



Celebrating 25 years of the  
New South Wales  
Legislative Council's Modern Committee System

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Paper to be presented by Hon Don Harwin  
at the 45th Presiding Officers' & Clerks'  
Conference

Apia, Samoa, 30 June - 4 July 2014

The first committee of the New South Wales Legislative Council was established in May 1825, only a matter of months after the Council itself was appointed in August 1824. Committees have been a feature of the House ever since, but were significantly revamped and modernised in the mid-1980s. Hence in September 2013, the Legislative Council celebrated a significant milestone – the 25<sup>th</sup> anniversary of its modern committee system. This paper reviews the projects and events that helped mark this 25<sup>th</sup> anniversary.

### **The changing role of the NSW Legislative Council**

The evolution of the NSW Legislative Council from a Chamber comprised of indirectly elected, part-time members to a Chamber comprised of directly elected full-time members provided the impetus for a modern committee system to be established.<sup>1</sup> By the 1984 election all members of the Legislative Council were elected and all were paid a full time salary by 1985.

The transformation of the Council meant that it had to find a new, effective role – and a revived committee system was a logical step. In 1979 and 1980, the Hon Lloyd Lange unsuccessfully moved that an inquiry into standing committees be set up. In early 1985, and with the support of the Opposition, the Leader of the ALP Government in the Legislative Council the Hon Barrie Unsworth moved for the appointment of a Select Committee on Standing Committees.

The Select Committee on Standing Committees reported in November 1986, and unanimously recommended the establishment of four standing committees:

- Subordinate legislation and deregulation
- State progress
- Social issues
- Country affairs.

However, little traction was gained for their establishment, and it was not until the newly elected Coalition government came to power in 1988 did the issue progress. Subsequently, on 9 June 1988 the Standing Committee on State Development and the Standing Committee on Social Issues were established. Seven years later in 1995 the Law and Justice Committee was established. The focus of these standing committees was policy development. In 1997 five General Purpose Standing Committees were established, which, in contrast to the previously established standing committees, had as their focus government scrutiny.

It has been remarked that the establishment of the first two standing committees in 1988 was the beginning of a renaissance for the Legislative Council, which has seen it become a powerful instrument for scrutinising the executive and holding it accountable to the electorate.<sup>2</sup>

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<sup>1</sup> *Hansard*, Legislative Council, 19 September 2013, p 23768 (Luke Foley) speaking on the motion of the 25<sup>th</sup> anniversary of the modern committee system.

<sup>2</sup> Clune, David, *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 5.

## Marking 25 years of the modern Committee system

The year 2013 was the 25<sup>th</sup> anniversary of the modern committee system in the Legislative Council. To celebrate such a milestone the Legislative Council organised a series of events, all organised under the catch-phrase ‘C25’.

On 19<sup>th</sup> September 2013 the chamber held a special debate to mark the 25<sup>th</sup> anniversary. Moved by the Hon Jennifer Gardiner on behalf of the Hon Duncan Gay, part (4) of the motion stated:

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.<sup>3</sup>

Following the debate in the House, a special luncheon was held for current and former members.

It was at this luncheon that a commemorative monograph and associated oral history project were launched to mark 25 years of the modern committee system. The oral history project involved the Clerk of the Parliaments, Mr David Blunt, and the former Parliamentary Historian, Dr David Clune, interview five eminent former members who were involved with the establishment of the first Standing Committees. These members, the Hon Ron Dyer; the Hon Elizabeth Kirby; the Hon William Lloyd Lange; the Hon Max willis; and the Hon John Hannaford, gave fascinating insights into the origins of the committee system. From the interview transcripts, Dr Clune authored a monograph – *Keeping the Executive Honest: The Modern Legislative Council Committee System. A Commemorative Monograph: Part One of the Legislative Council’s Oral History Project*. In addition to the Monograph, an oral history short film was also produced, which captured the emotions and intonations of the five members.

## The C25 Seminar

In addition to the above proceedings on 20<sup>th</sup> September 2013 a full day ‘C25’ seminar was held at Parliament House. To commence proceedings one of Australia’s pre-eminent leading counsel Mr Bret Walker SC gave the opening keynote address. With the topic ‘Inquiry powers in an era of executive dominance’, the speech provided a thought provoking start to the day. A précis of Mr Walker’s address is provided at Appendix One.

Following the keynote address by Mr Walker, the balance of the seminar was divided into four sessions:

1. Holding the Government to account
2. Developing policy for NSW citizens
3. Taking Parliament to the people
4. Beyond 2013.

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<sup>3</sup> *Minutes*, Legislative Council, 19 September 2013, p 2020.

At each of these sessions, a panel of speakers gave a short presentation, which was then followed by a discussion led by questions from the floor.

This paper will summarise the key themes from each of these sessions, using information from the seminar, as well as from the Parliamentary debate and oral history project.

## **Session 1 - Holding the Government to account**

This session, chaired by Reverend the Hon Fred Nile MLC, heard from four guest presenters:

- Associate Professor Rodney Smith, Department of Government and International Relations, University of Sydney
- The Hon Helen Sham-Ho, OAM, former Chair General Purpose Standing Committee No. 3
- The Hon Amanda Fazio, MLC, former President
- Mr Quentin Dempster, Journalist, Presenter of *7.30 NSW*, ABC TV.

Each of these presenters came to the seminar with different backgrounds and experiences, which provided some interesting insights into the role of committees in holding the government to account.

