the Legislative Council, New South Wales
17	Australian Lawyers Alliance
18	Department of the Legislative Assembly, New South Wales
19	The Greens NSW
20	Parliament of Queensland

Appendix 2 Hearing witnesses

Date	Name	Position and Organisation
Friday 29 April 2016 Macquarie room Parliament House	Mr David Blunt	Clerk of the Parliaments and Clerk of the Legislative Council, Department of the New South Wales Legislative Council
	Mr John Evans PSM	Former Clerk of the Parliaments, Department of the New South Wales Legislative Council
	Dr Rosemary Laing	Clerk of the Senate, Department of the Senate
	Mr Rafael Gonzalez-Montero	Deputy Clerk and Senior Manager of Select Committees, Office of the Clerk, New Zealand House of Representatives
	Dr Luke McNamara	Professor, Faculty of Law, University of New South Wales
	Dr Julia Quilter	Associate Professor, School of Law, University of Wollongong
	Mr Neil Laurie	Clerk of the Parliament, Department of the Queensland Legislative Assembly
	Dr Laura Grenfell	Associate Professor of Law, Law School, University of Adelaide
	Dr Rodney Smith	Professor of Australian Politics, Department of Government and International Relations, The University of Sydney

Appendix 3 Discussion paper

LEGISLATIVE COUNCIL

Select Committee on the Legislative Council
Committee System

Legislative Council committee system

Discussion paper

LEGISLATIVE COUNCIL

Legislative Council committee system: Discussion paper

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Telephone 9230 3544

Facsimile

Terms of reference

1. That this House notes that on marking the 25th anniversary of the modern committee system in the Legislative Council in 2013, the House acknowledged that the work of committees enables the Legislative Council to effectively:
 - (a) hold the Government to account,
 - (b) allow for community engagement in the parliamentary process, and
 - (c) develop sound policy for New South Wales' citizens.
2. That a select committee be established to inquire into and report on how to ensure that the committee system continues to enable the Legislative Council to effectively fulfil its role as a House of Review.

These terms of reference were referred to the committee by the Legislative Council on 24 June 2015.

Committee membership

The Hon Scott Farlow MLC	Liberal Party	<i>Chair</i>
The Hon Mick Veitch MLC	Australian Labor Party	<i>Deputy Chair</i>
The Hon Greg Donnelly MLC	Australian Labor Party	
Dr John Kaye MLC	The Greens	
The Hon Trevor Khan MLC	The Nationals	
Revd the Hon Fred Nile MLC	Christian Democratic Party	
The Hon Greg Pearce MLC	Liberal Party	
The Hon Dr Peter Phelps MLC	Liberal Party	

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Chapter 1 Introduction

This chapter provides an overview of the inquiry, explains the purpose of this discussion paper and briefly explores the establishment of the modern Legislative Council committee system.

The inquiry

- 1.1 The Select Committee on the Legislative Council Committee System was established by the House on 24 June 2015. The full terms of reference are set out on page iv.
- 1.2 While the modern Legislative Council committee system is generally seen as highly effective and robust, the aim of the inquiry is to ensure that the committee system continues to enable the Council to fulfil its role as a house of review into the future.
- 1.3 The final report is likely be published in the second half of 2016.

Purpose of the discussion paper

- 1.4 The purpose of this discussion paper is to provide a starting point for those interested in making a written submission. Before drafting this discussion paper the committee consulted with all members of the Legislative Council as well as with the Chairs' Committee to ascertain the issues of most importance to members.
- 1.5 The discussion paper highlights key matters that the committee is interested in addressing during this inquiry. Chapters conclude with a set of questions you may wish to consider when providing a submission. A consolidated set of these questions is provided on page 28. Although this paper highlights some key issues, this does not mean you cannot raise other matters of importance.
- 1.6 The discussion paper has been distributed with the call for submissions. Submissions are due by Sunday 6 March 2016. The committee intends to conduct a symposium and hearings in 2016 following the submission closing date.
- 1.7 If you are interested in attending the symposium and/or giving evidence at a hearing please indicate this in your submission.

Background

- 1.8 The modern Legislative Council committee system had its genesis in the 1978 reconstitution of the Council into a fully elected, full-time House. Prior to this, members were indirectly elected by both Houses acting as an electoral college and served on a part-time basis. By 1984 all members of the Council were directly elected, and by 1985 received a full-time salary.

- 1.9 Following the reconstitution, the Council had a new sense of purpose with members seeing the establishment of a system of committees as a way of enabling the House to fulfil its modern role as a House of Review and provide it with a strong sense of relevance.¹

Select Committee on Standing Committees

- 1.10 Harnessing this renewed sense of purpose, in 1985 the Council established a select committee to inquire into the constitution, operation, funding, staffing and accommodation of a system of standing committees in the Legislative Council.²

- 1.11 The select committee, chaired by the Hon Ron Dyer, reported in 1986 and recommended the establishment of three standing committees covering state progress, social issues and country affairs and the revamping of the then existing Standing Committee of Subordinate Legislation and Deregulation.³ The select committee suggested that any system of standing committees for the Legislative Council:

- (a) Must take account of factors such as the limited number of participating members.
- (b) Should recognise the interests, skills and involvement of Members so that effective participation in the system might be encouraged.
- (c) Should encourage public access to and participation in the processes of government.
- (d) Must focus on the provision of longer-term advice and recommendations for policy direction.
- (e) Must adopt an accessible practical approach which will engender the respect of Parliament, government and the public.⁴

Establishment of subject standing committees and general purpose standing committees

- 1.12 After the 1988 election, the newly elected Coalition government agreed to establish two standing committees – on Social Issues and State Development.⁵ Internally, the coalition leadership had proposed that five policy committees be established, but the government had

¹ Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), p viii; David Clune, *Keeping the executive honest: the modern Legislative Council committee system*, A Commemorative Monograph: Part One of the Legislative Council's oral history project, (2013) p 15.

² *Minutes*, NSW Legislative Council, 28 February 1985, pp 333-334.

³ Select Committee on Standing Committees of the Legislative Council, *Standing Committees* (1986), p 10.

⁴ Select Committee on Standing Committees of the Legislative Council, *Standing Committees* (1986), p viii.

⁵ *Minutes*, NSW Legislative Council, 9 June 1988, pp 182-186.

concerns about allowing so many committees to exist, including the cost.⁶ The Standing Committee on Law and Justice was established some years later in May 1995, following the election of a Labor government.⁷

- 1.13 Then, in May 1997, the Council agreed to a Coalition opposition motion to appoint five General Purpose Standing Committees (GPSCs), each responsible for overseeing specific ministerial portfolios and for conducting the annual Budget Estimates hearings.⁸ The GPSCs were modelled on the functions of the Senate legislation/references committees, which will be discussed in chapter 2. The establishment of the GPSCs was initially opposed by the government in both 1997 and 1999. However since 1999, the motion for their establishment has been routinely moved by the government of the day at the start of a parliament.⁹
- 1.14 Prior to 2015, five GPSCs were established at the start of each Parliament. The number of committees was increased in May 2015 to six committees.¹⁰

C25: Marking 25 years of the committee system in the Legislative Council

- 1.15 On 19 and 20 September 2013 the Legislative Council celebrated the 25th anniversary of its modern committee system with a series of events known as C25. On 19 September the House debated and passed the following motion:
- (1) That this House notes that:
 - (a) 2013 marks the twenty-fifth anniversary of the modern committee system in the Legislative Council, and
 - (b) the committee system began in 1988 with the establishment of the Standing Committee on Social Issues and the Standing Committee State Development, followed by the establishment of the Standing Committee on Law and Justice in 1995 and the general purpose standing committees in 1997.
 - (2) That this House notes:
 - (a) the significant contribution to the committee system made by former and current members of this House, along with the valuable contribution of individuals and representatives of community organisations who have participated in committee inquiries, and

⁶ David Clune, *Keeping the executive honest: the modern Legislative Council committee system*, A Commemorative Monograph: Part One of the Legislative Council's oral history project, (2013) p 21.

⁷ *Minutes*, NSW Legislative Council, 24 May 1995, pp 36-43.

⁸ *Minutes*, NSW Legislative Council, 7 May 1997, pp 674-680.

⁹ *Minutes*, NSW Legislative Council, 3 July 2003, pp 220-233; *Minutes*, NSW Legislative Council, 10 May 2007, pp 55-57; *Minutes*, NSW Legislative Council, 12 May 2011, pp 98-102; *Minutes*, NSW Legislative Council, 6 May 2015, pp 65-68.

¹⁰ *Minutes*, NSW Legislative Council, 6 May 2015, pp 65-68.

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Legislative Council committee system: Discussion paper

- (b) that the work of the modern committee system will be celebrated and reflected on at a seminar to be held on Friday 20 September 2013 at Parliament House.
 - (3) That this House acknowledges and thanks the committee staff for their hard work and professionalism in support of the committee system.
 - (4) That this House notes that the work of committees has continued, and will continue, to enable the Legislative Council to effectively:
 - (a) hold the government to account,
 - (b) allow for community engagement in the parliamentary process, and
 - (c) develop sound policy for New South Wales citizens.¹¹
- 1.16** On 20 September 2013 a seminar was held at Parliament House featuring four panels of current and former members of the Legislative Council. A transcript of the event is available on Parliament's website.¹²
- 1.17** Both the motion in the House and the seminar provided members with the opportunity to explore the historical development of the committee system, celebrate its triumphs and consider its future.
- 1.18** The Legislative Council Oral History Project was also launched during C25. The first publication in this monograph series, titled 'Keeping the Executive Honest: The Modern Legislative Council Committee System', focused on the development of committees in the Council and drew on interviews with five former members who were integral in its establishment. This publication is also available on Parliament's website.¹³

¹¹ *Hansard*, NSW Legislative Council, 19 September 2013, pp 23765-23796.

¹² NSW Parliament, *C25*, <http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/C25>.

¹³ NSW Parliament, *Oral History Project*, <http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/OralHistory>.

Chapter 2 Legislative Council committee system

This chapter outlines the current Legislative Council committee system and briefly compares it with the system in the Australian Senate.

Current committee system

2.1 The current Council committee system consists of three subject standing committees and, as of 2015, six GPSCs. Select committees and joint select committees may also be established on an ad hoc basis to inquire into matters of public importance. In addition, eight joint committees are established at the start of every Parliament, but these are administered by the Legislative Assembly.¹⁴

Subject standing committees

2.2 The three subject standing committees are:

- Law and Justice
- Social Issues
- State Development.

2.3 The subject standing committees have six members: three government; two opposition; and one crossbench. These committees all have government chairs.¹⁵

2.4 Inquiries may either be referred to these committees by the House, by ministers or through a narrow self-reference mechanism where a committee can inquire into relevant annual reports or petitions tabled in the Legislative Council.¹⁶ The first two referral procedures are utilised on a regular basis, however no standing committee has ever self-referred an annual report or petition for inquiry.

General purpose standing committees

2.5 As of 2015 there are six GPSCs. These committees are responsible for overseeing all ministerial portfolios, with each responsible for between five to eight portfolios.¹⁷ GPSCs inquire into matters relevant to their portfolios and conduct the annual Budget Estimates hearings.

2.6 GPSCs have seven members: three government; two opposition; and two crossbench. These committees elect their own chairs and currently have one opposition and five crossbench

¹⁴ Note: In addition, the Legislative Council has two standing committees supported by the Procedure Office, the Procedure Committee and the Privileges Committee.

¹⁵ Note: The resolution establishing the standing committees requires the Leader of the Government to nominate the chairs.

¹⁶ *Minutes*, NSW Legislative Council, 6 May 2015, pp 63-64.

¹⁷ *Minutes*, NSW Legislative Council, 6 May 2015, pp 65-68.

