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## NSW Legislative Council Committees: current trends

### Introduction

With five standing committees, five general purpose standing committees (GPSCs) and the increasing use of select committees, the Legislative Council's committee system is a vibrant and active mechanism through which the House fulfils its role as a House of review.

Due to flexibility in terms of which committee may be utilised to examine an issue as well as the methods of referring terms of reference, and the high level support provided to committees by the Department's secretariat staff, the committee system is viewed by all representatives in the Council as a rigorous means of examining issues, consulting with interest groups and the public and developing recommendations to government.

As next year marks the 25<sup>th</sup> anniversary of what we call the 'modern Legislative Council committee system' - which began with the establishment of two standing committees in 1988<sup>1</sup> - it is timely to precis a number of recent trends and issues.

### Legislative Council committee system

A diagram illustrating the Council's committee system is appended as Appendix 1. There are three types of committees - standing committees, general purpose standing committees and select committees.

**Standing committees:** Three standing committees conduct inquiries referred by the House or a Minister, in the broad areas of law and justice, social issues and state development. These committees conduct inquiries into policy issues that generally have state wide significance. There are also two 'House' committees – the Privileges Committee and Procedure Committee.

**General purpose standing committees:** Five committees with allocated government portfolios that conduct inquiries scrutinising government actions through their self-referral power, as well as the annual budget estimates inquiries. Portfolio allocation: GPSC1 – economic development; GPSC 2 – community and services; GPSC 3 – transport, regional infrastructure and services; GPSC 4 – law, justice and safety; GPSC 5 – environment, accountability and regulation.

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<sup>1</sup> In 1985 the House established the Select Committee on Standing Committees to investigate and report on a structured system of standing committees for the Council. The Committee's report recommended the establishment of four standing committees. Following the 1988 election, two standing committees were created; the Social Issues Committee and the State Development Committee. In 1995 a third standing committee, the Law and Justice Committee, was established (together with the Standing Committee on Parliamentary Privilege and Ethics). The focus of inquiries conducted by these committees is on public policy and they have developed a strong reputation for the quality of their work. Many recommendations have been taken up by governments and they have had a significant influence upon public policy. These committees generally operate in a non-partisan manner. In 1997 the House established a second set of standing committees, GPSC Nos. 1-5. The membership of these committees reflects the make-up of the House and the Government does not have a majority on these committees. They have tended to be focused upon accountability, conducting inquiries into matters of immediate topical and political interest, or into areas of public administration.

**Select committees:** Ad hoc committees established by the House from time-to-time to inquire into a particular issue. Joint select committees can also be established and operate under the standing orders of the House where the motion originated (and are supported by the staff of that House).

### Level of activity

The NSW Legislative Council continues to have one of the most active committee systems in the region. Committee activity over the past five years is summarised in the table that follows.<sup>2</sup>

In terms of numbers of inquiries, committee activity has been relatively constant over the period. The current year shows slightly increased activity. This is in part explained by more active Procedure and Privileges committees adding to the usually high level of general committee activity.

	2011/12	2010/11	2009/10	2008/09	2007/08
<b>Inquiries</b>	32	26	27	26	29
<b>Reports tabled</b>	25	18	18	19	22
<b>Submissions</b>	1684	700	2273	1491	681
<b>Hearings</b>	94	35	74	85	58
<b>Witnesses</b>	905	302	581	668	622
<b>Site visits/ regional hearings</b>	13	5	7	19	14

The number of submissions received fluctuates depending on the nature of inquiries. For example, the Select Committee on Recreational Fishing which received 1,023 submissions and the GPSC No. 5 *Inquiry into Coal Seam Gas* which received 911 submissions accounts for the relatively large number of submissions in 2009/10 and 2011/12 respectively. The number of hearings and witnesses similarly fluctuates.

In respect to members' committee activity, Legislative Council members also serve on a large number of active joint standing committees administered by the Legislative Assembly. For example, in the current Parliament 17 Legislative Council members serve on five joint standing committees, which have conducted eight inquiries. In addition, the Legislation Review committee on which three Legislative Council members sit has produced 20 Bills Digests reviewing 163 bills and 18 regulations.