Associate Professor Smith spoke first and argued that the most critical factor to the establishment and success of committee's scrutinising the Executive was the loss of Government control of the Legislative Council in 1988. He continued that a robust committee system has largely developed through the activities of cross-bench members, combined with whoever was in opposition at the time. Smith argued that governments have a limited interest in scrutiny, and explained it as follows:

Governments have a very limited interest in scrutiny no matter their pronouncements while in opposition. For example, Nick Greiner was very keen on a committee system prior to 1988. A couple of years after 1988, he wished that the Legislative Council might be abolished. Labor's opposition to the self-referral powers of the general purpose standing committees in the late 1990s is another example of a party in opposition happy to scrutinise the government but when they are in government, suddenly scrutiny seems like a scary thing.<sup>4</sup>

Smith expanded on this argument, and noted that while Opposition MLCs have an interest in scrutiny, this is limited by the fact that they are aware that one day, they too may be a Minister or part of a Government, hence there is a kind of self-limiting device that reduces the interests of Opposition MLCs in scrutiny. Smith maintained that because they will never be part of the Executive, the crossbenchers are key players in the scrutiny of government:

The crossbenchers have no chance of gaining Executive power so they become the key players. Although some are more interested in scrutiny than others, most of them have at least some interest in scrutiny.<sup>5</sup>

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<sup>4</sup> Associate Professor Rodney Smith, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 17.

<sup>5</sup> Associate Professor Rodney Smith, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 17.

Smith concluded that in the absence of a committed group of crossbench MLCs who can combine with the Opposition to form a majority in the Chamber and in committees themselves, scrutiny of the Executive is very much reduced.

The second speaker was the Hon Helen Sham-Ho, former member of the Legislative Council and Chair of the General Purpose Standing Committee No 3 during its 2000 inquiry into police resources in Cabramatta. Using this inquiry as a case study, Ms Sham-Ho gave a powerful presentation on the forceful impact that a committee scrutinising government policy can have.

Ms Sham-Ho noted that at the turn of the century drug peddling and use was a major scar on the community fabric of Cabramatta. Over 15 per cent all drug overdoses in NSW occurred in the suburb, addicts were injecting in plain view in subways and shelters, and more than half of all handgun shootings in the state happened in the area. Despite this, the Commissioner of Police declared that police operations in Cabramatta were such a success that the suburb was no longer regarded as dangerous or difficult a place as it used to be.

Ms Sham-Ho explained that the Committee was active in hearing from community members to ascertain what was really going on in Cabramatta:

We held many hearings at local venues in Cabramatta and heard from the community directly. We saw the problems with our own eyes. We held 10 hearings and two community forums and visited Cabramatta four times. One of the most important hearings was held in private at Cabramatta High School. We heard of schoolchildren who were too scared to leave their homes to come to school because drug users were shooting up in the stairwell of their apartment building.<sup>6</sup>

With the media interest generated by the inquiry, the Committee was spectacularly successful in bringing about change to police procedures and operations, as Ms Sham-Ho noted:

...led to major changes in police management and the appointment of a new police Minister, a new police commissioner and a new local area commander and the establishment of a new police station in Cabramatta. It gained national media coverage for several months.<sup>7</sup>

Effective scrutiny of government policy and decision making can be challenging, and it proved to be the case for this inquiry. Ms Sham-Ho observed that: 'It was a very difficult inquiry for the committee and the police resisted many of its processes through their legal section. Government members were often placed in a difficult position.'<sup>8</sup>

However, a key message of Ms Sham-Ho's presentation was that communities can use the democratic process of a committee inquiry, have its voice be heard, and can transform public policy.

In the C25 debate in the House, the Hon Charlie Lynn MLC commented in relation to this inquiry:

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<sup>6</sup> Hon Helen Sham-Ho, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 18.

<sup>7</sup> Hon Helen Sham-Ho, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 17.

<sup>8</sup> Hon Helen Sham-Ho, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 18.

The inquiry into policing in Cabramatta illustrates why the general purpose standing committees are among the most important development in the council's role as a House of scrutiny and inquiry.<sup>9</sup>

When the Hon Amanda Fazio was President of the Legislative Council, General Purpose Standing Committee No 1 commenced a self-referred inquiry into the Gentrader Transactions. These transactions were part of the then State Government's energy reform strategy, but were highly controversial and were announced just months before a general election. On the same morning that three members of GPSC 1 called for a meeting to adopt terms of reference to hold an inquiry into the Gentrader transactions, the Governor, with the advice of the Executive Council, prorogued the 54th Parliament.

Ms Fazio explained that, as President of the Legislative Council at the time, she was drawn into the argument about two key questions:

1. Whether or not Legislative Council committees could conduct business when Parliament was prorogued
2. Whether or not witnesses should be compelled to appear and give evidence.<sup>10</sup>

President Fazio subsequently permitted the inquiry to proceed, but given the uncertainty about the privileged status of the proceedings, determined that it would be inappropriate to subpoena witnesses.

Although denied by the then Premier, the Committee found that the Executive asked the Governor to prorogue Parliament in an attempt to foreclose the GPSC inquiry into the gentrader transactions. A key lesson from this experience is that governments cannot evade scrutiny by an Upper House committee by proroguing Parliament, and indeed this issue set a precedent for the NSW Legislative Council.