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chairs.¹⁸ This is in contrast to the 55th Parliament (2011-2015) where four out of the five GPSCs were chaired by government members, and to the 54th (2007-2011) and 53rd Parliaments (2003-2007) which both had one government, two opposition and two crossbench chairs. In 2015, Revd the Hon Fred Nile MLC negotiated with the government on behalf of the opposition and crossbench to increase the number of GPSCs from five to six and to replace government chairs with opposition and crossbench chairs to increase their independence and effectiveness.

- 2.7 As well as receiving references from the House, GPSCs have the ability to self-refer an issue for inquiry on the expenditure, performance or effectiveness of any government department, statutory body or corporation, relevant to the portfolios allocated to the committee. Given this power and the fact that they have a non-government majority, these committees often conduct inquiries into highly contentious matters.

Select committees

- 2.8 In addition to standing committees, the Legislative Council may establish a select committee to inquire into a particular matter. Similar to GPSCs, these committees often have seven members and a non-government majority.
- 2.9 The 55th Parliament saw an unprecedented 14 select committees established by the Council. This compares with three in the 54th, three in the 53rd and four in the 52nd Parliament.

Joint committees

- 2.10 There are currently eight joint committees consisting of members from both the Legislative Council and the Legislative Assembly: five joint statutory committees and three joint standing committees. These committees have between five and eleven members.
- 2.11 All joint statutory and standing committees are supported by the Legislative Assembly Committee Office.

Joint statutory committees

- 2.12 Joint statutory committees are established in accordance with legislation by resolutions of both Houses as soon as practicable after the commencement of a new Parliament. The five committees are:
- Committee on Children and Young People
 - Committee on Health Care Complaints Commission
 - Independent Commission Against Corruption Committee
 - Ombudsman, the Police Integrity Commission and the Crime Commission
 - Legislation Review Committee.

¹⁸ Note: The five crossbench chairs consist of representatives from three parties.

- 2.13 With the exception of the Legislation Review Committee, the functions of each joint statutory committee are similar. Generally speaking, the committees monitor and review the exercise of the functions of the bodies they oversight, examine each annual and other report presented to Parliament and report on any desirable changes to the functions, structures and procedures of the bodies.¹⁹ The functions of the Legislation Review Committee are discussed in chapter 3.

Joint standing committees

- 2.14 Since 2004 three joint standing committees have been established by resolutions of both Houses at the start of each Parliament:
- Joint Standing Committee on Electoral Matters
 - Joint Standing Committee on Road Safety (Staysafe)
 - Joint Committee on the Office of the Valuer General.
- 2.15 The Electoral Matters committee scrutinises electoral laws and practices and the public funding of political parties. Staysafe monitors, investigates and reports on road safety in New South Wales, while the Valuer General committee performs an oversight role of that statutory body.

Chairs' Committee

- 2.16 Since 2013 the Chairs' Committee has operated as an informal forum for Legislative Council committee chairs to raise procedural and administrative issues relevant to the operation of committees in the Council.

Committee workload

- 2.17 For many years Legislative Council committees have conducted in-depth inquiries that involve extensive consultation with the community. The following table provides an overview of the large amount of work undertaken by committees in recent years.

Activity	2014-2015	2013-2014	2012-2013	2011-2012
Inquiries	45	30	19	26
Submissions	1,202	1,882 ²⁰	2,362 ²¹	2,153
Hearings	56	71	63	86
Witnesses (hearings and public forums)	471	592	547	850
Reports tabled	29	22	11	16

¹⁹ See for example: *Advocate for Children and Young People Act 2014*, s 37; *Health Care Complaints Act 1993*, s 65; *Independent Commission Against Corruption Act 1988*, s 64; *Ombudsman Act 1974*, s 31B.

²⁰ Note: An additional 1,529 pro forma responses were also received by the inquiry into Greyhound racing in New South Wales. Due to logistical constraints these responses were not processed or published.

²¹ Note: This number does not include an additional 5,224 responses received by the Standing Committee on Social Issues for the inquiry into same-sex marriage. Due to logistical constraints these responses were not processed or published.

Committee system in the Australian Senate

- 2.18** The functions of the GPSCs are partially modelled on the Australian Senate's committee system. The Senate's current committee system was established in 1994²² and consists of eight pairs of standing committees that each focus on different subject areas. These pairs of committees comprise a references committee (also referred to as a general purpose standing committee) and a legislation committee, which have overlapping membership and a shared secretariat.²³
- 2.19** References committees inquire into and report on general matters, while legislation committees have three main functions, to:
- undertake Budget Estimates
 - scrutinise bills
 - scrutinise annual reports and the performance of government departments and agencies.²⁴
- 2.20** Each committee has six members, with references committees having a non-government majority and non-government chairs and legislation committees having a government majority and government chairs. Committees with government chairs elect non-government deputy chairs, and vice versa.²⁵

Key questions

1. Do you have any comments about the current Legislative Council committee system?
2. Do you have any comments about the composition of Legislative Council committees or the appointment of chairs?
3. Is the current committee structure appropriate to ensure the Council is able to fulfil its role as a House of Review?
4. Is there scope for the committee system in the Legislative Council to incorporate aspects of the committee system in the Australian Senate?

²² Note: The modern Senate committee system was established in 1970 and was based on the United States Senate model. On 11 June 1970, the Senate Opposition Leader, Lionel Murphy, successfully moved for the establishment of the legislative and general purpose standing committees.

²³ Note: This system was modified between 2006 and 2009 when the Howard Government gained a majority in the Senate. However, the committee system was again restructured in May 2009 to return to the system of paired legislation and references committees.

²⁴ Harry Evans and Rosemary Laing (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 461.

²⁵ Note: According to standing order 25 the Leader of the Government nominates the chair of each legislation committee and deputy chair of each references committee and the Leader of the Opposition nominates the deputy chair of each legislation committee and chair of each references committee.

Chapter 3 The scrutiny of bills, Budget Estimates, government responses and confidential evidence

At the beginning of this inquiry the select committee asked Legislative Council members and the Chairs' Committee to identify issues to be considered during the inquiry. Certain aspects of committee practice were also identified during the C25 seminar. This chapter discusses these issues, as follows:

- the scrutiny of bills
- Budget Estimates
- government responses
- partially and fully confidential evidence.

The scrutiny of bills

- 3.1 The first issue identified at the beginning of the inquiry was the scrutiny of bills. In New South Wales committees undertake two types of legislative scrutiny: substantive inquiries into proposed legislation and the technical examination of bills and regulations.

Inquiries into bills by Legislative Council committees

- 3.2 Legislative Council committees undertake minimal scrutiny of draft legislation. Since 1997 only 11 bills have been referred to its committees.
- 3.3 Five of these bills were referred by the Council to GPSCs,²⁶ two were referred to the Standing Committee on Law and Justice,²⁷ a further three were referred to select committees²⁸ and one bill was referred to the Standing Committee on Social Issues by a minister.²⁹

²⁶ GPSC No. 4, NSW Legislative Council, *Inquiry into aspects of the Transport Safety and Reliability Bill* (2003); GPSC No. 3, NSW Legislative Council, *Macedonian Orthodox Church Property Trust Bill 2010* (2010); GPSC No. 2, NSW Legislative Council, *Education Amendment (Ethics Classes Repeal) Bill 2011* (2012); GPSC No. 4, NSW Legislative Council, *Fair Trading Amendment (Ticket Reselling) Bill 2014* (2015). Note: The committee inquiring into the Correctional Services Legislation Amendment Bill 2006 did not report, *Minutes*, NSW Legislative Council, 7 June 2006, pp 100-101.

²⁷ Standing Committee on Law and Justice, NSW Legislative Council, *Crimes Amendment (Child Protection Excessive Punishment) Bill 2000* (2000); Standing Committee on Law and Justice, NSW Legislative Council, *Home Building Amendment (Insurance) Act 2002* (2002).

²⁸ Select Committee on Juvenile Offenders, NSW Legislative Council, *Juvenile Offenders* (2005); Select Committee on Electoral and Political Party Funding, NSW Legislative Council, *Electoral and Political Party Funding in New South Wales* (2008); Select Committee on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, NSW Legislative Council, *Inquiry into the provisions of the Election Funding Expenditure and Disclosures Amendment Bill 2011* (2012).

²⁹ Standing Committee on Social Issues, NSW Legislative Council, *Safety Net? Inquiry into the Classification (Publications, Films and Computer Games) 2001* (2002).

- 3.4 By contrast, the Australian Senate has a procedure for the regular referral of bills for inquiry. The Selection of Bills Committee recommends to the Senate which bills should be referred to a legislation committee for detailed inquiry, at what stage of their passage they should be referred, and the reporting date.
- 3.5 The standing order establishing the committee does not contain any criteria which the committee is required to follow in making recommendations in relation to bills. This allows the committee to take into account any grounds advanced by senators for the submission of bills to committee scrutiny.³⁰ Referral of bills may take place at any stage with recent trends indicating that most referrals occur at the earliest possible stage.³¹
- 3.6 This process has seen approximately 180 bills referred to legislation committees in the current Parliament alone (2013 to present). The Selection of Bills Committee is an informal committee which meets each sitting day to confer on the day's program and is comprised of three government and three opposition senators, including the government and opposition whips, and the whips of any minority parties.³²
- 3.7 In the New Zealand Parliament, almost all bills are referred to the 13 subject-area select committees for inquiry before they receive a first reading,³³ while in the Queensland Parliament, all bills stand referred to the eight portfolio committees after they are read a first time.³⁴

Technical examination of bills and regulations

- 3.8 All bills introduced in the New South Wales Parliament must be considered by the joint statutory Legislation Review Committee. The committee, which is administered by the Legislative Assembly, is required to report to both Houses as to whether any bill:
- (i) trespasses unduly on personal rights and liberties, or
 - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - (iv) inappropriately delegates legislative powers, or

³⁰ Harry Evans and Rosemary Laing (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 455.

³¹ Harry Evans and Rosemary Laing (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 308.

³² Parliament of Australia, *No. 4 – Senate Committees*, http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_Briefs/Brief04.

³³ David McGee, *Parliamentary Practice in New Zealand*, (Dunmore Publishing Limited, Wellington, 3rd ed, 2005), p 237.

³⁴ Queensland Parliament, *Queensland Parliamentary Procedures Handbook* (2014) p 26, <https://www.parliament.qld.gov.au/documents/assembly/procedures/ParliamentaryProceduresHandbook.pdf>.

- (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.³⁵

- 3.9 The committee must also consider all regulations subject to disallowance by resolution of either or both Houses of Parliament.³⁶
- 3.10 From 1960 to 1987 all regulations were reviewed by a Legislative Council committee. In 1987 a Legislative Assembly select committee recommended that this role be undertaken by a joint parliamentary committee. The bill to enact this recommendation and establish a joint Regulation Review Committee was met with resistance in the Council from members of the opposition and crossbench. The Hon Max Willis argued that the Council committee had 'been doing its job just a little too effectively and [was] causing some embarrassment to the government'.³⁷ He suggested that 'it might be convenient to bury its role in a new committee totally dominated by the lower house and the government control that involves'.³⁸ Nevertheless, the bill passed the Council, and the Regulation Review Committee was established in 1987. It remained in operation until 2003 when its role was subsumed by the current Legislation Review Committee.
- 3.11 The creation of the Legislation Review Committee stemmed from a 2001 recommendation from the Standing Committee on Law and Justice that a joint legislation review committee be established to work alongside the joint Regulation Review Committee.³⁹ The Law and Justice Committee recommended that a joint committee should undertake this role as it is 'important that the protection of rights and liberties be the responsibility of the whole Parliament'.⁴⁰ The government supported the establishment of a joint committee but argued it was unnecessary to have separate committees to review legislation and regulations and combined both functions into the present Legislation Review Committee.
- 3.12 During the early years of the committee, concerns were raised that the joint functions of scrutinising bills and regulations was proving inefficient. This was raised in a 2003-04 report by the committee itself,⁴¹ which recommended that it appoint a subcommittee to deal with regulations. The matter was again raised in 2006 by the then Legislative Council Opposition Whip who noted that the committee's function relating to regulations was gradually diminishing.⁴² The importance of reviewing regulations was also raised by the Hon Elizabeth Kirkby during C25:

³⁵ *Legislation Review Act* 1987, s 8A.