The statistics do not show the variety of committees that operate in the Legislative Council, for example the increase in the number of select committees and joint select committees managed by the Council. These are discussed in a later section of this paper.

### Supporting our committees

The Legislative Council's 10 standing committees and, currently, 3 select committees are supported by a small staff of 18. Our staffing structure is set out in Appendix 2. A feature of our staffing model is its flexibility. Essentially, there is one committee secretariat managed by the three directors reporting to a clerk assistant. Each director has ongoing responsibility for two or more committees.

<sup>2</sup> By way of comparison, figures taken from annual reports of other Australian jurisdictions show the number of reports tabled: Northern Territory – 9; ACT – 40 (including 15 scrutiny of Bills reports); Tasmania – 8; Western Australia -37; Victoria – 15; Queensland – 77 (the vast majority of which are scrutiny of Bills reports). South Australia's figures were not available.

All other project and administrative staff rotate among the committees according to inquiry workload and usually work on more than one inquiry at once. New select committees are generally able to be supported within the existing secretariat. A recent exception was the Select Committee on Recreational Fishing which saw the Council receiving specific funding to employ two additional project staff.

By moving from one inquiry to the next, all staff are continuously engaged in 'core' committee work.<sup>3</sup> Our rotational system also allows staff to work with different teams and to work on different subject matters which is beneficial for skill development. Committee Chairs and Members are comfortable with the staffing model and have confidence in the high calibre of staff and the services they provide to committees.

### **Co-operation with the Executive**

Co-operation between Legislative Council committees and the Executive, in terms of participation in inquiries and reliance on committees to examine and formulate recommendations on public policy issues, has grown over the past five years. Notwithstanding increased co-operation in these areas traditional tensions between the Council and the Executive continue to give rise to confrontations from time to time, as will be examined later in this paper.

### **Participation in committee inquiries**

The participation of government agencies, and at times Ministers, in committee inquiries through the provision of submissions and other information and appearing as witnesses at hearings, is important to the ability of committees to effectively examine their terms of reference.

In the past it was rare for a Minister to accept an invitation to appear before an Upper House committee, except during the Budget Estimates hearings.<sup>4</sup> However, a slow shift began in the late 2000's,<sup>5</sup> leading to the current Parliament where to date no Minister has refused an invitation to appear before a Council committee.<sup>6</sup> For example, during the 2011 inquiry conducted by the Select Committee on the Kooragang Island Orica Chemical Leak, the Premier and three Ministers accepted invitations to appear at a public hearing for seven hours collectively. During the Select Committee into the provisions of the Election Funding, Disclosure and Amendment Bill 2011, the Premier readily

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<sup>3</sup> Committee staff also participate in the work of the House and the Department's corporate needs.

<sup>4</sup> A number of examples can be drawn from the period 2000-2007: during the 2004 GPSC No. 4 Inquiry into the Designer Outlets Centre, Liverpool – the 'Orange Grove Inquiry' the Premier, the Planning Minister and the Assistant Planning Minister all refused the Committee's invitation to appear; and during the 2005/2006 *Inquiry into the Cross City Tunnel* conducted by a joint select committee administered by the Council, the Premier, the Minister for Police, the Minister for Planning and the Minister for Roads, all refused to appear.

<sup>5</sup> For example, in November 2011 the Minister for Planning accepted an invitation to appear before the Joint Select Committee on the Royal North Shore Hospital (administered by the Council). In 2009 the Minister for Planning appeared before GPSC 4 during its *Inquiry into Badgery's Creek land dealings*. In January 2011 the Premier and the Treasurer appeared before GSPC 1 during the *Inquiry into the Gentrader Transactions* (this was the first occasion of a Premier appearing before an Upper House Committee other than for the estimates hearings).

<sup>6</sup> Premiers have appeared at Budget Estimates Inquiry hearings each year for their portfolio, but the only appearance outside of an Estimates hearing prior to

appeared before the Committee and said during evidence that he is “always happy to come to parliamentary committees because it is the heart of democracy”.<sup>7</sup>

There are also plentiful examples of government agencies adopting a co-operative approach to providing valuable information to committee inquiries in the form of written submissions and oral evidence. Indeed, the vast majority of inquiries conducted by Upper House committees have included the receipt of submissions from relevant government agencies and most have included the appearance of departmental witnesses.

