



## State Senate Bill 2012

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**Bill introduced, and read a first time and ordered to be printed on motion by Reverend the Hon. Fred Nile.**

### Second Reading

**Reverend the Hon. FRED NILE** [10.23 a.m.]: I move:

That this bill be now read a second time.

I thank members for the opportunity to bring this matter to the attention of the House and for the House to give serious consideration to its provisions. Under our operating procedures the Government does not give serious consideration to a bill until it has been read a second time in this House. I am pursuing that procedure. We are not adopting the bill; I am just giving a second reading speech and then the bill will be left on the table while discussions about the bill and the best time to proceed with it occur within the Government and the Opposition.

The State Senate Bill 2012 is very simple. Obviously it will not and cannot amend the New South Wales Constitution and the wording establishing the original New South Wales Legislative Council. That would require a referendum. I am not proposing a referendum. I am not proposing to replace the name "New South Wales Legislative Council" with the term "State Senate". The bill simply gives members the option of using that term. It is interesting that the term "State Senate" has already been used by the Legislative Council. Members might remember that during Legislative Council estimates committee hearings in previous years a large banner saying "State Senate" has been displayed behind the witnesses. When I saw that it provoked me to think about the authority for that banner.

This bill is simply giving legislative authority to the Legislative Council, the members and Clerks to use the term when required, when necessary or when they feel it is helpful. It is not intended to do anything to confuse the members of the House or the public. The Hon. Bryan Vaughan, who served in this House for many years and became a good friend of mine, often talked about the State Senate. He had a real conviction about it and often said to me, "When are you going to do something about it, Fred?" So in 2010 I started off on my passage, if you like.

It is important that members have the option of using alternative language to describe themselves, such as "State Senator", rather than the archaic term "the honourable" which they can still use if they wish. Already some members do not use the title "honourable". When I have visited the United Kingdom, where there is still a class structure, and the term "honourable" has been used, people have often inquired whether I have an aristocratic connection to members of the royal family. The term "honourable" is usually used in the United Kingdom in that way and sometimes the term causes confusion. That does not worry me particularly and this bill does not stop members using that term if they want. I am in favour of our historical origins.

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 now known as State Senates and the members are State Senators. When I have visited the United States—I am sure this has happened to other members of this House—and say that I am a member of the Legislative Council, people look a bit blank and do not know what I mean. They ask if I am a local town councillor. When I have said, "I am a member of the State Senate", they rapidly understand my role. The bill will allow members to use the term, particularly when visiting the United States, and to use it in the knowledge that they do so with the approval of this House. This bill basically gives members that approval.

When this bill is passed the use of the term "State Senator" or "Senate" still will be optional for members. Members will be free to use the title "honourable" and to still describe this House as the New South Wales

Legislative Council if they wish. The title "New South Wales Legislative Council" cannot be changed unless there is a referendum. These terms are part of our State's Constitution Act 1902 No 32. Section 7A of that Act, under the heading "Referendum for Bills with respect to Legislative Council and certain other matters", provides that the Legislative Council shall not be abolished or dissolved, nor shall its powers be altered except in the manner provided by the section, that is, by a referendum. This bill is not trying to bypass a referendum. As I said, it simply provides an option for members.

The title of the "Legislative Council" was adopted in 1823 when the first seven members met in what we now call the Parkes Room. In fact, the table in that room is the same table they sat at—so I have been told, and I do not think that information is incorrect. There were only seven members and they sat around that table in the Parkes Room and made laws for New South Wales, with the Governor as the chairman of that body. The New South Wales Act 1823 stated:

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 a warrant under his or their sign manual to constitute and appointed a council to consist of such persons resident in the said Colony not exceeding seven less than five as His Majesty his Heirs and Successors shall be pleased to appoint.

Members will note that the 1823 Act refers to the fact that it was not expedient to have a Legislative Assembly. That did not come into effect until 1856. Upon its establishment, the council was a deliberative or consultative body responsible for advising the Governor and making laws. At that stage it had no independent legislative power. I understand that it met in secret and that members were bound by an oath not to reveal its deliberations. The oath they took stated:

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.