³⁶ *Legislation Review Act* 1987, s 9.

³⁷ *Hansard*, NSW Legislative Council, 23 November 1987, p 16799 (Max Willis).

³⁸ *Hansard*, NSW Legislative Council, 23 November 1987, p 16799 (Max Willis).

³⁹ Standing Committee on Law and Justice, NSW Legislative Council, *A NSW Bill of Rights* (2001), p 132.

⁴⁰ Standing Committee on Law and Justice, *A NSW Bill of Rights* (2001), p 132.

⁴¹ Legislation Review Committee, Joint parliamentary committee, *Operation, Issues and Future Directions: September 2003-June 2004* (2004), p 11.

⁴² *Hansard*, NSW Legislative Council, 5 April 2006, p 22060 (Don Harwin).

... the devil lies in the regulations. So unless the regulations are being fully policed, you will never know whether that legislation is going to work. If it is necessary to strengthen the [Legislation] Review Committee, perhaps that is something that should be done.⁴³

- 3.13 The Australian Parliament has a Scrutiny of Bills Committee and a Regulations and Ordinances Committee, both of which are Senate committees. These committees perform a similar role to the Legislation Review Committee. The Scrutiny of Bills Committee is established according to standing order and produces both an alert digest and a scrutiny of bills report. The Regulations and Ordinances Committee, with the assistance of an independent legal adviser, meets every sitting week to check the validity of all disallowable legislative instruments tabled in the Senate.⁴⁴

Budget Estimates

- 3.14 The second issue identified at the beginning of this inquiry was the annual Budget Estimates hearings. Budget Estimates involves members of the Legislative Council questioning ministers and senior public servants on the expenditure, performance and effectiveness of their departments and is thus an integral aspect of the Council's scrutiny role.
- 3.15 The Budget Estimates inquiry has been conducted annually by GPSCs since their formation in 1997. Initially Estimates was conducted in May and June, prior to the budget being passed, however in 1999 this was changed to later in the year, usually a few months after the budget was delivered. This was considered appropriate as the Council is not able to prevent the passage of appropriation bills:

This separation of consideration of the Budget Estimates from the passage of the Appropriation Bills allows a more relaxed timeframe for their consideration ... and is particularly appropriate for the Legislative Council which, while having a scrutiny function concerning government expenditure, is not able to prevent the passage of the ordinary annual services of the government.⁴⁵

- 3.16 Up until 2006, hearings were held on sitting weeks, including at night after the rising of the House, and lasted up to two hours.
- 3.17 In recent years, Estimates has consisted of one substantive week of hearings in August/September, with the timetable and procedures adopted by resolution of the House. As part of the resolution, a week is set aside a few months later for supplementary hearings.⁴⁶
- 3.18 Hearings are now scheduled for up to four hours with time for questions divided evenly between the parties. For example, in a one hour hearing the government and opposition would each be allocated 20 minutes and the two crossbench members would receive 10 minutes each. If a third crossbench member from another party is involved as a participating

⁴³ Hon Elizabeth Kirkby, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 52.

⁴⁴ Parliament of Australia, No. 4 - Senate Committees, http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_Briefs/Brief04.

⁴⁵ GPSC No. 1, NSW Legislative Council, *Report on Budget Estimates 1999-2000: Volume 1* (1999), p 3.

⁴⁶ For example see: *Minutes*, NSW Legislative Council, 24 June 2015, pp 230-231.

member the committee must then determine the allocation of time between members. This could involve dividing the 20 minute crossbench allocation three ways or seeking to use a portion of the opposition's time.

- 3.19 In recent years it has become customary for the government to forgo its allocated time for questions on the proviso that hearings are shortened by this length of time.
- 3.20 In addition to the hearing process, members may ask ministers supplementary questions. The number of supplementary questions has been increasing dramatically over the past few years, with almost 5,500 questions being submitted to ministers in the 2015-16 Budget Estimates inquiry.⁴⁷
- 3.21 Budget Estimates reports are much shorter than standard committee reports. Instead of analysing the evidence received, reports consist of dot points outlining the main matters discussed. These reports contain no recommendations to the government and therefore do not require a government response.
- 3.22 In consultation for this paper, members voiced their dissatisfaction with aspects of the current process, namely the limited time available to ask questions in hearings.
- 3.23 In the Australian Senate, particulars of proposed expenditure and tax expenditure statements are referred twice each year to the eight legislation committees. The Senate Estimates process effectively replaces the committee of the whole stage in the House.
- 3.24 After the introduction of the budget, the appropriation bills are debated in the House of Representatives and during this time the bills are not available for consideration by the Senate. Rather than defer examination, the Senate refers documents which reproduce the details of the appropriation bills to its eight legislation committees.
- 3.25 Senate Estimates operate differently to the Legislative Council as they occur twice each year, hearings are much longer and there is no formal division of time between the parties for asking questions.

Government responses

- 3.26 The third issue identified at the beginning of this inquiry was the consideration or scrutiny of government responses. According to standing orders, government responses are due six months after a report is tabled. This often occurs after the report has been debated in the House. During the C25 conference one participant suggested a process where, a month after the government response is received, the committee could meet and discuss the response to see if there is a need to re-examine any matter.⁴⁸
- 3.27 During consultation for this paper a member suggested that an annual report on the implementation of government responses to committee reports be produced.

⁴⁷ NSW Legislative Council, 'House in Review' (2015) 56/8, p 8.

⁴⁸ Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 49.

- 3.28 Another C25 participant suggested that the take note debate in the House for reports occur after the government response is received, rather than be initiated as soon as a report is tabled.⁴⁹
- 3.29 By contrast, government responses in the Australian Senate are due three months after a report is tabled. These responses are regularly subject to motions for the Senate to take note of the document.⁵⁰ According to standing order, debate on government responses occurs during the same time as debate on committee reports.⁵¹

Partially and fully confidential evidence

- 3.30 The fourth issue identified by some members at the beginning of this inquiry concerns the acceptance and publishing of partially and fully confidential submissions and oral evidence.
- 3.31 Wherever possible, committee proceedings should be conducted in public. However, submission authors or witnesses may request that part or all of their evidence, including their name, remains confidential to all but members of the committee and the committee secretariat. Some degree of confidentiality is normally sought for one of three reasons: the disclosure of personal information, adverse comment against a third party, or concerns about retaliation due to the content of their evidence. Committees will generally agree to requests for partial or full confidentiality.
- 3.32 Members who raised this matter are most concerned with how to manage information that has been kept confidential due to adverse mention. If material is confidential, it makes it difficult for committee members to follow up on, or test the veracity of adverse remarks. Keeping allegations confidential also means that persons subject to adverse mention have no knowledge of these remarks and no chance to respond. The result is that lines of inquiry may be left incomplete. Or, if the committee does decide to publish this information, it risks reporting untested allegations where due process has not been provided and the confidentiality of an inquiry participant may have been breached.
- 3.33 Further there are no Legislative Council guidelines that dictate how a committee should respond when an inquiry participant makes adverse remarks. The committee response and degree of information kept confidential are decided on a case by case basis that depends on the nature and sensitivities of each inquiry. It should be noted that the Australian Senate has privilege resolutions (discussed in chapter 4) for the protection of inquiry witnesses. With regard to adverse mention, the resolutions provide several options including that the evidence be heard in camera, be expunged from the transcript, or that the person adversely mentioned be given an opportunity to respond either in writing or at a hearing. These practices are generally followed by Legislative Council committees.

⁴⁹ Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 50.

⁵⁰ Harry Evans and Rosemary Laing (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 524

⁵¹ Harry Evans and Rosemary Laing (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 200.

- 3.34** Some members also contended that inquiry participants should not be granted anonymity or confidentiality if they are concerned about intimidation or retribution for giving evidence. This is because a committee's proceedings, including the making of submissions and oral evidence given by witnesses, are protected by parliamentary privilege. Therefore, in theory, evidence can be given freely and honestly without fear or threat of legal action for defamation, or any form or intimidation.

Key questions

5. Should committees in the NSW Parliament play a greater role in scrutinising legislation on a regular basis? If so, how?
6. Is the current system for scrutinising regulations effective?
7. Should any changes be made to the Budget Estimates process?
8. Is the time available for questions at Budget Estimates generally adequate or should it be expanded? If so, how should this be done?
9. In general do committees allocate sufficient time to the questioning of witnesses? Should there be a process for allowing more time with certain witnesses?
10. Should a process be introduced to examine or debate government responses?
11. Is the time allowed for a government response to a committee report (six months) too long?
12. Under what circumstances should a committee decide to keep a submission or a transcript of evidence partially or fully confidential?
13. Should inquiry participants be granted anonymity or confidentiality if they are concerned about intimidation or retribution for giving evidence?

Chapter 4 Committee powers

This chapter discusses whether Legislative Council committees have adequate powers to undertake their inquiry role and if appropriate procedures are in place to ensure the protection of inquiry witnesses.

Parliamentary privilege in New South Wales

- 4.1 New South Wales is unusual amongst Australian jurisdictions as no statute defines the powers and privileges of Parliament. Instead, the New South Wales Parliament relies on the common law principle of ‘reasonable necessity’ as well as a small number of statutes which bear on parliamentary privilege. This includes Article 9 of the *Bill of Rights 1689* (by virtue of the *Imperial Acts Application Act 1969*)⁵². Article 9 states: That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.⁵³
- 4.2 The privileges of freedom of speech and freedom of debate are enshrined in Article 9. However, uncertainty remains on two basic points: what is covered by ‘proceedings in Parliament’, and what is meant by ‘impeached’.⁵⁴ It has been argued that the vagueness of the article’s wording does not match the needs of modern Parliaments.⁵⁵
- 4.3 Article 9 has been the subject of legal cases in the United Kingdom, Canada, Australia and New Zealand.⁵⁶ These cases prompted the Australian and New Zealand parliaments to codify and consolidate their privileges in statute.⁵⁷ It has been argued that New South Wales should adopt similar legislation to give broad and consistent statutory meaning to Article 9;⁵⁸ indeed a number of unsuccessful attempts have been made since 1985 to enact such legislation.⁵⁹

⁵² Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 47; Stephen Frappell, ‘A case for a parliamentary privileges Act for New South Wales’ (2015) 30 (1) *Australasian Parliamentary Review*, pp 8-9.

⁵³ Note: Modern wording used.

⁵⁴ Joint Committee on Parliamentary Privilege, Parliament of the United Kingdom, *Parliamentary Privilege First Report* (1999) Chapter 2.

⁵⁵ Stephen Frappell, ‘A case for a parliamentary privileges Act for New South Wales’ (2015) 30 (1) *Australasian Parliamentary Review*, p 24.

⁵⁶ Joint Committee on Parliamentary Privilege, Parliament of the United Kingdom, *Parliamentary Privilege First Report* (1999) Chapter 2.

⁵⁷ *Parliamentary Privileges Act 1987* (Cth); *Parliamentary Privileges Act 2014* (NZ).

⁵⁸ Stephen Frappell, ‘A case for a parliamentary privileges Act for New South Wales’ (2015) 30 (1) *Australasian Parliamentary Review*, p 24.