### **Executive initiated inquiries into public policy matters**

The past five or so years has also seen the growing use of Upper House committees by the Executive as a means of examining important public policy issues, facilitating public consultation and testing possible administrative and legislative reform options. The main mechanism by which this is occurring is via Ministerial references to the three government majority standing committees.<sup>8</sup>

The ability of the Council's Law and Justice, Social Issues and State Development Committees to accept terms of references from Ministers is unique to the NSW Legislative Council. Since their inception, the resolution establishing these committees at the commencement of each Parliament has provided that, as well as inquiring into matters referred by the House, they “may inquire into and report on any matter relevant to the functions of the committee which is referred by a Minister of the Crown”.<sup>9</sup>

Through this provision these three committees have examined a number of significant public policy issues at the request of Ministers. The Law and Justice Committee in the 54<sup>th</sup> Parliament was the most active example of this trend, with the Attorney General referring inquiries into adoption by same sex couples, altruistic surrogacy, the naming of children in criminal proceedings and judge alone trials. Each of these inquiries led to legislative reform with the work of the committee acknowledged in debate.<sup>10</sup>

This practice is continuing in the current Parliament: the Social Issues Committee is currently conducting an inquiry into domestic violence; the State Development Committee is examining the adequacy of water storages in NSW; and the Law and Justice Committee reported in March on its inquiry into the consolidation of tribunals, all in response to Ministerial references.

In relation to such references, it could be argued that the ability of Ministers to refer matters to a committee of the Legislative Council has implications for the independence of the Council from the

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<sup>7</sup> The Hon Barry O'Farrell MP, Premier, Evidence, 20 January 2012, p 4.

<sup>8</sup> Another recent example of the Executive utilising parliamentary committees to examine critical public policy matters is the Joint Select Committee on the NSW Workers Compensation Scheme, which examined reform proposals designed to address the Scheme's considerable deficit: *NSW South Wales Workers Compensation Scheme*, Report, June 2012.

<sup>9</sup> LC Minutes (9/5/11) 5, item 11.

<sup>10</sup> *Inquiry into the prohibition on the publication of names of children involved in criminal proceedings*: LC Debates (22/10/2009) 18538-18540 and (28/10/2009) 18839-18844; *Inquiry into altruistic surrogacy*: LC Debates (21/10/2010) 26544 and (27/10/2010) 26913-26944; *Inquiry into Adoption by same-sex couples*: LC Debates (7/9/2010) 25215-25218 and 25240-25267, (8/9/2010) 25338-25344 and 25357-25387; *Inquiry into judge alone trials*: LC Debates (24/11/2010) 28002, 28073-28074 and (30/11/2010) 28436 and 28437.

Executive.<sup>11</sup> However, two important limitations on this power negate this concern. First, the resolution *permits* the committees to inquire into a matter referred by a Minister and it is therefore for the committee to determine whether to accept, amend or reject the reference.<sup>12</sup> Second, when a committee resolves to inquire into a matter referred by a Minister, it is required by resolution to report its decision to the House, thus providing the opportunity for the House to consider the reference.<sup>13</sup>

Regardless of the position taken in relation to this debate, there is strong anecdotal evidence indicating that members, Ministers and stakeholders alike hold great store in this type of committee inquiry. A glance at the debates in the House on bills implementing recommendations of such committees shows that the work of the committees have been instrumental in the development of important legislative changes and assisting members of Council and the Assembly in formulating their contribution to debate.<sup>14</sup>

The establishment of a joint select committee on the motion of the Government earlier this year, to conduct an inquiry into the financial viability of the NSW Workers Compensation Scheme and proposed reform options, is a further illustration of the faith in the committee inquiry process held by the Executive (the increased use of select committees is examined later in this paper). It remains to be seen however what impact the increase in the number of committees in the Legislative Assembly, to 19 in the current parliament, may have on the frequency and type of referrals to Council committees in the future.<sup>15</sup>

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<sup>11</sup> This issue was examined in detail in a research paper produced by a NSW Legislative Council committee officer as part of the Parliamentary Law, Practice and Procedure course: *In defence of an anathema: referral of inquiries by Ministers by Upper House Committees*, Merrin Thompson, 2011.