It certainly was not open government in those days. Thankfully it is today, as we in this House share its deliberations. 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" that was used in the United Kingdom. The *Encyclopaedia of Parliaments* indicates that the term "Legislative Council" was a name usually given to the colonial legislatures of the British Commonwealth. The term was adopted in all six Australian colonial legislatures. As members know, 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 also was adopted to describe the upper Houses of the provincial Canadian legislatures, but I understand all those Houses have been abolished. Abolition also occurred in New Zealand in 1951.

In the New South Wales Constitution Act "the Legislature" is defined as, "The Legislature means His Majesty the King", which is now, obviously, the Queen, "with the advice and consent of the Legislative Council and the Legislative Assembly". That was after 1856, when New South Wales had both Houses of Parliament. The legislative powers of the New South Wales Parliament were traditionally constrained by imperial links to the British Parliament, defined in the Act of the British Parliament as extending to the colony of New South Wales, provided that the Act was made "applicable to such colonies by the express words or necessary amendment". Section 2 of the Act made any colonial laws that were repugnant to provisions of any British Acts "absolutely void and inoperative". Obviously that arrangement changed when the Commonwealth and the States continued to exist as colonies, although from 1907 the description "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 released the Commonwealth from imperial constraints on its legislative power. Under that Act the Commonwealth Parliament could not legislate in a manner repugnant to British law. However, the States, including New South Wales, were not similarly released until 1986 upon enactment of the Australia Act. Under section 1 of the Australia Act 1986 the British Parliament abdicated any legislative power over the States and Territories. 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 that have extra-territorial operation.

Accordingly it was not until 1926 that 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 "Legislative Council" possibly implies that a colonial legislature that advises the Governor in secret but has no legislative power is no longer relevant or appropriate. It has previously been argued in debate in this House that the title "New South Wales Senate" would engender a greater recognition and understanding than the title "Legislative Council". As I mentioned

earlier, the Hon. Bryan Vaughan referred to this during his valedictory speech in 1998. He stated:

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—a Bundesrat, as they would say in Germany. "Ah", she said, "I know what you mean."

A former Leader of the House in the Legislative Council, the Hon. Barrie Unsworth, observed:

I myself have had the same 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 titles "Senate", "State Senate", "Senator" and "State Senator" engender greater recognition than the title "Legislative Council" or "Legislative Councillor" which, as I have said, are Commonwealth and colonial terms. I sought advice from the then Clerk of the Parliaments, whose advice by letter states:

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 ...

The Clerk then referred to various legislative commentaries. Her letter goes on to state:

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 by referendum.

As I stated earlier, that is a key factor in this debate. I am not in any way proposing a referendum or a change to the Constitution Act. As I mentioned earlier, I also discovered that the Legislative Council's website has displayed "State Senate" by order of previous presidents, not the current President. The use of the term "State Senate" has become a custom. I believe it is in order for this House to consider and pass this legislation so that a custom that is without any legislative authority becomes legalised.

We need consistency rather than have people make up their own minds and the terms change from time to time under different presidents. That is the purpose of this bill. I trust that after due discussion members on both sides of this House will support this bill. Some members have said that the biggest obstacle to the passage of this legislation is the Legislative Assembly, which is jealous of its powers and its rights. It would not be happy with legislation that appeared to boost the importance of the Legislative Council. I hope that members have now grown up and that there is no longer any jealousy.

**The Hon. Dr Peter Phelps:** Good luck on that one.

**Reverend the Hon. FRED NILE:** I am an optimist; we could have goodwill. This bill has to be passed by both Houses of Parliament. It could be said that we would have legislative approval for what we were doing if this bill were passed only in the Legislative Council, but it would not be a proper bill. I hope that the new Premier—I have not twisted his arm on this yet—gives the bill his sympathetic support, that we have goodwill on both sides of the

Parliament and that the bill is passed in due course. I leave the matter in members' hands for their deliberation and hopefully their approval.

**Debate adjourned on motion by the Hon. John Ajaka and set down as an order of the day for a future day.**