The journalist Mr Quentin Dempster noted that unicameralism in Queensland led that legislature to be termed a 'sausage machine' – bills were put in one end, a handle was turned and without further debate legislation was exuded from the other end. Dempster explained that unicameralism was eventually discredited in Queensland in the 1980s through the Fitzgerald inquiry into police and political corruption. Dempster lamented that Fitzgerald did not recommend that the Queensland Upper House be restored as a check and balance on executive government, and that two statutory oversight bodies were established instead:

These two external oversight bodies were alright up to a point, but they did not have the flexibility and responsiveness of an upper House with powers to bring executive government to account on decisions and issues which, while contentious, may not necessarily fall into the corrupt conduct category.<sup>11</sup>

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<sup>9</sup> *Hansard*, Legislative Council, 19 September 2013, p 23778 (Charlie Lynn) speaking on the motion of the 25<sup>th</sup> anniversary of the modern committee system.

<sup>10</sup> Hon Amanda Fazio MLC, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 19.

<sup>11</sup> Mr Quentin Dempster, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 21.

In contrast, Mr Dempster noted that the committees of the NSW Legislative Council have made a significant contribution to government accountability:

... The committee system has its deficiencies, but after 25 years of operation I think the concluded consensus must be that it has made a significant contribution to the good governance and accountability of New South Wales through a readiness to respond to public distress or concern about any issue .... This has consolidated the credibility and integrity of the upper House committee system. It has enhanced the public understanding and the public record it creates is enduring.<sup>12</sup>

The five former members interviewed as part of the oral history project had strong views about the role of the Legislative Council committee system and the delicate balance between a government's right to legislate and the House's right to review the work of the Executive. In Lloyd Lange's view, the Legislative Council's right to review and scrutinise is as equally as important as the Government's right to legislate:

[The Government] ...must always have the right to legislate. I do not think there is any doubt about that. Of equal or even more importance is the House's right to review, ... From the community point of view they need to know that the legislation is being properly examined before it is passed. I do not think that happens much these days or as much as it might, despite the committee system ... It is essential that the Parliament be able to examine the public finances on behalf of the community, otherwise it is pointless having the second House. I think it is imperative that scrutiny be full and complete. If the Government has something it wants to hide, it should be made public.<sup>13</sup>

Similarly, Max Willis noted that 'It is a fundamental of our constitutional system that the executive government is responsible and answerable to parliament for everything it does.'<sup>14</sup>

Reflecting on her time as a Member of the Legislative Council, Liz Kirkby was convinced that Upper House committees were needed and valuable as part of the House of review:

... I believe a house of review is essential ... The government has, in my opinion, a right to put forward legislation based on matters on which the election has been fought. But it surely does not mean that it has an ability to force through that legislation in a dictatorial manner. It is one thing to make an election promise and quite another to translate that promise into legislation. It is necessary for parliament, particularly a house of review, to see if the legislation is going to do exactly what it is intended to do.<sup>15</sup>

While the general consensus of the seminar was that committees play an effective role in the scrutiny and accountability of government, members did provide some critical comment, particularly in relation to the Budget Estimates inquiry process. Each year, the General Purpose Standing Committees conduct their Inquiry into Budget Estimates, which provides an opportunity for the examination of budget papers and programs of government departments.

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<sup>12</sup> Mr Quentin Dempster, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 21.

<sup>13</sup> Clune, David, *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 35.

<sup>14</sup> Clune, David, *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 36.

<sup>15</sup> Clune, David, *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 37.

The Hon Luke Foley MLC argued that the time given to the General Purpose Standing Committees is insufficient to properly scrutinise the spending of the Executive:

I believe, in order to perform our proper role of scrutinising and holding accountable the Executive government, this House will need to push the boundaries out when it comes to our estimates process. ... The current estimates process of this House provides for insufficient scrutiny of Ministers and departments. I do not seek to make a partisan political point in saying that. It may well be that it was the former Labor Government that ensured that the estimates process of this House is curtailed and provides for insufficient scrutiny.<sup>16</sup>

The Hon Natasha Maclaren-Jones MLC also criticised the estimates process, but from another angle compared to that of Mr Foley. Contrasting the estimates process in the Australian Parliament, which ‘focusses heavily on matters relating to items of proposed expenditure’, Mrs Maclaren-Jones stated that in the Legislative Council:

... the focus tends not to be on proposed expenditure but on political point-scoring. At a Commonwealth level, the majority of questions asked by committee members are directed at officers of departments or their agencies, and refer to expenditure under consideration. This does not mean that Ministers are exempt, but they tend to focus their responses on policy matters.

... We have an opportunity to work in a bipartisan manner to examine and build on the strengths of our Chamber to improve our budget process and the committee system....<sup>17</sup>

## **Session 2 – Developing policy for NSW citizens**

An important role for committees of the New South Wales Legislative Council is policy development, and session two focussed on this role. Chaired by the Hon Niall Blair MLC, the seminar heard from four guest presenters:

- The Hon Max Willis, former President of the Legislative Council, former Chair of the Social Issues Committee
- The Hon Ann Symonds, former member of the Legislative Council, former Chair of the Social Issues Committee
- The Hon John Hatzistergos, former member of the Legislative Council, former Attorney-General
- Ms Alison Peters, Chief Executive Officer, Council of Social Services of NSW.

As the inaugural Chair of the Social Issues Committee the Hon Max Willis had a special perspective on the value of Committees in developing public policy. Mr Willis recounted that the highlight of his 28 year parliamentary career was as Chairman of the Social Issues Committee, and gave the example of the Committee’s inquiry into adoption information. He stated that he hoped the adoption inquiry was the ‘benchmark of the use of parliamentary standing committees for the development of policy for implementation by government.’<sup>18</sup> The Committee produced a

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<sup>16</sup> *Hansard*, Legislative Council, 19 September 2013, p 23769 (Luke Foley) speaking on the motion of the 25<sup>th</sup> anniversary of the modern committee system.

