

Second Reading

Reverend the Hon. FRED NILE [3.27 p.m.]: I move:

That this bill be now read a second time.

I thank members of the House for allowing me to bring on this bill and deliver the second reading speech. The State Senate Bill 2010 is very simple but historical. Obviously, it will not and cannot amend the New South Wales Constitution and the wording that established the original New South Wales Legislative Council. However, in recent years the Legislative Council Clerks have displayed at a Legislative Council estimates committee public hearing a large banner that reads "New South Wales Senate". It is time, therefore, that this bill is passed in order that the Legislative Council can be referred to by an alternative title, the New South Wales Senate.

It is also important that members have the option of using alternative language to describe themselves, such as "State Senator" rather than the archaic term "the honourable". I acknowledge that some members already have protested over the use of the term "the honourable" and have asked that members of the House and the President not use the term when they are addressing them. I respect their right to make that request. When visiting the United Kingdom, where there is still a class structure, officials have believed, when I have been introduced as Reverend the Hon. Fred Nile, that I have some aristocratic association with the Royal family, because that is what the term "honourable" is associated with in the United Kingdom. But, as members know, I come from the working class, with a wooden spoon in my mouth rather than a silver spoon.

What this bill proposes is already the practice in other nations that originally had legislative councils, especially in the United States of America, where the upper Houses are known as State Senates and the members as State senators. When visiting the United States, as I have done on many occasions, I explain that my role is that of a senator in the New South Wales State Senate. I do that to let them understand my role, to clarify my position and to avoid confusion surrounding the title of MLC held by a member of the Legislative Council.

When this bill is passed the use of the terms "State Senate" or "Senator" will be optional for members. Members will also still be free to use the title "honourable" and to describe this House as the New South Wales Legislative Council if they wish. However, I assume the terms "New South Wales Senate" and "State Senator" will be used at all official activities and on the correspondence of the President, the Clerks and their staff. It will be optional for each member of this House as to how they direct their staff about what terminology they require to be used. It will also be optional for members to decide how they will use this new terminology on their letterheads, business cards, compliments slips, et cetera.

The object of the bill is to authorise the use of the term "State Senate" in reference to the Legislative Council and to authorise the use of the term "State Senator" in reference to a member of the Legislative Council. Clause 3 of the bill states:

The State Senate and Senators

(1) The Legislative Council may also be called the State Senate, and the use of that name has the same effect for all purposes as the use of its other name.

(2) Accordingly, a member of the Legislative Council may also be called a State Senator.

The title of the Legislative Council was adopted in 1823 under the New South Wales Act 1823. That Act stated in part:

And whereas it may be necessary to make laws and ordinances for the welfare and good government of the said colony of New South Wales and the dependencies thereof, the occasion of which cannot be foreseen and whereas it is not at present expedient to call a legislative assembly in the said colony Be it therefore enacted that it shall and may be lawful for his Majesty, his heirs and successors by warrant under his or their sign manual to constitute and appoint a council to consist of such persons resident in the said colony not exceeding seven nor less than five as his Majesty, his heirs and successors shall be pleased to appoint

At its establishment, the Council was a deliberative or consultative body responsible for advising the Governor in making laws. At that stage it had no independent legislative power. It met in secret and members were under oath not to reveal its deliberations. The Oath of Appointment to the first Council stated in part:

I do swear that I will, to the best of my judgement and ability, faithfully advise and assist the Governor in all such matters as shall be brought under my consideration as a Member of the Council of the said Colony; and I swear that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration, or which shall become known to me as a Member of the said Council.

Times have changed since 1823. This Council is a body that is open to the public in all its deliberations. The derivation of the name "Legislative Council" is most likely from the term "Privy Council". In Britain, the Privy Council is a body that advises the Head of State on how to exercise his or her executive power. The word "privy" means private or secret; thus a Privy Council was originally a committee of the Monarch's closest advisors that gave confidential advice on affairs of state. The model of the Legislative Council, which met in secret as an advisory body to the Governor, is along similar lines, although its remit was to advise the Governor in relation to the making of laws for the peace, welfare and good governance of the colony.