⁵⁹ Stephen Frappell, ‘A case for a parliamentary privileges Act for New South Wales’ (2015) 30 (1) *Australasian Parliamentary Review*, pp 10-11.

Parliamentary Evidence Act 1901

- 4.4 The *Parliamentary Evidence Act 1901* is the key statute in New South Wales regulating the powers of parliamentary committees. It provides committees with strong powers to compel witnesses to attend hearings and give evidence, including the power to:
- penalise witnesses for failing to attend following a summons to give evidence
 - compel answers to lawful questions and penalise witnesses for refusing to answer such questions
 - protect witnesses so they can give evidence without fear or threat of legal action for defamation
 - penalise witnesses for giving false evidence.
- 4.5 Although the Act provides committees with significant powers, questions have been raised about aspects of the Act, including the appropriateness of its penal provisions and its archaic and arcane language. For example, under s 11(1):
- ... if any witness refuses to answer any lawful question during the witness's examination, the witness shall be deemed guilty of a contempt of Parliament, and may be forthwith committed for such offence into the custody of the usher of the black rod ... and, if the House so order, to gaol ...⁶⁰
- 4.6 Flaws in s 11 have been acknowledged for at least 30 years, including the ambiguity of the expression 'lawful question', the lack of any procedure to follow to detain a witness within the parliamentary precinct and concerns as to whether Parliament's powers to punish witnesses accords with community expectations.⁶¹
- 4.7 It has been suggested that the *Parliamentary Evidence Act* be modernised to make its provisions both unambiguous and reflective of contemporary community standards regarding procedural fairness. This could potentially be done as part of the process to consolidate the privileges of Parliament in a New South Wales parliamentary privileges Act.⁶²

Privileges resolutions

- 4.8 While the *Parliamentary Evidence Act 1901* provides committees with the power to compel witnesses to give evidence, the protection of witnesses is also an important consideration for the committee system. Although Legislative Council committees act judiciously to protect their participants, there are no formal, publically available procedures in place to ensure that this occurs.

⁶⁰ *Parliamentary Evidence Act 1901*, s 11(1).

⁶¹ Beverly Duffy and Sharon Ohnesorge, 'Out of step? The New South Wales Parliamentary Evidence Act 1901' (Paper presented at the 2015 Australian Study of Parliament Group conference, Wellington, 2 October 2015), pp 13 and 18.

⁶² Stephen Frappell, 'A case for a parliamentary privileges Act for New South Wales' (2015) 30 (1) *Australasian Parliamentary Review*, p 23.

- 4.9 In contrast, the Australian Senate adopted privilege resolutions in 1988 following the enactment of the *Parliamentary Privileges Act 1987* (Cth). This includes two types of resolutions on procedures for the protection of committee witnesses: one for general Senate committees and another for the Privileges Committee. The general Senate committees resolution details a number of matters such as the publication of evidence, the giving of *in camera* evidence and adverse mention. A full list of the Senate privilege resolutions is available on the Australian Parliament website.⁶³
- 4.10 A recent paper argued that either in lieu of, or complementary to, statutory enactment of parliamentary privileges in New South Wales, the Legislative Council should consider adopting similar resolutions to the Senate that are ‘well thought-through, fair and transparent’. The resolutions should:
- set the boundaries for what committees may do
 - provide procedural protection to witnesses
 - provide a formal framework within which difficult issues can be resolved.⁶⁴

Challenges to committee powers

- 4.11 Over the past few decades the executive government has challenged various powers of Legislative Council committees, including the powers to:
- order State papers
 - call for information covered by statutory secrecy provisions
 - request that Parliamentary Counsel’s Office prepare draft bills.

Order for the production of State papers

- 4.12 The Legislative Council has a common law power to order the production of State papers from the executive as affirmed by the High Court in *Egan v Willis* (1998). The Council’s position is that committees also have the power to order papers if considered necessary in the context of a particular inquiry.⁶⁵
- 4.13 Between 1999-2001 the government complied with several orders for papers from committees. However, following Crown Solicitor’s advice issued in September 2001, the executive has refused to comply with a number of orders for papers from committees. Since 2001 the executive’s position is that ‘while the Legislative Council has the power to compel

⁶³ Parliament of Australia, *Appendix B - Senate privilege resolutions*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed%20inquiries/2004-07/report_125/e02.

⁶⁴ Beverly Duffy and Sharon Ohnesorge, ‘Out of step? The New South Wales Parliamentary Evidence Act 1901’ (Paper presented at the 2015 Australian Study of Parliament Group conference, Wellington, 2 October 2015), p 22.

⁶⁵ Beverly Duffy and David Blunt, ‘Information is power: recent challenges for committees in the NSW Legislative Council’ (Paper presented at 45th Presiding Officers’ & Clerks’ Conference, Apia, Samoa, 30 June - 4 July 2014), p 2.

the production of State papers, it has not been determined that a committee of the Legislative Council has such a power, or can have it delegated to it by the House.⁶⁶

Statutory secrecy provisions

- 4.14** Several laws in New South Wales contain statutory secrecy provisions, making it a criminal offence for certain information to be disclosed. It is a long held position of Australian parliaments that statutory secrecy provisions have no effect on the powers of the Houses and their committees to conduct inquiries, and do not prevent committees seeking information covered by such provisions. *Odgers* notes that the basis of this position is that the law of parliamentary privilege provides absolute immunity to the giving of evidence before a House or a committee and ‘it is a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words’.⁶⁷
- 4.15** For many years Legislative Council committees have been frustrated in their attempts to gain information covered by statutory secrecy. A breakthrough was achieved in 2015 when senior public officials provided information that was covered by statutory secrecy to a select committee.⁶⁸ However it is unclear whether the executive has conceded that privilege ‘trumps’ secrecy, or if this was a one off, and information was provided due to the inquiry’s unique circumstances.⁶⁹

Preparation of draft bills

- 4.16** Legislative Council standing order 226(3) provides that: For the purposes of preparing a draft bill for incorporation in a report to the House, a committee may, with the consent of the relevant Minister, make use of the services of any staff of the Parliamentary Counsel’s Office.
- 4.17** In 2012, a select committee sought to utilise this procedure for the first time. However the Premier refused the committee’s request on the basis that the ‘normal’ process was preferred. The matter was then referred to the Chair’s Committee to consider the efficacy of the standing order in its current form.⁷⁰ The matter was subsequently referred to the Procedure Committee in 2014.⁷¹

⁶⁶ Beverly Duffy and David Blunt, ‘Information is power: recent challenges for committees in the NSW Legislative Council’ (Paper presented at 45th Presiding Officers’ & Clerks’ Conference, Apia, Samoa, 30 June - 4 July 2014), pp 2-3.

⁶⁷ Harry Evans and Rosemary Laing (ed), *Odgers’ Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 66.

⁶⁸ Select Committee on the conduct and progress of the Ombudsman’s inquiry “Operation Prospect”, NSW Legislative Council, *The conduct and progress of the Ombudsman’s inquiry “Operation Prospect”* (2015).

⁶⁹ Steven Reynolds, Samuel Griffith and Tina Higgins, Asserting the inquiry power: parliamentary privilege trumps statutory secrecy in New South Wales, (Paper presented at 46th Presiding Officers’ & Clerks’ Conference, Hobart, Tasmania, July 2015), p 3.

⁷⁰ Select Committee on the Partial Defence of Provocation, NSW Legislative Council, *The partial defence of provocation* (2013), pp 235, 238 and 243.

⁷¹ *Minutes*, NSW Legislative Council, 12 August 2014, p 2647.

Key questions

14. Would the introduction of a parliamentary privileges act in New South Wales, similar to the Australian and New Zealand statutes assist Legislative Council committees to undertake their inquiry role?
15. Should the *Parliamentary Evidence Act 1901* be amended?
16. Should the Legislative Council introduce privileges resolutions, similar to resolutions adopted by the Australian Senate in 1988?
17. Should standing order 226(3) be amended to remove the requirement for the 'consent of the relevant Minister' when a committee has resolved to request that Parliamentary Counsel's Office prepare a draft bill?

Chapter 5 Community engagement and awareness

The chapter explores how Legislative Council committees engage with the community. A particular focus is the methods that have been adopted to increase awareness and knowledge of inquiries and the committee process.

Standard community engagement practices

- 5.1 Legislative Council committees employ a number of methods typically used by parliamentary committees to engage stakeholders in inquiries, including calling for submissions, conducting public hearings and forums and more recently using social media, such as Twitter. Committees use the Legislative Council Twitter account @nsw_upperhouse⁷² to publicise inquiries and their activities.

Innovative engagement practices

- 5.2 Over many years Legislative Council committees have adopted a number of innovative approaches to community engagement.
- 5.3 These have included advertising a survey on Facebook for an inquiry on the bullying of children and young people,⁷³ using Storify for a number of inquiries to tell the ‘story’ of an inquiry⁷⁴ and uploading videos of the Chair to the Parliament’s YouTube account to provide inquiry updates.⁷⁵
- 5.4 Other innovative approaches include conducting:
- a private roundtable discussion for key inquiry stakeholders on possible report recommendations⁷⁶
 - Aboriginal cultural awareness training for members and staff at the start of inquiries concerning indigenous issues⁷⁷
 - an online questionnaire as part of the evidence gathering process.⁷⁸

⁷² Twitter, *NSW Legislative Council*, https://twitter.com/nsw_upperhouse.

⁷³ GPSC No. 2, *NSW Legislative Council*, ‘Bullying of children and Young People’ (2009) pp 2-3.

⁷⁴ See for example: Storify, *Inquiry into regional aviation Services*, https://storify.com/NSW_UpperHouse/inquiry-into-regional-aviation-services.

⁷⁵ YouTube, *Parliament of NSW*, <https://www.youtube.com/user/NSWParliament/videos>.

⁷⁶ Standing Committee on Social Issues, *NSW Legislative Council*, ‘Domestic violence trends and issues in NSW’ (2012), p 2.

⁷⁷ For example: Standing Committee on Law and Justice, *NSW Legislative Council*, ‘The family response to the murders in Bowraville’ (2014), p 1.

⁷⁸ GPSC No. 6, *NSW Legislative Council*, ‘Results of online questionnaire: Inquiry into local government in NSW’ (2015), available at: <http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/8BC356B1B716725CCA257E90000F83DF>.

LEGISLATIVE COUNCIL

Legislative Council committee system: Discussion paper

- 5.5** In addition to these examples, the Committee Office conducts a number of workshops each year in conjunction with the Council of Social Service of NSW (NCOSS) to improve non-government stakeholders' understanding of parliamentary inquiries. The workshop includes segments on how to write an effective submission and how to be an effective witness at a hearing.⁷⁹ The Committee Office has conducted similar workshops with a number of other groups such as the Public Interest Advocacy Centre and Community Legal Centres. There is also a committee segment in the Public Service Seminar program, held a number of times each year.
- 5.6** Further, the Legislative Council Procedure Office Training and Research team operates a Regional Secondary School Outreach program. This involves travelling with committees to rural areas to educate school students about the committee process.
- 5.7** The Parliament has also recently collaborated with the University of Sydney to implement an undergraduate subject 'Parliament and Democracy'. This subject features lectures held at Parliament House by staff of the Council and Assembly, including on the work of committees.⁸⁰
- 5.8** It is important to note that the Legislative Council does not have a dedicated office to manage community engagement. Although further innovative engagement methods would be beneficial, the practical matters of staffing restrictions and budget need to be carefully considered as part of any decision to expand engagement methods.

Key questions

18. Is the current level of community engagement in committee inquiries adequate?
19. How could community engagement be improved?
20. How could committees better utilise social media for inquiries to engage with the community?
21. Are there any measures the committee staff could take to improve the engagement of individuals with a specific interest in addition to the peak and representative bodies?