<sup>17</sup> *Hansard*, Legislative Council, 19 September 2013, p 23783 (Natasha Maclaren-Jones) speaking on the motion of the 25<sup>th</sup> anniversary of the modern committee system.

<sup>18</sup> Hon Max Willis, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 26.



unanimous report recommending legislative reform, which was subsequently implemented by the Government.

Mr Willis concluded that the development of social policy by governments and the Parliament is second best compared to that achieved by standing committees, which he considered have proved to be successful and effective in public policy development:

Social change by social engineering by government is a very dangerous process. The best social engineer is the community itself by a process of evolution relying on the community's innate sense of right and wrong. Parliament as a whole, dominated by party discipline and Executive Government, is not a suitable alternative instrument in a true democracy. The standing committees that we have developed in this place over the last 25 years have proven to be a successful and effective mechanism for policy development, especially in areas of social change. This should be jealously guarded and encouraged to evolve to the benefit of society....<sup>19</sup>

Regarding the operation of the Social Issues Committee, the Hon Ann Symonds concurred with the sentiments of Mr Willis, and described the adoption inquiry as a model in which public policy can be developed. One of the reasons why Ms Symonds considered it a 'model' was that it led to legislative reform, and the government provided a budget for the reforms to be implemented.

However, Ms Symonds noted that other inquiries she was involved in also produced unanimous reports, but this failed to persuade the government of the day to implement change or reform. She asked what can be done to further Committee recommendations:

The biggest challenge to government and to the committees is: How do we affect the responses that we want, even if we produce unanimous reports? ...The question is: When you have such understanding, such commitment and such passion for change in such an area, how is it that government does not get around to implementing the change? Public policy needs to be affected by committee decisions, but how does the committee get to the stage of inducing implementation by the government? What sort of processes should we have as committees to further the recommendations that we have made and the outcomes that we have presented to the Government? I think that is a major consideration.<sup>20</sup>

As a former member of the Legislative Council and former Attorney-General, the Hon John Hatzistergos had an interesting perspective on the value of committees in developing public policy. He particularly noted the value of the development of policy being open in the public arena:

If I can summarise what I thought were the most important aspects of particularly the Law and Justice Committee, they were that they enabled a public exposition of the issues and the framing of the parameters of a debate. They gave the public an opportunity to contribute directly to policy formation....They gave the committee members an opportunity to be informed by the submission process and to consider the issues. And they gave members an

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<sup>19</sup> Hon Max Willis, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 27.

<sup>20</sup> Hon Ann Symonds, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 28.

opportunity to debate the committee report in a take-note debate, which did not involve a vote but did involve an airing of their positions not dictated by party allegiances.<sup>21</sup>

Mr Hatzistergos concluded that after committee scrutiny and review, ‘In many instances a political consensus developed which ultimately enabled the legislative process to go forward.’<sup>22</sup>

Ms Peters, Chief Executive Officer, Council of Social Services, also observed that one of the greatest benefits of the Legislative Council committee system is that it provides for an in-depth consideration of public policy issues, and that this can lead to a consensus view on the way forward:

...the committee process is that, for some of the trickiest and most difficult of issues, it has often led to a consensus view about the way forward and we see that as a great strength. There is no doubt that the committee process has an influencing role. The process has a capacity to not only influence decision-makers and government—and certainly many committee reports have led to governments changing their position on critical matters—but the committee process also has the capacity to influence the views of other stakeholders.<sup>23</sup>

In the debate in the Chamber marking C25, many members recognised the value of committees in the development of public policy. For instance, the Hon Marie Ficarra observed that committees:

...allowed extensive amounts of time and effort to review issues that had fallen under legislative scrutiny. It was the careful and prolonged examination of specific issues, especially complex issues, which allowed the compilation of thorough committee reports, informing members of findings and, in turn, permitting the delivery and reception of informed recommendations for policy development. These reports have been delivered with a high degree of analytical excellence and have contributed to the making of sound policy and the development of effective governance.<sup>24</sup>

The Hon Peter Primrose spoke of the importance of committee members listening to the evidence while considering public policy. Speaking from experience as a member on the Social Issues Committee and its inquiry into hepatitis C, he reflected:

... the message I took from my experience of serving on that committee was that it was a success because its members respected the evidence that was given to them. Despite the fact that we had our own perceptions as human beings, members of political parties and people who read correspondence and opinions in the media, the committee went where the evidence took it. To me, the value of that was the fundamental lesson. We went in with personal views, but we listened to what we were told by people experiencing the disease, their families and the experts. That took us to places to which many of us thought at the beginning of the inquiry we would not go. Accordingly, the committee, which was made up

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<sup>21</sup> Hon John Hatzistergos, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 30.

<sup>22</sup> Hon John Hatzistergos, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 30.

<sup>23</sup> Ms Alison Peters, Chief Executive Officer, Council of Social Services of NSW, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 32.

<sup>24</sup> *Hansard*, Legislative Council, 19 September 2013, p 23773 (Marie Ficarra) speaking on the motion of the 25<sup>th</sup> anniversary of the modern committee system.

of such disparate people with different opinions, came out with many recommendations and a unanimous 400-page report.<sup>25</sup>

### Session 3 – Taking Parliament to the People

The third session of the C25 seminar was ‘Taking Parliament to the People’. The Hon Jennifer Gardiner MLC chaired this session, which heard from the following three presenters:

- Mr Peter Topura, Director, Procedure, Bougainville House of Representatives
- Mr Simon Johnston, Twinning Project Coordinator, NSW Parliament
- Mr Steven Reynolds, Deputy Clerk, Legislative Council, NSW Parliament.