In *An Encyclopaedia of Parliament*, Wilding and Laundry indicate that "Legislative Council" was the name usually given to the colonial legislatures of the British Commonwealth. The term was adopted in all six Australian colonial legislatures, although the Legislative Council of Queensland was abolished in 1922. The Legislative Councils of New South Wales, Victoria, Tasmania, South Australia and Western Australia remain. The term was also adopted to describe the upper Houses of the provincial Canadian legislatures—all those upper Houses have since been abolished—and the New Zealand Legislative Council was abolished in 1951. Today, section 3 of the Constitution Act 1902 defines "The Legislature" as follows:

The legislature means His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly.

The legislative powers of the New South Wales Parliament were traditionally constrained by imperial links to the British Parliament. Section 1 of the Colonial Laws Validity Act 1865 defined an Act of the British Parliament as extending to the colony of New South Wales, provided that the Act was "made applicable to such colony by the express words or necessary intendment". Section 2 of the Act made any colonial laws that were repugnant to the provisions of any British Acts "absolutely void and inoperative".

This arrangement did not change at Federation in 1901. The Commonwealth of Australia and the States continued to exist as colonies, although from 1907 the description of "dominion" was accorded to the larger colonies such as Australia, South Africa, New Zealand and Canada. It was only in 1931 that the Statute of Westminster 1931 released the Commonwealth Parliament from imperial constraints on its legislative power. Under that Act the Commonwealth Parliament could now legislate in a manner repugnant to British law. However, the states, including New South Wales, were not similarly released until 1986 and the enactment of the Australia Acts. Under section 1 of the Australia Act 1986 (UK) the British Parliament abdicated any legislative power over the States and Territories, and section 2 provides:

It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State

Accordingly, in 1986 the New South Wales Parliament ceased to be a colonial legislature—some members may be surprised by that. It may be argued that the title of the Legislative Council, possibly implying a colonial legislature which advises the Governor in secret but which has no legislative power, is no longer relevant or appropriate.

It has previously been argued in debate in this House that the title of New South Wales Senate would engender greater recognition and understanding than the title Legislative Council. In his valedictory speech in 1998, the Hon. Bryan Vaughan—and I obviously discussed this matter with him during his time in this place—observed:

Madam President, on Tuesday, 1 December, at a luncheon in your dining room for a German delegation, I sat next to a visiting German delegate, retired State Minister Professor Ursula Maennle of Bavaria. Professor Maennle pointed to the cover of the menu and said, 'Speaker Murray MP is obviously a member of Parliament, but what are you?' I said, 'The President is not an MP, she is an MLC' The professor said, 'What is that?' I told her that the Legislative Council was a State Senate as they would say in German. 'Ah', she said, 'I know what you mean.'

On 24 May, the Leader of the House, the Hon. Barrie Unsworth MLC, observed:

I myself have had difficulty explaining my position to American visitors on occasions when I have had the opportunity to visit the United States of America and have tried to explain the Legislative Council's function. Certainly in recent times I have found it much easier to explain my position and this happened recently when I met the United States Attorney General by saying that I am the majority leader of the State Senate. He understood what I was talking about. If I had given him the correct designation of my office, I feel he would still be contemplating what I was doing in this legislature.

It is likely that in international circles the title of "Senate" or "State Senate" engenders greater recognition than the title of "Legislative Council", which is a Commonwealth and colonial term. In relation to the United States of America, it is notable that all US States except Nebraska have a State Senate. They also generally have a Legislative Council, but in most instances this body is constituted to provide non-partisan legal and other advice to the legislators. At the domestic Australian level, it may be argued that the greater public awareness and recognition of the Commonwealth Senate and the role it plays within the Commonwealth system of government may engender greater recognition of the title "New South Wales State Senate". The fact that the New South

Wales Legislative Council performs similar functions to those of the Commonwealth Senate, acting as a House of review and actively seeking to hold the executive Government to account and having relatively strong legislative powers, similar electoral arrangements and a similar strong committee system, may further support this change. When I first proposed this bill the Hon. Tony Kelly sought advice from the Clerk of the Parliaments, Ms Lynn Lovelock. It is important that members are made aware of the information in her reply. In a letter dated 26 May 2009 she said:

Dear Minister

The proposal to rename the Legislative Council the New South Wales State Senate

You have asked for briefing material in relation to a proposal to rename the Legislative Council the New South Wales State Senate.