⁷⁹ Annual Report 2014, *NSW Department of the Legislative Council* (2014), p 65.

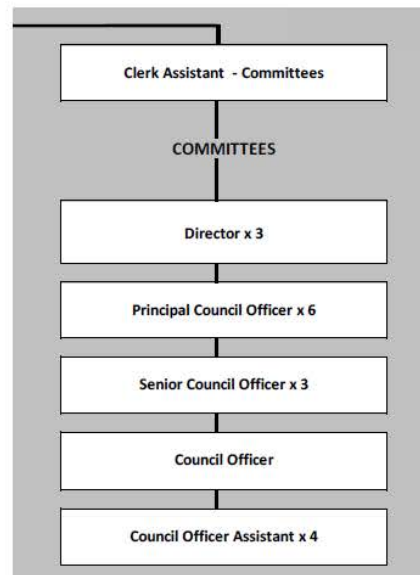
⁸⁰ University of Sydney, *GOVT3997 - Parliament and Democracy*, http://sydney.edu.au/arts/government_international_relations/undergraduate/units_of_study.shtml?u=GOVT_3997_2015_2.

Chapter 6 The role of the secretariat

Another important issue concerns the secretariat support provided by staff of the Legislative Council to committees.

Current staffing

- 6.1** The Committee Office of the Department of the Legislative Council has an establishment of 17 full-time equivalent positions.
- 6.2** The Clerk-Assistant Committees is responsible for overseeing the Committee Office with three Directors managing its day to day operations. Six Principal Council Officers, assisted by three Senior Council Officers, are responsible for managing inquiries. These officers are supported by five administration staff.
- 6.3** Committee staff are responsible for the administrative aspects of inquiries, liaising with stakeholders, providing procedural advice to members and writing the Chair's draft report.
- 6.4** In the 2014/15 financial year the net cost of operating committees was approximately \$2.4 million, which includes travel, accommodation and staffing. This can be compared to approximately \$123 million for the net cost of the overall operation of the Parliament in 2014/15.



Staffing practices

- 6.5** Secretariat staff in the Legislative Council are employed as generalists, meaning they are not permanently attached to a particular committee but may be asked to work on any inquiry of any committee. Staff are employed from a range of academic backgrounds. Prior to the late 1990s staff were attached to particular committees, however a more flexible model was introduced to ensure that work was spread evenly amongst the secretariat.
- 6.6** It is important for staff to be flexible as it is commonplace for officers to work concurrently on more than one inquiry into very different subject matters. Although this can be a challenge, it provides staff with the opportunity for professional development and diverse inquiry experience.

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- 6.7 For inquiries that require specialist or technical knowledge it is not uncommon for the committee, to request a briefing from experts or from departmental staff at the commencement of an inquiry.⁸¹ This can assist the members and secretariat to understand complex matters before receiving evidence.
- 6.8 On two occasions committees have employed an external actuary to assist with analysis of technical financial information.⁸²
- 6.9 The matter of ‘experts’ being employed on an ad hoc basis to assist with inquiries was raised by a member during the consultation process for this discussion paper. It was also raised during C25 where a former member noted he had tried to introduce a system where special counsel, similar to the United States Congress, be employed to assist GPSCs.⁸³ A current member agreed with this and noted:
- [Thought] should be given to bringing in specialist advice permanently, or perhaps on a case-by-case basis like a special counsel. I have had inquiries where we have had ... to bring in people to explain to the committee issues about which not many of them, if any, had any technical knowledge.⁸⁴
- 6.10 This issue was initially considered by the Select Committee on Standing Committees in the 1980s which recommended that consultants only be employed for specific and specialist research that could not be possible through internal resources. In coming to this opinion, the committee noted:

...the committee believes that as a general principle as much as is feasible ... the research for committees should be carried out using internal resources. Evidence suggests that there are likely to be difficulties which arise in maintaining full control of the direction of an inquiry if the role of consultants is not carefully controlled.⁸⁵

⁸¹ For example: Standing Committee on Law and Justice, NSW Legislative Council, *Review of the Crimes (Forensic Procedures) Act 2000* (2002); Standing Committee on State Development, NSW Legislative Council, *Nanotechnology in New South Wales* (2008); GPSC No. 5, NSW Legislative Council, *Coal seam gas*, (2012).

⁸² GPSC No. 2, NSW Legislative Council, *Second Interim Report on the Inquiry into Rural and Regional New South Wales Services: Rural Doctors, Aged Care & Mental Health* (1999); GPSC No.1, NSW Legislative Council, *NSW Workers Compensation Scheme, Final report* (2002).

⁸³ Hon John Hannaford, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 46.

⁸⁴ Hon Robert Brown MLC, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 48.

⁸⁵ Select Committee on Standing Committees of the Legislative Council, NSW Legislative Council, *Standing Committees* (1986), pp 57-58.

Key questions

22. Should experts be employed by committees on an ad hoc basis to contribute to the inquiry process?
23. Should committees have access to experts who can provide advice and assistance on the drafting of report recommendations?
24. Are current staffing levels in the Committee Office sufficient to adequately support Legislative Council committees?

Summary of key questions

1. Do you have any comments about the current Legislative Council committee system?
2. Do you have any comments about the composition of Legislative Council committees or the appointment of chairs?
3. Is the current committee structure appropriate to ensure the Council is able to fulfil its role as a House of Review?
4. Is there scope for the committee system in the Legislative Council to incorporate aspects of the committee system in the Australian Senate?
5. Should committees in the NSW Parliament play a greater role in scrutinising legislation on a regular basis? If so, how?
6. Is the current system for scrutinising regulations effective?
7. Should any changes be made to the Budget Estimates process?
8. Is the time available for questions at Budget Estimates generally adequate or should it be expanded? If so, how should this be done?
9. In general do committees allocate sufficient time to the questioning of witnesses? Should there be a process for allowing more time with certain witnesses?
10. Should a process be introduced to examine or debate government responses?
11. Is the time allowed for a government response to a committee report (six months) too long?
12. Under what circumstances should a committee decide to keep a submission or a transcript of evidence partially or fully confidential?
13. Should inquiry participants be granted anonymity or confidentiality if they are concerned about intimidation or retribution for giving evidence?
14. Would the introduction of a parliamentary privileges act in New South Wales, similar to the Australian and New Zealand statutes, assist Legislative Council committees to undertake their inquiry role?
15. Should the *Parliamentary Evidence Act 1901* be amended?
16. Should the Legislative Council introduce privileges resolutions, similar to resolutions adopted by the Australian Senate in 1988?
17. Should standing order 226(3) be amended to remove the requirement for the 'consent of the relevant Minister' when a committee has resolved to request that Parliamentary Counsel's Office prepare a draft bill?
18. Is the current level of community engagement in committee inquiries adequate?
19. How could community engagement be improved?
20. How could committees better utilise social media for inquiries to engage with the community?
21. Are there any measures the committee staff could take to improve the engagement of individuals with a specific interest in addition to the peak and representative bodies?

- 22 Should experts be employed by committees on an ad hoc basis to contribute to the inquiry process?
- 23 Should committees have access to experts who can provide advice and assistance on the drafting of report recommendations?
- 24 Are current staffing levels in the Committee Office sufficient to adequately support Legislative Council committees?

Appendix 1 References and further reading

New South Wales

**David Clune, *Keeping the executive honest: the modern Legislative Council committee system*, A Commemorative Monograph: Part One of the Legislative Council's oral history project, (2013).

*Beverly Duffy and David Blunt, 'Information is power: recent challenges for committees in the NSW Legislative Council' (Paper presented at 45th Presiding Officers' & Clerks' Conference, Apia, Samoa, 30 June - 4 July 2014).

*Beverly Duffy and Madeleine Foley, 'Social media, community engagement and perceptions of parliament: a case study from the NSW Legislative Council', *Australasian Parliamentary Review*, (2011), 26(1), pp 198-206.

Beverly Duffy and Sharon Ohnesorge, 'Out of step? The New South Wales *Parliamentary Evidence Act 1901*' (Paper presented at the Australasian Study of Parliament Group Conference, Wellington, New Zealand, 2 October 2015).

*Beverly Duffy and Merrin Thompson, *NSW Legislative Council*, 'Innovative committee methods: Case studies from two Parliaments' (2003).

*Madeleine Foley, 'Committee review of executive decisions: rubber stamp or game changer?' (Paper presented at the Australasian Study of Parliament Group Conference, 2013).

*Stephen Frappell, 'A case for a parliamentary privileges Act for New South Wales' *Australasian Parliamentary Review*, (2015), 30(1), pp 8-25.

*The Hon Don Harwin MLC, 'Celebrating 25 years of the New South Wales Legislative Council's Modern Committee System' (Paper presented at 45th Presiding Officers' & Clerks' Conference, Apia, Samoa, 30 June - 4 July 2014).

***Hansard*, NSW Legislative Council, 19 September 2013, pp 23765-23796 (Debate on C25).

*Teresa McMichael, 'Prorogation and Principle; The Gentrader Inquiry, Government accountability and the shutdown of Parliament', *Australasian Parliamentary Review*, (2012), 27(1), pp 196-206.

*Teresa McMichael, 'How far can they go: committee powers outside of inquiries', *Australasian Parliamentary Review*, (2012), 27(2), pp 43-53

**Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013.

*Steven Reynolds, Samuel Griffith and Tina Higgins, 'Asserting the inquiry power: parliamentary privilege trumps statutory secrecy in New South Wales', (Paper presented at 46th Presiding Officers' & Clerks' Conference, Hobart, Tasmania, July 2015).

*Merrin Thompson, 'Through the lens of accountability: referral of inquiries by ministers to upper house committees', *Australasian Parliamentary Review*, (2013), 28(1), pp 97-108.

Select Committee on Standing Committees of the Legislative Council, *NSW Legislative Council*, Standing Committees (1986).

*These papers are available on the NSW Parliament webpage '[Articles on the Council](#)'.

**These papers are available on the NSW Parliament webpage '[C25: 25th Anniversary of Committees](#)'.

Other jurisdictions

Committee System Review Committee, *Legislative Assembly of Queensland*, 'Review of the Queensland Parliamentary Committee System' (2010).

Gareth Griffith, 'Parliament and Accountability: The role of parliamentary oversight committees', *Australasian Parliamentary Review*, (2006), 21(1), pp 7-46.

Rosemary Laing, 'The Senate Committee System: Historical Perspectives', *Papers on Parliament*, No. 55, (2011).

Liaison Committee, UK House of Commons, *Select committee effectiveness, resources and powers: Second Report of Session 2012-13* (2012).

Liaison Committee, UK House of Commons, *Select committee effectiveness, resources and powers: Third Report of Session 2012-13* (2013).

Anthony Marinac and Jonathon Curtis, 'The Scrutiny of Government Agencies by Parliamentary Joint Committees', *Australasian Parliamentary Review*, (2006), 21(1), pp 118-134.

Catherine Rodgers, 'A comparative analysis of rights scrutiny of bills in New Zealand, Australia and the United Kingdom: Is New Zealand lagging behind its peers?', *Australasian Parliamentary Review*, (2012), 27(1), pp 4-17.

Meg Russell, Bob Morris and Phil Larkin, *The Constitution Unit, University College London*, 'Fitting the Bill: Bringing Commons Legislation Committees into line with best practice' (2013).

Standing Orders Committee, New Zealand House of Representatives, 'Review of Standing Orders 2014' (2014).

Standing Orders Committee, *Legislative Council of Victoria*, 'Final Report on the establishment of new Standing Committees for the Legislative Council' (2010).