<sup>12</sup> While to date no terms of reference referred by a Minister have been rejected by a standing committee, on at least two occasions terms of reference have been amended by a committee.

<sup>13</sup> There has been one example of the House amending terms of reference referred by a Minister. In 2005 the Minister for Police referred terms of reference to the Social Issues Committee for an inquiry into matters relating to policing in Macquarie Fields, including comments made by the Leader of the Opposition in the Legislative Assembly. After the terms of reference were reported to the House considerable debate ensued as to whether the terms of reference were in order. The Clerk advised that there is no authority for a Minister to direct a committee to undertake an inquiry into a member of another House, as this offends against the separation of powers and the authority of the House to manage its own affairs. Subsequently the House resolved to amend the terms of reference: LC Minutes (23/03/05) 96, item 9. The House also issued an instruction to the Committee to not commence the inquiry until the completion of operational reviews into the police response conducted by NSW Police and NSW Ombudsman: LC Minutes (23/03/05) 96, item 22.

<sup>14</sup> See footnote 5.

<sup>15</sup> In the 55<sup>th</sup> Parliament the NSW Legislative Assembly committee system was significantly expanded through the establishment of two new groups of committees: Specialist Standing Committees and Portfolio Standing Committees. To a large degree, these committees replicate the committee structure of the Legislative Council. There was a 28.6% growth in the total number of committees, up from 14 to 18 (the Standing Orders and Procedures Committee is excluded from these figures.) The new committees operate in addition to ongoing statutory and standing committees, including the statutory oversight committees, Public Accounts Committee, Committee on Electoral Matters and Committee on Parliamentary Privilege and Ethics. Some of the functions of previous standing committees, such as the Standing Committee on Public Works and the Public Bodies Review Committee, were subsumed into the new Portfolio Standing Committees. For further information see: NSW Legislative Assembly, *Annual Report 2010-2011*, pp 13-14.

## **Conflict between committees and the Executive**

Unsurprisingly, in a House of Review without a government majority and with an active committee system, committees have also been the backdrop for significant conflict with the Executive. The culmination of this was an attempt by the Executive in 2011 to close down Parliament to prevent an inquiry into the sale of state electricity assets. Less dramatic but equally significant is the increased number of inquiries into operations of government agencies, debate over government responses and a more rigorous Budget Estimates process. The increased use of committee powers, such as issuing a summons to a witness, may also be an aspect of this conflict, and is discussed in a later section of the paper.

### **Prorogation<sup>16</sup>**

The effect of prorogation on committees was tested in late 2010-early 2011. On 14 December 2010, the 'Gentrader transactions' which transferred trading rights to electricity generation of nine State-owned power stations to the private sector, were finalised. On 22 December, under the self-referencing power, three members of GPSC 1 requested that a meeting be convened to consider an inquiry into the transactions. On the same morning the Governor, on the advice of the Executive Council, prorogued Parliament, several months before the 26 March 2011 election. The Premier issued a press release that included a statement that "committees continue to exist during prorogation, but unless the particular Committee is specifically authorised by legislation to do so, they may not continue to sit and transact business during prorogation".<sup>17</sup>

This view, based on Crown Solicitor's advice from 1994, was not supported by the Clerk of the Parliaments who subsequently advised the Committee Chairman that the Committee could indeed continue to meet and transact business despite prorogation. Consequently, the Committee met on 23 December and resolved to proceed with the Inquiry. The basis for the Clerk's advice was that while the House can be prorogued under section 10 of the *Constitution Act 1902*, the House has the power under section 15 to regulate its own business. The Clerk further argued that there is no limitation in standing order 206, which empowers the House to appoint standing committees to sit during the life of the Parliament, regarding the right of standing committees to sit during any recess of the House.<sup>18</sup> Notably, the Premier, Treasurer and Leader of the Opposition all appeared voluntarily before the Committee to give evidence.