The NSW Parliament is ‘Twinned’ with the national parliament of the Solomon Islands and the Autonomous Region of Bougainville’s House of Representatives. A common feature of many parliaments, including NSW and its twinned parliaments, is that in the course of its inquiries Committees travel and visit and speak to relevant people and communities in rural and regional areas. Mr Topura of the Bougainville House of Representatives explained some of the special difficulties that their committees face in undertaking this task, including limited funding and staffing, and that many areas of the Autonomous Region have no reliable communication or road networks. Using a case study of a Bougainville Committee inquiring into the Torokina Palm Oil project, Mr Topura showed film footage of the Committee having to navigate its way to isolated towns and villages by small dinghy, and roads which were virtually impassable.

However, Mr Topura noted an issue which is also pertinent to many other Parliaments. While on the Committee’s site visit people in the communities did not understand committee work, and confused the institutions of government and parliament. Mr Topura explained:

They were all thinking we were the government. They were accusing the members of not delivering. So the committee members had to listen to what they were saying and try to get what they needed to write its report. ... the local people do not know what the distinction is between the Executive Government and the Parliament.<sup>26</sup>

The general public’s confusion of the role of Executive Government compared to that of the Parliament is an issue also experienced in NSW. For instance, the Hon Robert Brown MLC noted that some witnesses appearing at committee hearings were confused as to the distinction between government and the parliament, but by the end of the inquiry were aware of the process. However, Mr Brown concluded that there had to be a better way to help educate communities about the role of the parliament:

Some of the comments made to me by witnesses coming to committees, particularly in rural New South Wales were ... they were coming there to have a go at the Government—in other words there was a problem with the participants not really understanding why the committee was there. But during the course of an inquiry, and certainly after the inquiry, the attitude completely changes: those constituents who have been involved in the inquiry are

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<sup>25</sup> *Hansard*, Legislative Council, 19 September 2013, p 23776 (Peter Primrose) speaking on the motion of the 25<sup>th</sup> anniversary of the modern committee system.

<sup>26</sup> Mr Peter Topura, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 37.

happy with the process. But when you go to a different location you start the whole process over again. There has to be a way that would perhaps better publish, publicise or broadcast the way that committees are run, and show the ways the formal process can be varied.<sup>27</sup>

In his presentation, Mr Steven Reynolds, Deputy Clerk, NSW Legislative Council, explained that when a Legislative Council Committee travels into regional areas, the Council will often also take staff to deliver educative programs to schools in that area, to inform them about the role of the Parliament and its committees. It is hoped that program, combined with other outreach programs, such as delivering workshops on the role of committees in conjunction with the Council of Social Services (NSW), as well as the programs run by the Education team of the NSW Parliament's Department of Parliamentary Services, will help inform communities about the role of the parliament.

Mr Reynolds challenged the seminar audience with the view that the traditional model of a parliamentary committee, 'with a chair and members sitting around a table asking a witness questions is outmoded and it may not survive the next 25 years'.<sup>28</sup> He concluded that this model is not really bringing parliament to the people, and then provided a review of how current Legislative Council committees bring their work to the community.

The use of the media is the most important way that committees engage with the public, Mr Reynolds concluded. He provided an example of a television news clip, seen by hundreds of thousands of viewers, which neatly summarised the evidence that a committee had brought to light. Similarly, a major metropolitan newspaper led a front page cover story of a committee report into school bullying.

Legislative Council committees also engage with citizens of the State by travelling and conducting site visits. He also noted that another important role of committees is to hold public forums and hearings in regional areas. At a public forum, citizens can address the committee for up to five minutes to express their view on the inquiry issue. The Hon Jennifer Gardiner MLC also noted the success of public forums in that it enables many people to have their say:

One of the beauties of the public forums—as well as having formal hearings with expert witnesses—is that you can perhaps restrict contributors to two-, three-, four- or five-minute speeches. That spreads the load around the community. Afterwards you have so much terrific feedback about people having a say. They have a chance to get off their chests whatever it was.<sup>29</sup>

Lastly, Mr Reynolds made reference to committees engaging with communities via social media. Committees have been tentative users of social media to date, but this is slowly changing. He noted that some four years ago a committee was inquiring into school bullying, but were getting no responses from school children. The committee subsequently established a survey on Facebook, and received about 300 responses from young people on issues of bullying.

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<sup>27</sup> Hon Robert Brown MLC, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 40.

<sup>28</sup> Mr Steven Reynolds, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 37.

<sup>29</sup> Ms Jennifer Gardiner, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 40.

More recently the Legislative Council has established a Twitter account (@nsw\_upperhouse), which Mr Reynolds noted has been successful in communicating with the public and stakeholder groups.

In conclusion, Mr Reynolds observed that while the community engagement model used by Legislative Council committees is a very old one, it continues to evolve:

I would say that the model the Legislative Council committees are using is a very old one—the basic model has not changed very much in 25 years—but the way in which those committees have engaged with the public of New South Wales continues to evolve and change. I am sure over the next 25 years it will go in all sorts of different directions that we have not anticipated.<sup>30</sup>

It is evident though that the ‘old media’ such as newspapers and television news and current affair programs can reach an audience of hundreds of thousands of people. Articles and stories about Legislative Council inquiries on these media can reach an audience much greater than what has been achieved to date by the Council using ‘new media’ such as social networking sites.