Appendix 4 Senate privilege resolutions nos 1 and 2

PARLIAMENTARY PRIVILEGE RESOLUTIONS AGREED TO BY THE SENATE ON 25 FEBRUARY 1988

1. Procedures to be observed by Senate committees for the protection of witnesses

That, in their dealings with witnesses, all committees of the Senate shall observe the following procedures:

1. A witness shall be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear (whether or not the witness was previously invited to appear) only where the committee has made a decision that the circumstances warrant the issue of a summons.
2. Where a committee desires that a witness produce documents relevant to the committee's inquiry, the witness shall be invited to do so, and an order that documents be produced shall be made (whether or not an invitation to produce documents has previously been made) only where the committee has made a decision that the circumstances warrant such an order.
3. A witness shall be given reasonable notice of a meeting at which the witness is to appear, and shall be supplied with a copy of the committee's order of reference, a statement of the matters expected to be dealt with during the witness's appearance, and a copy of these procedures. Where appropriate a witness shall be supplied with a transcript of relevant evidence already taken.
4. A witness shall be given opportunity to make a submission in writing before appearing to give oral evidence.
5. Where appropriate, reasonable opportunity shall be given for a witness to raise any matters of concern to the witness relating to the witness's submission or the evidence the witness is to give before the witness appears at a meeting.
6. A witness shall be given reasonable access to any documents that the witness has produced to a committee.
7. A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in private session, and shall be invited to give reasons for any such application. If the application is not granted, the witness shall be notified of reasons for that decision.
8. Before giving any evidence in private session a witness shall be informed whether it is the intention of the committee to publish or present to the Senate all or part of that evidence, that it is within the power of the committee to do so, and that the Senate has the authority to order the production and publication of undisclosed evidence.

9. A chairman of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry. Where a member of a committee requests discussion of a ruling of the chairman on this matter, the committee shall deliberate in private session and determine whether any question which is the subject of the ruling is to be permitted.
10. Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate.
11. Where a committee has reason to believe that evidence about to be given may reflect adversely on a person, the committee shall give consideration to hearing that evidence in private session.
12. Where a witness gives evidence reflecting adversely on a person and the committee is not satisfied that that evidence is relevant to the committee's inquiry, the committee shall give consideration to expunging that evidence from the transcript of evidence, and to forbidding the publication of that evidence.
13. Where evidence is given which reflects adversely on a person and action of the kind referred to in paragraph (12) is not taken in respect of the evidence, the committee shall provide reasonable opportunity for that person to have access to that evidence and to respond to that evidence by written submission and appearance before the committee.
14. A witness may make application to be accompanied by counsel and to consult counsel in the course of a meeting at which the witness appears. In considering such an application, a committee shall have regard to the need for the witness to be accompanied by counsel to ensure the proper protection of the witness. If an application is not granted, the witness shall be notified of reasons for that decision.
15. A witness accompanied by counsel shall be given reasonable opportunity to consult counsel during a meeting at which the witness appears.
16. An officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister.
17. Reasonable opportunity shall be afforded to witnesses to make corrections of errors of transcription in the transcript of their evidence and to put before a committee additional material supplementary to their evidence.

18. Where a committee has any reason to believe that any person has been improperly influenced in respect of evidence which may be given before the committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given, the committee shall take all reasonable steps to ascertain the facts of the matter. Where the committee considers that the facts disclose that a person may have been improperly influenced or subjected to or threatened with penalty or injury in respect of evidence which may be or has been given before the committee, the committee shall report the facts and its conclusions to the Senate.

2. Procedures for the protection of witnesses before the Privileges Committee

That, in considering any matter referred to it which may involve, or gives rise to any allegation of, a contempt, the Committee of Privileges shall observe the procedures set out in this resolution, in addition to the procedures required by the Senate for the protection of witnesses before committees. Where this resolution is inconsistent with the procedures required by the Senate for the protection of witnesses, this resolution shall prevail to the extent of the inconsistency.

1. A person shall, as soon as practicable, be informed, in writing, of the nature of any allegations, known to the Committee and relevant to the Committee's inquiry, against the person, and of the particulars of any evidence which has been given in respect of the person.
2. The Committee shall extend to that person all reasonable opportunity to respond to such allegations and evidence by:
 - a. making written submission to the Committee;
 - b. giving evidence before the Committee;
 - c. having other evidence placed before the Committee;
 - d. having witnesses examined before the Committee.
3. Where oral evidence is given containing any allegation against, or reflecting adversely on, a person, the Committee shall ensure as far as possible that that person is present during the hearing of that evidence, and shall afford all reasonable opportunity for that person, by counsel or personally, to examine witnesses in relation to that evidence.
4. A person appearing before the Committee may be accompanied by counsel, and shall be given all reasonable opportunity to consult counsel during that appearance.
5. A witness shall not be required to answer in public session any question where the Committee has reason to believe that the answer may incriminate the witness.
6. Witnesses shall be heard by the Committee on oath or affirmation.

7. Hearing of evidence by the Committee shall be conducted in public session, except where:
 - a. the Committee accedes to a request by a witness that the evidence of that witness be heard in private session;
 - b. the Committee determines that the interests of a witness would best be protected by hearing evidence in private session; or
 - c. the Committee considers that circumstances are otherwise such as to warrant the hearing of evidence in private session.
8. The Committee may appoint, on terms and conditions approved by the President, counsel to assist it.
9. The Committee may authorise, subject to rules determined by the Committee, the examination by counsel of witnesses before the Committee.
10. As soon as practicable after the Committee has determined findings to be included in the Committee's report to the Senate, and prior to the presentation of the report, a person affected by those findings shall be acquainted with the findings and afforded all reasonable opportunity to make submissions to the Committee, in writing and orally, on those findings. The Committee shall take such submissions into account before making its report to the Senate.
11. The Committee may recommend to the President the reimbursement of costs of representation of witnesses before the Committee. Where the President is satisfied that a person would suffer substantial hardship due to liability to pay the costs of representation of the person before the Committee, the President may make reimbursement of all or part of such costs as the President considers reasonable.
12. Before appearing before the Committee a witness shall be given a copy of this resolution.

Appendix 5 Minutes

Minutes No. 1

Thursday 13 August 2015

Members Lounge, Parliament House at 2.00 pm

1. Members present

Mr Farlow (*Chair*)

Mr Veitch (*Deputy Chair*)

Dr Kaye

Mr Khan

Revd Mr Nile

Mr Pearce

Dr Phelps

2. Apologies

Mr Donnelly

3. Tabling of resolution establishing the committee

The Chair tabled the resolution of the House establishing the committee, which reads as follows:

1. That this House notes that on marking the 25th anniversary of the modern committee system in the Legislative Council in 2013, the House acknowledged that the work of committees enables the Legislative Council to effectively:
 - (a) hold the Government to account,
 - (b) allow for community engagement in the parliamentary process, and
 - (c) develop sound policy for New South Wales' citizens.
2. That a select committee be established to inquire into and report on how to ensure that the committee system continues to enable the Legislative Council to effectively fulfil its role as a House of Review.
3. That, notwithstanding anything to the contrary in the standing orders, the committee consist of eight members comprising:
 - (a) four government members,
 - (b) two opposition members, and
 - (c) two crossbench members.
4. That the Chair be a member of the Government and Deputy Chair be a member of the Opposition.
5. That members may be appointed to the committee as substitute members for any matter before the committee by providing notice in writing to the Committee Clerk, with nominations made as follows:

- (a) nominations for substitute government or opposition members are to be made by the Leader of the Government, Leader of the Opposition, Government or Opposition Whip or Deputy Whip, as applicable, and
 - (b) nominations for substitute crossbench members are to be made by the substantive member or another crossbench member.
6. That a committee member who is unable to attend a deliberative meeting in person may participate by electronic communication and may move any motion and be counted for the purpose of any quorum or division, provided that:
 - (a) the Chair is present in the meeting room,
 - (b) all members are able to speak and hear each other at all times, and
 - (c) members may not participate by electronic communication in a meeting to consider a draft report.
7. That, unless the committee decides otherwise:
 - (a) submissions to inquiries are to be published, subject to the Committee Clerk checking for confidentiality and adverse mention and, where those issues arise, bringing them to the attention of the committee for consideration,
 - (b) the Chair's proposed witness list is to be circulated to provide members with an opportunity to amend the list, with the witness list agreed to by email, unless a member requests the Chair to convene a meeting to resolve any disagreement,
 - (c) the sequence of questions to be asked at hearings alternate between opposition, crossbench and government members, in that order, with equal time allocated to each,
 - (d) transcripts of evidence taken at public hearings are to be published,
 - (e) supplementary questions are to be lodged with the Committee Clerk within two days, excluding Saturday and Sunday, following the receipt of the hearing transcript, with witnesses requested to return answers to questions on notice and supplementary questions within 21 calendar days of the date on which questions are forwarded to the witness, and
 - (f) answers to questions on notice and supplementary questions are to be published, subject to the Committee Clerk checking for confidentiality and adverse mention and, where those issues arise, bringing them to the attention of the committee for consideration.

4. Conduct of committee proceedings – Media

Resolved, on the motion of Dr Kaye: That unless the committee decides otherwise, the following procedures are to apply for the life of the committee:

- the committee authorise the filming, broadcasting, webcasting and still photography of its public proceedings, in accordance with the resolution of the Legislative Council of 18 October 2007
- the committee webcast its public proceedings via the Parliament's website, where technically possible
- the committee adopt the interim guidelines on the use of social media and electronic devices for committee proceedings, as developed by the Chair's Committee in May 2013
- media statements on behalf of the committee be made only by the Chair.

5. Conduct of the inquiry into the Legislative Council committee system

5.1 Consultation with the Chairs' Committee and LC Members on inquiry scope

The Chair proposed to seek initial input on the scope of the inquiry from the Chairs' Committee at its next meeting on 26 August 2015 and to email all members of the Legislative Council to ask what they would like the select committee to consider during its inquiry.

Resolved, on the motion of Dr Kaye: That:

- the Chair request the President place an item on the agenda for the next Chairs' Committee meeting regarding the scope of the select committee's inquiry, and
- the Chair send an email to all members of the Legislative Council noting the commencement of the inquiry and asking for their input on what they would like the select committee to consider during its inquiry.

5.2 Issues paper

Resolved, on the motion of Dr Kaye: That an issues paper be prepared by the secretariat by early November 2015, and once agreed by the Committee, provided to stakeholders with their invitation to make a submission.

5.3 Closing date for submissions

Resolved, on the motion of Dr Kaye: That stakeholders be invited to make a submission following the publication of an Issues Paper by the committee in mid-November 2015, and that the closing date for submissions be in March 2016.

5.4 Stakeholder list

The secretariat circulated a draft stakeholder list.

Resolved, on the motion of Dr Kaye: That members have until Friday 4 September 2015 to nominate additional stakeholders.

5.5 Advertising

All inquiries are advertised via twitter, stakeholder letters and a media release distributed to all media outlets in New South Wales.

If the committee also wishes to advertise in the Sydney Morning Herald and/or Daily Telegraph it is recommended that the advertisement be placed in the Early General News section of the newspapers rather than the Government Noticeboard.

5.6 Hearing dates

Resolved, on the motion of Dr Kaye: That the timeline for hearings be considered by the committee following the receipt of submissions. Further, that hearing dates be determined by the Chair after consultation with members regarding their availability.

5.7 Site visits

Resolved, on the motion of Dr Kaye: That the committee consider the possible conduct of site visits in 2016, following the submission closing date.

6. Adjournment

The committee adjourned at 2.08 pm. *Sine die*.