### **Government responses to committee reports**

Under standing order 233, the Government is required to report to the House within six months of a report being tabled, what action if any, the Government proposes to take in relation to each recommendation of the committee. By August 2011, there were nine government responses outstanding from the previous Parliament. In September 2011, correspondence from the Leader of the House, the Hon Duncan Gay MLC, advised the Clerk that the Government would not provide outstanding government responses, based on legal advice that standing order 233 does not "oblige

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<sup>16</sup> The effect of prorogation on the operation of Parliamentary committees was examined in detail in a paper produced by a NSW Legislative Council committee officer for the Australasian Study of Parliament Group conference in 2011: *Prorogation and principle: the Gentrader Inquiry, Government accountability and the shutdown of Parliament*, Teresa Mc Michael.

<sup>17</sup> Media Release, Premier of NSW, *Governor prorogues 54<sup>th</sup> NSW Parliament*, 22 December 2010.

<sup>18</sup> Clerk of the Parliaments, *Advice to the President of the Legislative Council on the power of standing committees to sit during the prorogation*, 11 January 2011.

the present Government, which holds the confidence of the Assembly of the 55<sup>th</sup> Parliament to provide a response to recommendations contained in reports which were tabled by Committees during the 54<sup>th</sup> Parliament".<sup>19</sup> Mr Gay did undertake to provide a response to any report from a previous Parliament "in relation to which the Legislative Council resolved to request a response from the Government".<sup>20</sup>

The Clerk of the Parliaments provided advice, tabled in the House, to the effect that requests under the standing order were not extinguished by the change of government. On 11 October 2011, the President reported that, under standing order 233(4), Government responses had not been received to the nine committee reports tabled during the last session of Parliament.<sup>21</sup> Subsequently, on 13 October 2011, and noting the undertaking in Mr Gay's correspondence, the House passed a motion requesting that outstanding government responses be tabled within 60 days of the passing of the motion.<sup>22</sup> All outstanding government responses were received within the time frame specified by the House.

### **Budget estimates reforms**

The GPSCs have been responsible for the annual budget estimates process since 1995<sup>23</sup> and are a very important part of the role of the House in scrutinising the Executive. A feature throughout the years has been that every Minister appears before the committee responsible for their portfolio, for hearings which can extend for up to four hours.

By 2007 the Government generally set the timetable for Estimates, which often involved hearings scheduled late at night in sitting weeks, and sometimes three committees sitting simultaneously. The Opposition then took the initiative for the 2008-2009 inquiry to reform the Estimates process to more closely resemble the Senate model upon which it was originally based.<sup>24</sup> Features of the reformed process included timetabling the hearings from 9.00 am to 6.00 pm on a non-sitting week, ensuring no more than two committees sat at any one time and ensuring the timetable for the week of both initial and supplementary hearings was set months in advance to provide sufficient notice to Ministers and heads of departments to attend. Resolutions prevented ministers from beginning hearings with excessively long opening statements, and the process of lodging questions on notice was streamlined and the deadline for submitting answers was shortened. The new process resulted in a considerably improved process and has been retained for each following year.

### **Inquiries scrutinising government agencies**

Over the past few years, Legislative Council committees have conducted several high profile inquiries that have focussed specifically on a particular government agency. For example the 2008 GPSC 2 *Inquiry into the management and operation of the NSW Ambulance Service*<sup>25</sup> examined the

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<sup>19</sup> The Hon Duncan Gay MLC, Leader of the House in the Legislative Council, correspondence to the Clerk of the Parliaments, 7 September 2011.

<sup>20</sup> The Hon Duncan Gay MLC, Leader of the House in the Legislative Council, correspondence to the Clerk of the Parliaments, 7 September 2011.

<sup>21</sup> LC Minutes (11/10/11) 45, item 4.

<sup>22</sup> LC Minutes (13/10/11) 47, item 18.

<sup>23</sup> Between 1991 to 1994 Estimates Committees operated as joint committees.

<sup>24</sup> LC Minutes (5/12/07) 35, item 18.

<sup>25</sup> Report 27, tabled 20 October 2008. In 2010, GPSC 2 conducted a follow up inquiry into the implementation of their recommendations – Report 33, tabled 30 April 2010.