A change of the name of the Legislative Council to the New South Wales State Senate would likely require amendment to the *Constitution Act 1902*.

In 1991, the Democrats had an amendment prepared by Parliamentary Counsel to be moved during debate on the Constitution (Legislative Council) Amendment Bill 1991 to provide for the insertion of a new section 18 into the *Constitution Act 1902* to provide:

18. Legislative Council also called the Senate

1) The Legislative Council may also be called the Senate, and the use of that name has for all purposes the same effect as the use of its other name.

2) Accordingly, a Member of the Legislative Council may be called a Senator.

In the event this amendment was not moved.

The 1991 proposed amendment entailed providing the Legislative Council with an additional title. Adding an additional title would not appear to affect any of the entrenched provisions of the *Constitution Act 1902* since it does not *prima facie* alter the constitution, powers or procedures of the Legislature, which is the test applied in *Trethowan v Peden* [(1930) 31 SR (NSW) 183 (FC)].

The alternative would be to seek an outright change in the title of the Legislative Council to the New South Wales State Senate. This may be a little more problematic, in that the manner and form provisions of the *Constitution Act 1902* refer to the Legislative Council, and specifically exclude entrenched sections from either repeal or amendment without a bill passing both Houses and being approved at a referendum.

That is the key factor. Under the provisions of this bill, we will not require a referendum. Although I assume such a referendum would be carried, it would involve a great deal of administrative resources and place a financial burden on the State. The Clerk of the Parliaments, Lynn Lovelock, continued:

There are several issues to be considered. For example, it may be possible to effect a name change without amending the *Constitution Act 1902* by amending the Interpretation Act 1987 to provide that any reference to the Legislative Council is a reference to the NSW State Senate. If this is not possible, a separate bill amending the *Constitution Act 1902* would be required. It is not clear to me whether such a bill would need to be submitted to a referendum, in accordance with section 7A, since I am uncertain whether changing the name of the Council to State Senate actually constitutes an alteration to the constitution, powers or procedures of the Legislature. Anne Twomey, for example, maintains that whether a law affecting an entrenched provision is a law with respect to the "constitution, powers or procedure" of the Parliament must be assessed in each particular case based upon the nature of the particular law.

The Council also has records that Parliamentary Counsel previously prepared a bill in the early 1990s to change the title of the Legislative Council, presumably to the New South Wales State Senate. However, the Council does not have a copy of the bill.

The adoption of the title of New South Wales State Senate would have the advantage that it is more reflective of the current role of the Council. It may be argued that the title of the Legislative Council, implying a colonial legislature which advises the Governor in secret, but which has no legislative power, is no longer relevant or appropriate.

Another advantage may be that the title of New South Wales State Senate would engender greater recognition and understanding than the title Legislative Council. The strong public awareness and recognition of the Commonwealth Senate, and the role that it plays within the Commonwealth system of government, may engender greater recognition of the title New South Wales State Senate. The fact that the New South Wales Legislative Council performs similar function to the Commonwealth Senate, acting as a House of Review actively seeking to hold the executive government to account, with relatively strong legislative powers, a similar electoral arrangement, and a similarly strong committee system, may further support this.

Finally, the adoption of the title of New South Wales State Senate, and the renaming of members of the Council as State Senators, may address an anomaly whereby members of the Legislative Assembly are referred to as MPs—that is, Members of Parliament—rather than Members of the Legislative Assembly (MLAs), whereas members of the

Council continue to retain the title of Member of the Legislative Council (MLCs).

There are precedents in favour of this proposal. The Clerk of the Parliaments does not see any legislative obstruction to the passage of this bill. I call on members of the House to give the bill their wholehearted support so that we can move into a new era in the historic development of the Legislative Council. The new titles of "State Senate" and "State Senators" more accurately reflect the duties of members of this House. I thank the House for giving me the opportunity to present this bill and look forward to the support of members.