Samuel Griffith
Clerk to the Committee

Minutes No. 2

Wednesday 4 November 2015

Room 1254, Parliament House at 10.05 am

1. Members present

Mr Farlow (*Chair*)

Mr Veitch (*Deputy Chair*)

Mr Donnelly

Dr Kaye

Revd Mr Nile

Dr Phelps (*via teleconference*)

2. Apologies

Mr Khan

Mr Pearce

3. Draft minutes

Resolved, on the motion of Mr Veitch: That draft minutes no. 1 be confirmed.

4. Correspondence

Received:

- 8 September 2015 – Mr Jeremy Buckingham MLC to Chair raising issues for the committee to consider during the inquiry
- 22 September 2015 – Mr David Shoebridge MLC to Chair raising issues for the committee to consider during the inquiry
- 28 September 2015 – Ms Jan Barham MLC to Chair raising issues for the committee to consider during the inquiry
- 19 October 2015 – Director of GPSC 2 to the Clerk-Assistant Committees forwarding a resolution adopted by GPSC2 regarding anonymous submissions.

Sent:

- 28 August 2015 – Email from Chair to all Legislative Council members calling for issues for the committee to consider during the inquiry
- 8 September 2015 – Reminder email from Chair to all Legislative Council members calling for issues for the committee to consider during the inquiry.

5. Conduct of the inquiry into the Legislative Council committee system

5.1 Closing date for submissions

Resolved, on the motion of Revd Mr Nile: That the closing date for submissions be Sunday 6 March 2016.

6. Consideration of Chair's draft discussion paper

The Chair submitted his draft discussion paper, entitled 'Legislative Council committee system: Discussion paper', which, having been previously circulated, was taken as being read.

Resolved, on the motion of Revd Mr Nile: That paragraph 2.6 be amended by inserting at the end: 'In 2015, Revd the Hon Fred Nile MLC negotiated with the government on behalf of the opposition and crossbench to increase the number of GPSCs from five to six and to replace government chairs with opposition and crossbench chairs to increase their independence and effectiveness.'.

Resolved, on the motion of Dr Kaye: That paragraph 2.7 be amended by omitting 'relevant to their portfolios for inquiry' and inserting instead 'for inquiry on the expenditure, performance or effectiveness of any government department, statutory body or corporation, relevant to the portfolios allocated to the committee'.

Resolved, on the motion of Dr Kaye: That paragraph 2.18 be amended by inserting the following footnote after ‘committee system was established in 1994’: ‘[FOOTNOTE: Note: The modern Senate committee system was established in 1970 and was based on the United States Senate model. On 11 June 1970, the Senate Opposition Leader, Lionel Murphy, successfully moved for the establishment of the legislative and general purpose standing committees.]’

Resolved, on the motion of Dr Kaye: That footnote 27 be amended by inserting at the end ‘Select Committee on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, NSW Legislative Council, *Inquiry into the provisions of the Election Funding Expenditure and Disclosures Amendment Bill 2011* (2012)’.

Resolved, on the motion of Dr Kaye: That paragraph 3.4 be amended by inserting the following paragraph after the second sentence:

‘The standing order establishing the committee does not contain any criteria which the committee is required to follow in making recommendations in relation to bills. This allows the committee to take into account any grounds advanced by senators for the submission of bills to committee scrutiny. [FOOTNOTE: Harry Evans and Rosemary Laing (ed), *Oggers’ Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 455.] Referral of bills may take place at any stage with recent trends indicating that most referrals occur at the earliest possible stage. [FOOTNOTE: Harry Evans and Rosemary Laing (ed), *Oggers’ Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 308].’

Resolved, on the motion of Dr Phelps: That the following new paragraphs be inserted after paragraph 3.27:

‘Partially and fully confidential evidence

The fourth issue identified by some members at the beginning of this inquiry concerns the acceptance and publishing of partially and fully confidential submissions and oral evidence.

Wherever possible, committee proceedings should be conducted in public. However, submission authors or witnesses may request that part or all of their evidence, including their name, remains confidential to all but members of the committee and the committee secretariat. Some degree of confidentiality is normally sought for one of three reasons: the disclosure of personal information, adverse comment against a third party, or concerns about retaliation due to the content of their evidence. Committees will generally agree to requests for partial or full confidentiality.

Members who raised this matter are most concerned with how to manage information that has been kept confidential due to adverse mention. If material is confidential, it makes it difficult for committee members to follow up on, or test the veracity of adverse remarks. Keeping allegations confidential also means that persons subject to adverse mention have no knowledge of these remarks and no chance to respond. The result is that lines of inquiry may be left incomplete. Or, if the committee does decide to publish this information, it risks reporting untested allegations where due process has not been provided and the confidentiality of an inquiry participant may have been breached.

Further there are no Legislative Council guidelines that dictate how a committee should respond when an inquiry participant makes adverse remarks. The committee response and degree of information kept confidential are decided on a case by case basis that depends on the nature and sensitivities of each inquiry. It should be noted that the Australian Senate has privilege resolutions (discussed in chapter 4) for the protection of inquiry witnesses. With regard to adverse mention, the resolutions provide several options including that the evidence be heard in camera, be expunged from the transcript, or that the person adversely mentioned be given an opportunity to respond either in writing or at a hearing. These practices are generally followed by Legislative Council committees.

Some members also contended that inquiry participants should not be granted anonymity or confidentiality if they are concerned about intimidation or retribution for giving evidence. This is because a committee's proceedings, including the making of submissions and oral evidence given by witnesses, are protected by parliamentary privilege. Therefore, in theory, evidence can be given freely and honestly without fear or threat of legal action for defamation, or any form or intimidation.'

Resolved, on the motion of Dr Kaye: That the following new key questions be inserted after question 7:

'Key question Is the time available for questions at Budget Estimates generally adequate or should it be expanded? If so, how should this be done?

Key question In general do committees allocate sufficient time to the questioning of witnesses? Should there be a process for allowing more time with certain witnesses?'

Resolved, on the motion of Dr Kaye: That the following new key question be inserted after question 8:

'Key question Is the time allowed for a government response to a committee report (six months) too long?'

Resolved, on the motion of Dr Phelps: That the following new key questions be inserted after the above amendment:

'Key question Under what circumstances should a committee decide to keep a submission or a transcript of evidence partially or fully confidential?

Key question Should inquiry participants be granted anonymity or confidentiality if they are concerned about intimidation or retribution for giving evidence?'

Resolved, on the motion of Dr Kaye: That the following new key question be inserted after question 15:

'Key question Are there any measures the committee staff could take to improve the engagement of individuals with a specific interest in addition to the peak and representative bodies?'

Resolved, on the motion of Mr Donnelly: That the following new key question be inserted after question 16:

'Key question Should committees have access to experts who can provide advice and assistance on the drafting of report recommendations?'

Resolved, on the motion of Revd Mr Nile:

- That the draft discussion paper, as amended, be adopted by the committee and published in accordance with standing order 226(4) and included with the letter sent inviting submissions and generally be made available to interested parties,
- That the Chair table the discussion paper in the House on Tuesday 10 November 2015,
- That the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling.

7. Adjournment

The committee adjourned at 10.47 am. *Sine die*.

Samuel Griffith
Clerk to the Committee

Minutes No. 3

Thursday 10 March 2016

Members' Lounge, Parliament House at 1.05 pm

1. Members presentMr Farlow (*Chair*)Mr Veitch (*Deputy Chair*)Ms Barham (*substituting for Dr Kaye during his absence*)

Mr Donnelly

Mr Khan

Revd Mr Nile

Dr Phelps

2. Apologies

Mr Pearce

3. Draft minutes

Resolved, on the motion of Dr Phelps: That draft minutes no. 2 be confirmed.

4. Correspondence**Received:**

- 19 November 2015 – Email from Professor Rod Rhodes, University of Southampton, advising he will not be making a submission
- 19 November 2015 – Email from Mr Andrew Kennon, Parliament of the United Kingdom, advising that he will not be making a submission, but is happy to provide any requested information
- 20 November 2015 – Email from Mr Tony Whitfield PSM, A/Auditor-General, advising he will not be making a submission
- 21 November 2015 – Email from Professor David Clune, Faculty of Arts, Department of Government and International Relations, University of Sydney, advising he will not be making a submission
- 19 February 2016 – Email from Ms Jan Barham MLC, Member of the Legislative Council, advising that she will be substituting for Dr Kaye during his absence
- 4 March 2016 – Email from Ms Ngila Bevan, Manager Advocacy and Communications, People with Disability Australia, advising she will not be making a submission but wishes to be informed of developments.

5. Submissions**5.1 Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos 1 to 11.

5.2 Late submissions

The committee noted it would accept late submissions and that the secretariat should email stakeholders advising they may make a late submission.

6. Invitation and call for papers for Australia-New Zealand Scrutiny of Legislation Conference at Parliament House, Perth, Western Australia

The committee noted the invitation attached to submission no. 2 from the Western Australia Legislative Council inviting members to the Australia-New Zealand Scrutiny of Legislation Conference at Parliament House, Perth, Western Australia from 11 to 14 July 2016.

7. Chairs' Committee meeting

The committee noted that the Chair will provide an overview of inquiry progress at the next Chairs' Committee meeting which will be held in the President's Dining Room at 1.00 pm on 16 March 2016.

8. Hearing and proposed site visit

Resolved, on the motion of Mr Veitch:

1. That the committee hold a hearing in Sydney on Friday 29 April 2016 from 10 am to 4 pm.
2. That the secretariat canvass dates with the committee for a possible site visit to the Australian Senate.

9. Adjournment

The committee adjourned at 1.17 pm. *Sine die*.

Samuel Griffith
Clerk to the Committee

Minutes No. 4

Friday 29 April 2016

Select Committee on the Legislative Council Committee System
Macquarie Room, Parliament House, Sydney, at 9.56 am

1. Members present

Mr Farlow, *Chair*
Mr Veitch, *Deputy Chair*
Mr Donnelly
Mr Khan
Revd Mr Nile
Dr Phelps

2. Apologies

Ms Barham
Mr Pearce

3. Previous minutes

Resolved, on the motion of Dr Phelps: That draft minutes no. 3 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received

- 14 March 2016 – Email from Professor George Williams, Faculty of Law, University of New South Wales, advising he will not be making a submission.
- 15 March 2016 – Email from Mr Richard Herr OAM PhD, Academic Coordinator, Parliamentary Law, Practice and Procedure Course, Faculty of Law, University of Tasmania, advising he may not be making a submission due to time constraints and sending apologies
- 15 March 2016 – Letter from The Hon Bruce James QC, Commissioner, Police Integrity Commission, advising the Commission does not wish to make a submission
- 6 April 2016 – Email from Professor Ian Marsh, Australian National University, advising he is happy to give evidence, referencing a report by House of Commons Committees and attaching an article reviewing UK system

- 9 April 2016 – Email from Professor Ian Marsh, Australian National University, attaching report by House of Commons Committees and attaching two articles from Pearls and Irritations website.

5. Public submissions

The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos 12 to 20, including attachments to submission no. 16.

6. Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Mr David Blunt, Clerk of the Parliaments, Department of the New South Wales Legislative Council.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr John Evans PSM, Former Clerk of the Parliaments, Department of the New South Wales Legislative Council.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined by teleconference:

- Dr Rosemary Laing, Clerk of the Senate, Department of the Senate.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined by Skype:

- Mr Rafael Gonzalez-Montero, Deputy Clerk and Senior Manager of Select Committees, Office of the Clerk, New Zealand House of Representatives
- Mr Edward Siebert, Clerk of Committees, Office of the Clerk, New Zealand House of Representatives.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Professor Luke McNamara, UNSW Law
- Associate Professor Julia Quilter, School of Law, University of Wollongong.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined by Skype:

- Mr Neil Laurie, Clerk of the Parliament, Department of the Queensland Legislative Assembly.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined by Skype:

- Associate Professor Laura Grenfell, Law School, The University of Adelaide.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Professor Rodney Smith, Department of Government and International Relations, The University of Sydney.