One way in which committee engagement is evolving is through the use of webcasting committee proceedings. Currently some committee hearings held at Parliament House in Sydney are webcast, which means that people all over the State, and indeed anywhere with an internet connection, can watch the hearing live via the Parliament’s website. Journalist Quentin Dempster commented on the positive impact of this:

With internet streaming which has been started in some committee hearings—this can build the relevance and effectiveness of these kinds of public inquiry. The public can observe members and witnesses grappling with the issues to be investigated. It brings an intellectual honesty to the proceedings because observers can say, "That does not sound right to me" or "That does not sound plausible" or "Why don't you ask that question?" With the public watching, it adds a different, spontaneous dynamic and people have to take these committee hearings seriously.<sup>31</sup>

In the seminar discussion after the presentations, a key message emerged – communities, especially in rural and regional areas, deeply appreciated the effort a committee has made to visit them and seek their views. The Hon Dr Phelps MLC expressed it this way:

In relation to taking committees to the people, one of things I have noticed ... is that, in some sense, there is an appreciative fatalism about the people who appear before committees. They do not actually expect that they are going to get what they want, but, at the same time, there is a sense of gratitude, and we find this especially when going around rural and regional New South Wales, that you have actually turned up to listen to them. In many ways, the contributions received are almost incidental to the fact that the witnesses appearing feel a sense of relief. They think, "You have actually come out here and you want to talk to us," rather than expecting a defined outcome from the committee process.<sup>32</sup>

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<sup>30</sup> Mr Steven Reynolds, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 38.

<sup>31</sup> Mr Quentin Dempster, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 21.

<sup>32</sup> Dr Peter Phelps, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 39.

Miss Gardiner concurred with the above comments, and noted that communities, especially in rural and regional areas, appreciated the effort that members have made to consult with them:

Having sat on a lot of rural and regional public hearings, some with literally hundreds of people in the room, there is a genuine appreciation that parliamentarians have taken the opportunity ... to go and interface with constituents. They really enjoy the process. The audience enjoys seeing the parliamentary committee interact with its witnesses and listening to the debate, and they appreciate the fact that the committee has made the effort.<sup>33</sup>

The Hon Robert Brown MLC reflected on his time as Chair of an inquiry that looked into coal seam gas, and noted that witnesses were grateful to have had the opportunity to put their opinion on the public record:

...The one thing I took away from that committee was a sense that the people who gave evidence at the hearings of that committee were grateful that they as ordinary citizens had a chance to have their say. Sometimes people gather out the front of this Parliament to have their say, generally with slogans. But being able to sit in front of a committee of the Parliament and to address one's concerns directly to a formal parliamentary body, to have those concerns recorded for posterity in Hansard and to have one's submission honestly considered is of enormous importance.<sup>34</sup>

#### **Session 4 – Beyond 2013**

The fourth and final session for the day focussed on the future for Legislative Council committees. Chaired by the Hon Luke Foley MLC, five presentations were made:

- The Hon Ron Dyer, Former Chair, Law and Justice Committee
- The Hon John Hannaford, Former Minister and former Chair, State Development Committee
- Associate Professor Rodney Smith, Department of Government and International Relations, the University of Sydney
- The Hon Robert Brown, MLC, Chair, General Purpose Standing Committee No. 5
- Dr John Kaye, MLC.

The first two speakers were two of the ‘founding fathers’ of the modern committee system and spoke about whether their vision had been fulfilled, while the other panellists discussed ‘a wish list for the future’.

The Hon Ron Dyer was the Chair of the Select Committee on Standing Committees, which as noted subsequently recommended the establishment of six select committees. Mr Dyer considered that while the committee model that has developed is not perfect, he considered that ‘the Social Issues Committee, the Law and Justice Committee and the State Development

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<sup>33</sup> Ms Jennifer Gardiner, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 39.

<sup>34</sup> *Hansard*, Legislative Council, 19 September 2013, p 23775 (Robert Brown) speaking on the motion of the 25<sup>th</sup> anniversary of the modern committee system.

Committee without doubt have all made major contributions to the functioning of the Legislative Council and to the governance of New South Wales.<sup>35</sup>

However, Mr Dyer was more circumspect with the operation of the general purpose standing committees, particularly in respect to the level of conflict sometimes seen in these committee proceedings. These comments reflected a recurring discussion throughout the day. For instance, journalist Mr Quentin Dempster noted the powerful nature of a unanimous committee report:

As a journalist observing this system, please allow me to make one request based on constructive criticism—would honourable members please restrain themselves from turning committee hearings into party political adversarial games? Dissenting reports along party lines are a giveaway. Where you get bipartisan support for the findings in a committee report or bring yourselves to a consensus across party lines that really builds the credibility of the findings.<sup>36</sup>

In his address Mr Dyer noted the comments of Mr Dempster, and commented that the consensus approach ‘coincides very much with my own view: perhaps that suits my style. However, government should be, and I include all interests in the Parliament in saying this, trying to govern in the interests of the State. If consensus can be developed, that is a very positive outcome.’<sup>37</sup>

Similarly, Reverend the Hon Fred Nile argued the importance of committees working in a bipartisan manner:

The temptation is for Oppositions—whether Liberal or Labor—to use the committee system for particular political purposes, which undermines the committee system. It is very important to maintain the bipartisan aspect in our committee systems. Committees are not established to score political points; they solve problems that in the long run will help the Government be more effective and also meet the needs of the people of New South Wales.<sup>38</sup>

Mr Hannaford agreed that the policy development committees have been successful, but was also more equivocal about the general purpose standing committees, for reasons similar to that of Mr Dyer. Mr Hannaford was critical about the adversarial nature in some of the general purpose standing committee proceedings:

The general purpose standing committees—to some extent, we have failed because we try to use them as an adversarial tool, politician against politician, and it does not work. When I see it sometimes on television, I cringe because I think that sort of adversarial gamesmanship damages the image, and eventually the reputation, of the Parliament and does not encourage members of the public to want to cooperate.<sup>39</sup>

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<sup>35</sup> Hon Ron Dyer, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 44.