The evidence concluded and the witness withdrew.

The public hearing concluded at 4.07 pm.

The public and media withdrew.

7. Further inquiry activity

Resolved, on the motion of Mr Veitch:

- a) That the secretariat prepare an options paper for the committee that includes draft recommendations
- b) That the options paper be distributed to David Blunt, Clerk of the Parliaments and the Hon Don Harwin MLC, President of the Legislative Council of New South Wales
- c) That the committee conduct a private roundtable meeting in late May/early June to discuss draft recommendations for the inquiry
- d) That the committee invite Mr Blunt and Mr Harwin to participate in the private roundtable meeting
- e) That the secretariat canvass the availability of Mr Blunt and Mr Harwin for the roundtable before canvassing dates with the committee.

The committee noted that it was unlikely to progress an earlier resolution to conduct a site visit to the Australian Senate.

8. Next meeting

The committee adjourned at 4.18 pm *sine die*.

Samuel Griffith
Clerk to the Committee

Minutes No. 5

Monday 30 May 2016

Select Committee on the Legislative Council Committee System

Waratah Room, Parliament House, Sydney, at 9.30 am

1. Members present

Mr Farlow, *Chair*

Mr Veitch, *Deputy Chair*

Ms Barham

Mr Donnelly

Mr Khan

Revd Mr Nile

Mr Pearce

Dr Phelps

2. Previous minutes

Resolved, on the motion of Mr Veitch: That draft minutes no. 4 be confirmed.

3. Roundtable meeting

The committee held a roundtable meeting with David Blunt, Clerk of the Parliaments and the Hon Don Harwin MLC, President of the Legislative Council of New South Wales to consider various options in relation to the key issues raised during the inquiry.

4. Second roundtable meeting

Resolved, on the motion of Revd Mr Nile: That the committee hold a second roundtable meeting on Monday 22 August 2016 to further consider options discussed this day and that David Blunt, Clerk of the Parliaments and the Hon Don Harwin MLC, President of the Legislative Council of New South Wales be invited to attend.

5. Next meeting

The committee adjourned at 12.42 pm until 9.30 am, Monday 22 August 2016 (*second roundtable meeting*).

Samuel Griffith
Clerk to the Committee

Minutes No. 6

Monday 22 August 2016
Select Committee on the Legislative Council Committee System
Room 1254, Parliament House, Sydney, at 9.31 am

1. Members present

Mr Farlow, *Chair*
Mr Veitch, *Deputy Chair*
Mr Donnelly
Mr Khan
Revd Mr Nile
Mr Pearce
Dr Phelps

2. Apologies

Mr Shoebridge

3. Previous minutes

Resolved, on the motion of Mr Veitch: That draft minutes no. 5 be confirmed.

4. Roundtable meeting

The committee held a roundtable meeting with David Blunt, Clerk of the Parliaments and the Hon Don Harwin MLC, President of the Legislative Council of New South Wales to consider various options in relation to the key issues raised during the inquiry.

5. Next meeting

The committee adjourned at 11.49 am *sine die*, for report deliberative.

Samuel Griffith
Clerk to the Committee

Draft minutes No. 7

Friday 18 November 2016

Select Committee on the Legislative Council Committee System

Room 1136, Parliament House, Sydney, at 9.41 am

1. Members present

Mr Farlow, *Chair*

Mr Veitch, *Deputy Chair*

Mr Donnelly

Mr Khan

Mrs Mitchell (*substituting for Mr Pearce*)

Revd Mr Nile

Dr Phelps

Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mr Veitch: That draft minutes no. 6 be confirmed.

3. Correspondence

The committee noted the following item of correspondence:

Received

- 26 May 2016 – Letter from Mr Neil Laurie, Clerk of the Parliament, Parliament of Queensland, providing clarification to the answer from the public hearing on 29 April 2016 (attached).

4. Answers to questions on notice

The following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- Mr Neil Laurie, Clerk of the Parliament, Parliament of Queensland
- Mr David Blunt, Clerk of the Parliaments, Parliament of New South Wales
- Dr Luke McNamara Professor, UNSW Law and Dr Julia Quilter, Associate Professor, School of Law, University of Wollongong.

5. Consideration of Chair's draft report

The Chair submitted his draft report entitled 'The Legislative Council Committee System', which, having been previously circulated, was taken as being read.

Resolved on the motion of Dr Phelps: That wherever occurring throughout the report omit 'LMRs' and insert instead 'LMRCs'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.8 be amended by omitting 'more than this would be unwieldly' and inserting instead 'however this is not considered a firm cap, rather we are conscious of the impact this work will have'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.17 and recommendation 3 be amended as follows:

- (a) by omitting 'three government members' and inserting instead 'four government members'
- (b) by omitting 'one crossbench members' and inserting instead 'two crossbench members'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 1.17:

‘This committee, with its potentially very broad subject matter, would be assisted by including two crossbench members rather than one. This will not only share the workload, it will also allow for a broader range of views to be considered in what will likely be an important oversight role.’

Resolved, on the motion of Mr Shoebridge: That paragraph 1.30 be omitted: ‘While there may be advantages to receiving government responses within a shorter timeframe, these are outweighed by the need to ensure the content of government responses receive careful consideration by the relevant agencies including, if necessary, by the Premier. Thus while we would urge the government to submit responses as soon as practicable following the tabling of a report, we do not propose amending the standing order to reduce the current six month deadline.’ and inserting instead:

‘We recognise the benefit of a considered government response and the need for inter-agency consultation. However, there is considerable benefit in obtaining prompt responses from the government, especially in those cases where a committee was brought into existence to address a pressing public issue. To strike a balance between these competing goals we are recommending that the standard timeframe for government responses be three months but that can be extended by notice provided to the President from the Leader of the Government in the House to six months where the government has determined it is unable to address the recommendations in that timeframe due to the need for inter-agency consultation.’

Recommendation x

That standing order 233 be amended so that government responses to committee recommendations be required within three months, and that this period can be extended to six months by provision of written correspondence from the Leader of the Government in the Legislative Council to the President, if additional time is required due to the need for inter-agency consultation.’

Resolved on the motion of Dr Phelps: That paragraph 1.44 be amended by inserting ‘The committee re-affirms the existing view that Budget Estimates is an important function in holding the Executive to account, both for the policy decisions of ministers, and for the implementation of those policies by officials. We recognise that their importance lies, chiefly, with the opposition and crossbench, but we also equally recognise that government members may wish to investigate legitimate concerns about the administration of departments and agencies.’ before ‘In recent years, Budget Estimates’.

Resolved on the motion of Dr Phelps: That wherever occurring in relation to Budget Estimates, omit ‘9.00 am until 6.00 pm’ and inserted instead ‘9.30 am until 6.30 pm’.

Resolved on the motion of Dr Phelps: That footnote 27 in paragraph 1.51 be amended by inserting ‘under this model’ after ‘Members acknowledged, that’.

Resolved on the motion of Dr Phelps: That the following new paragraph be inserted after paragraph 1.52:

‘The committee re-affirms the existing view that Budget Estimates should be conducted with a primary view to obtaining information. It is a well-established convention that ministers attend the initial Budget Estimates hearings and be prepared to answer questions about policy and administration, and officials should be prepared to answer questions on the administration of those policies. If a minister is unable to attend a supplementary hearing, he or she should make reasonable efforts to find a replacement from the Executive, so that officials are not left in a position where they are required to justify policy decisions (as opposed to the implementation of those policies).’

Mr Donnelly moved: That recommendation 8 be amended by omitting all words and inserting instead: ‘That two hearings for the 2017-18 Budget Estimates inquiry be held in August 2017 and February 2018, over seven working days for each from 9.30 am until 6.30 pm’.

Question put.

Committee divided.

Ayes: Mr Donnelly, Dr Phelps, Mr Shoebridge, Mr Veitch.

Noes: Mr Farlow, Mr Khan, Mrs Mitchell, Revd Mr Nile.

Question resolved in the negative on the casting vote of the Chair.

Mr Shoebridge moved: That the second sentence in paragraph 1.53 and recommendation 8 be omitted:

‘The committee therefore supports trialling a *modest* expansion of hearing time for the 2017-2018 Budget Estimates, increasing the time allocated from five to seven days.

Recommendation 8

That initial hearings for the 2017-2018 Budget Estimates inquiry be held over seven days from 9.00 am until 6.00 pm.’

Further, that the following sentence and recommendation be inserted instead:

‘While some members advocated for a full Senate model, there would still clearly be benefit in holding two, one week sessions of Budget Estimates, one in February and one in late August/early September (except in the February preceding a General Election).

Recommendation 8

That hearings for the 2017-18 Budget Estimates inquiry be held over two separate weeks, from 9.30 am until 6.30 pm in late August/early September 2017 and February 2018, to trial increasing the duration of Budget Estimates hearings.’

Question put.

Committee divided.

Ayes: Mr Donnelly, Dr Phelps, Revd Mr Nile, Mr Shoebridge, Mr Veitch.

Noes: Mr Farlow, Mr Khan, Mrs Mitchell.

Question resolved in the affirmative.

Dr Phelps moved: That the following new paragraphs and recommendation be inserted after recommendation 8:

‘The Committee believes that division of time between Members for questioning in Estimates should be determined by the individual Committees. However, we do not support the current practice of allocating strictly equal amounts of time between Government, Opposition, and crossbench Members, if the only result from that division is that it be “given up” by the Government Members or, worse, filled with Dorothy Dix-style questions.

The Committee notes Government Members have numerous opportunities outside of Budget Estimates in which they can raise concerns with Ministers about the policy positions that have been announced by the Government. However, they may well have concerns about the administration of various policies and programs by official. To that end, Chairs of Budget Estimates Committees should be alert to, and should intervene to prevent, what appears to be any attempt to waste the time of their Committee with Dorothy Dix-style questions to Ministers.

Additionally, the Committee does not believe it is in the interests of the good government of the State for the total quantum of time allocated for Budget Estimates hearing to be reduced through the current mechanism of Government Members “giving up” their time for questions. If the Government Members do not have genuine questions sufficient to fill any time allocated to them, that time should be available for questions from Opposition and crossbench Members, should they wish to avail themselves of it.

Recommendation x

The division of time allocated to questioning between the Members on a Budget Estimates Committee shall be determined by each Committee themselves, although reasonable amounts of time must be allocated to all Members who indicate that they have legitimate questions.

Moreover, the existing practices of reducing the total quantum of time available for questions when Government Members “give up” their allocated time should cease; and Chairs should swiftly intervene to prevent time-wasting activities, such as Dorothy Dix-style questions, from Government Members.’

Question put.

Committee divided.

Ayes: Dr Phelps, Mr Shoebridge.

Noes: Mr Donnelly, Mr Farlow, Mr Khan, Mrs Mitchell, Revd Mr Nile, Mr Veitch.

Question resolved in the negative.

Resolved, on the motion of Revd Mr Nile: That:

- (a) the draft report, as amended, be the report of the committee and that the committee present the report to the House
- (b) the transcripts of evidence, submissions, answers to questions on notice and correspondence relating to the inquiry be tabled in the House with the report
- (c) upon tabling, all unpublished transcripts of evidence, submissions, answers to questions on notice and correspondence relating to the inquiry be published by the committee
- (d) the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling
- (e) the committee secretariat be authorised to update any text where necessary to reflect changes to recommendations or new recommendations resolved by the committee
- (f) dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting
- (g) that the report be tabled on Monday 28 November 2016.

6. Next meeting

The committee adjourned at 11.10 am sine die.

Samuel Griffith

Clerk to the Committee