<sup>36</sup> Mr Quentin Dempster, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 22.

<sup>37</sup> Hon Ron Dyer, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 44.

<sup>38</sup> *Hansard*, Legislative Council, 19 September 2013, p 23770, (Fred Nile).

<sup>39</sup> Hon John Hannaford, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 46.

Mr Hannaford recounted that he always considered the general purpose standing committees to be about examining public servants rather than Ministers:

When one politician asks another politician a question, you are lucky if you get a straight answer. I always intended that the general purpose standing committees should be about asking public servants about what is going on. It is the Minister who is accountable to the Parliament but the bureaucracy is responsible to the Parliament. The Parliament will not get misled by members of the public service, but it will be told what is frankly going on.<sup>40</sup>

Whether committees should consistently operate in a bipartisan manner led to some debate in the seminar. For example, the Hon Luke Foley agreed that the three policy focussed standing committees should be bipartisan where possible, but in relation to the scrutiny function of the estimates committees or select committees he argued that it is entirely appropriate for members of those inquiries to be inquisitorial towards public servants and adversarial towards ministers.<sup>41</sup> Similarly, Dr John Kaye observed:

... but partisan conflict - that sometimes seemingly rude behaviour in which we engage - creates a degree of accountability and scrutiny of government that I think produces great outcomes.<sup>42</sup>

In his address Mr Hannaford also reflected on the capacity of committees to delve deeply into an issue, and argued that there is a need to enhance the capabilities of the committee staff, including employing special counsel to help develop questioning and information gathering techniques:

There is a need to enhance the capability of the staff of our committees. ... Gathering information from people is an art and it is an art that has to be learned. Every politician thinks that he has the art; a lot of barristers and lawyers think they do too, but they do not. Some of these hearings can become very confrontational. Putting in place a program of special counsel to assist in the development of studies by general purpose standing committees is something that I would advocate for the future.<sup>43</sup>

Mr Hannaford's final message was in relation to the protection of witnesses giving evidence to a committee. He argued that the Council needed a well articulated framework to protect witnesses, and in doing so will enhance the reputation of the Parliament:

... when you are starting to bring public servants in, you will need to have a very clear framework about how they are going to be protected. ... Because that is part of what will enhance your reputation, that not only will you get truthful guidance and assistance, you will get it because these people have confidence in you as an institution. We have such protections for some of our royal commissions. The parliamentary committee is, in fact, the most powerful of royal commissions. Look carefully at how you look after those who you want to be looking after you, by providing you with information as you move forward.<sup>44</sup>

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<sup>40</sup> Hon John Hannaford, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 46.

<sup>41</sup> Hon Luke Foley MLC, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 23.

<sup>42</sup> Dr John Kaye MLC, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 48.

<sup>43</sup> Hon John Hannaford, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 46.

<sup>44</sup> Hon John Hannaford, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 46.



The seminar then heard from the three remaining speakers on their thoughts to improve the committee system. Associate Professor Smith noted that in 1988, when the modern committee system was established, there were 3.3 million voters in NSW. Today there are 4.6 million voters, an increase of 39 per cent. He suggested that if the number of members of the Legislative Council also increased by the same amount, another 16 members could be added, meaning another eight to be elected at each election. The result of this would be to lower the quota as to the number of votes required to be elected, but with recent legislative amendments the ‘micro parties’ would still be excluded. Smith concluded that if the number of members of the Legislative Council was increased, then this would help prevent the government from gaining a majority in the upper house:

...it would ensure one of the most important features of the Legislative Council's committee work and one of the most important protections of the continued good work of those committees and that is that it would almost certainly go further to prevent the government of the day from ever gaining a majority in the Legislative Council and on those committees.<sup>45</sup>

The Hon Robert Brown MLC remarked on the issue of the physical capability of the number of members who actually carry out committee work – there is a natural limit to how many inquiries can be conducted. Mr Brown identified an alternative solution - to increase the budget allocation of the Legislative Council committee work – and that this increased funding be directed to provide extra resources for the committee secretariat. He considered that thought should be given to bringing in permanent specialist advice or engage special counsel on a case by case basis. His rationale for this was as follows:

I have had inquiries where we have had to spend the money... to bring in people to explain to the committee issues about which not many of them, if any, had any technical knowledge. ... it does not matter what witnesses you bring in from outside to give you their opinion...unless the committee or the secretariat has some sort of resource available to check the veracity of statements, you are wasting your time and the reports you produce for the Government really are not worth the paper they are written on.<sup>46</sup>

In the C25 debate in the House the Hon Steve Whan also argued that committees need to have greater resources:

The committee system has many positives, but some things need to be improved. From my experience in both Houses, committees need more resources to undertake independent research. For example, whilst committees do well on the resources available, they are often reliant on industry submissions for expert information on various issues.<sup>47</sup>

The last speaker at the Seminar was Dr Kaye MLC, who argued that government accountability is not just about good governance, it is also about good governments:

A government subject to stringent accountability measures, such as independent committees, is much more likely to avoid the sorts of disasters that the gentrader inquiry

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<sup>45</sup> Associate Professor Rodney Smith, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 47.

<sup>46</sup> 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.

<sup>47</sup> *Hansard*, Legislative Council, 19 September 2013, p 23783 (Steve Whan) speaking on the motion of the 25<sup>th</sup> anniversary of the modern committee system.

exposed. Those sorts of inquiries create an environment in which good governments, re-electable governments, are more likely to prosper than the alternative.<sup>48</sup>

Dr Kaye was concerned about the prospect of a government gaining a majority in the Legislative Council, and hence forming a majority on committees. He argued that under these circumstances, governments can avoid scrutiny. He suggested that in the future, to avoid this scenario, the composition of committees should not reflect the composition of the House, but of its diversity:

My big idea is that we do not have committees the composition and chairmanship of which reflects the composition of the Parliament but, rather, reflects the diversity of the Parliament and the urgent and important need for the Parliament to have genuine accountability and mechanisms for investigation.<sup>49</sup>

The Chair of the session then opened discussion to the seminar audience, and invited their ideas as to how to build an even more effective modern committee system into the future. The following points were raised:

- Committees should have a process by which they could look into the government response to their recommendations, and determine if there was a need to examine part of the government response
- The House should ascertain the priorities and issues affecting the people of the State, select those issues and have inquiries into those
- Committee debates in the House about a report should be held after the government response has been received, currently there is no debate in the House about a government response to a report
- There should be a mechanism to check if the government has implemented its own response to a report, and if there are recommendations that have not been implemented, then the committee should have another look at the issue
- Where possible report recommendations should be tested and refined with stakeholders before reporting to government – they may have a much greater chance of being implemented
- That scrutiny committees such as the Legislation Review Committee should reside in the Legislative Council, at the very least the Public Accounts Committee should be a Joint Committee.

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<sup>48</sup> Dr John Kaye MLC, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 49.

<sup>49</sup> Dr John Kaye MLC, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 49.

## Appendix One – a précis of Mr Bret Walker’s keynote address – access to Cabinet documents

The focus of Mr Walker’s address was access to Cabinet documents. To date, there have been two ‘test cases’ that have shaped the powers of the Legislative Council. These cases, *Egan vs Willis* and *Egan vs Chadwick* have confirmed the NSW Legislative Council’s power to order the production of government papers including those documents for which claims of legal professional privilege or public immunity privilege could be made at common law, with one exception: documents that disclose the actual deliberations of Cabinet.<sup>50</sup>

Walker noted that Cabinet papers may be compelled to be produced if their production is necessary for the presentation of the defence of a criminally accused person. He continued that if it is good enough for the administration of justice, what is it about Cabinet papers that the accountability of the Executive, one of the bulwarks of democracy, is categorically less important than they are automatically immune in every case?

Walker observed that responsible government has been described by the Chief Justice as a concept based upon the combination of law, convention and political practice, hence will change over time as practices change. The importance of this is that responsible government is the basis upon which the rule of necessity operates so as to give the power to compel the production of State papers to Committees and the Legislative Council.

Walker rhetorically asked why the rule of necessity for the Legislative Council and its committees does not permit Cabinet documents to be produced, and noted that two reasons have been put forward. The traditional reason is that if members of Cabinet knew that their minutes might be produced, their candour would be reduced, diminished or reversed. Walker noted that this argument is now treated by Australian judges as wrong, and described it as ‘an obvious historical calumny on a political class in another country and we do not have to adopt it here.’ Walker then described the ‘new or modern fallacy’, and quoted from an English judgement, which stated that disclosure of Cabinet material would create or fan ill-informed public or political criticism, and this criticism would be without adequate knowledge of the background and perhaps with an axe to grind.

In reply to this ‘modern fallacy’ Walker noted that:

Access to Cabinet documents will increase knowledge. Access to Cabinet documents, including that which goes to Cabinet rather than record what goes on at Cabinet, will provide knowledge of background. Revelation of the fact that people disagree at Cabinet would be revelation of the bleeding obvious.<sup>51</sup>

Somewhat pessimistically, Walker considered that the incapacity to compel the production of Cabinet documents is unlikely to be remedied in court, unlikely to be remedied by legislation, and perhaps in theory remediable only by the unlikely event of the Executive giving up its secrecy.

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<sup>50</sup> Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (The Federation Press, 2008), p 480.

<sup>51</sup> Mr Bret Walker SC, Keynote address. Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 10.

So what is to be done? Walker considered that the Council and its members should enunciate its position and that due to the special nature of how parliamentary law and practice works, over time it will become the accepted wisdom:

Perhaps the only thing at the moment—but certainly the first thing to be done at the moment—is that the Council and thoughtful individual members of the Council, as well as the Council speaking collegiately, ought to say, "We note that the return is deficient in this fashion; we deplore the deficiency; we maintain that *Egan v. Chadwick* is wrong, and we move on." Fifty years from now, ... will put together all of those statements, add what Chief Justice Gleeson said about the way in which one understands the extent of powers and, I hope, will then opine, in the circumstances that then obtain that: "It may have taken a long time, but the statement of position by the Legislative Council, long made, now ought to be recognised as the true state of affairs." And that is because the way in which the law is made in this area is not as it is for any other area with which I am familiar. So it is partly what you do but what you do also includes what you say.<sup>52</sup>

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<sup>52</sup> Mr Bret Walker SC, Keynote address. Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 14.