Service's management and culture, and in particular the occurrence of bullying and harassment within the organisation. The Committee extensively questioned the Chief Executive of the Service during the inquiry. During the 2009-10, GPSC 4 *Inquiry into Badgery's Creek land dealings and planning decisions*,<sup>26</sup> the Director-General of the Department of Planning was cross-examined about his dealings with property developers and lobbyists including former Federal Labor Minister Graham Richardson. In 2010 the Social Issues committee conducted an inquiry into services provided or funded by the Department of Ageing, Disability and Home Care.<sup>27</sup> While these types of inquiries have high degrees of conflict, and are difficult for members and staff, they are an essential part of the scrutiny role of the Council.

### Increased use of coercive powers

The past eight years has seen an increase in the use by the Council's committees of their power to summon witnesses.<sup>28</sup> In the first instance committees seek the voluntary cooperation of witnesses and, until 2004, no committee of the 'modern' Council had resorted to using its summoning power to compel the attendance of a reluctant witness.<sup>29</sup> From 2004 to the present day the power to summons has been used, or threatened to be used, on five occasions. On four of those five occasions the issuing or threat of a summons had the desired result and the witnesses subsequently appeared before the committee or, in two cases, provided information requested by the committee.<sup>30</sup>

On the fifth occasion, during the GPSC 1 *Inquiry into the Gentrader Transactions*<sup>31</sup> ten witnesses refused to respond to summonses issued to them and the Committee took the first steps toward

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<sup>26</sup> Report 21 - interim report, tabled 20 November 2009; Report 22 - final report, tabled 25 February 2010.

<sup>27</sup> Report 44, tabled 11 November 2010. Note this was not a ministerial reference but was referred by the House following a private members' notice of motion.

<sup>28</sup> Standing order 308 empowers committees to 'send for an examine persons, papers records and things' and, in accordance with the *Parliamentary Evidence Act 1901*, any person (except a member of parliament) may be summonsed to give evidence before a committee. A summons compels a person to attend and to answer any lawful question ask by the committee.

<sup>29</sup> Note that until 2000, the practice of the Council was to serve all witnesses, other than Members, with a summons on arrival at a hearing. This was based on the erroneous assumption that the protections that relate to giving evidence before a parliamentary committee are predicated on whether a witness has been summoned. This practice is no longer followed.

<sup>30</sup> In 2004, GPSC 4 summoned the Chief of Staff to the Assistant Planning Minister to appear at a hearing: GPSC 4, *The Designer Outlets Centre, Liverpool*, Report 11, December 2004, pp 4-5. In 2009 GPSC 4 threatened to summons Mr Graham Richardson to appear before it a second time when he refused to answer questions on notice: GPSC 4, *Badgery's Creek land dealings*, Report 21, November 2009, pp 95-96. In the 2010 Select Committee into the NSW Taxi Industry the CEO of Cabcharge appeared as a witness after the Committee threatened the use of a summons. The Committee subsequently resolved to forward additional questions on notice to Mr Reginald Kermode. After Mr Kermode refused to answer some of those questions the Committee issued a summons for him to appear before the Committee to answer the questions. After Mr Kermode subsequently provided written answers that were to the Committee's satisfaction the Committee cancelled the hearing and let the summons lapse: *Inquiry into the NSW Taxi Industry*, June 2010, p 250. In 2011, the Select Committee into the Kooragang Island Orica chemical leak threatened to issue summonses to ensure the appearance of key Orica employees, after which the employees agreed to appear without having to be summoned: *Kooragang Island Orica chemical leak*, February 2012, p 166.

<sup>31</sup> The Committee issued summonses to one current and nine former directors of Delta Electricity and Eraring Energy to appear at a hearing after they refused an invitation to appear. However, even after having been issued with a summons, the directors refused to appear citing concerns as to whether their

utilising the provisions of the *Parliamentary Evidence Act 1901* to enforce the summonses. Ultimately the discretion of the President to seek a warrant from the Supreme Court for the arrest of the individuals summoned was not pursued due to the contention surrounding the legitimacy of the Committee operating after prorogation.<sup>32</sup>

The willingness of the Council committees to exercise its coercive power to summon witnesses in recent years is a trend that will be watched with interest. It is noteworthy that each of the examples where a committee has issued summonses, or threatened to do so, have involved inquiries that in part have examined the activities of private sector entities and in four of those examples the individuals summonsed were from the private sector.<sup>33</sup>

An interesting corollary to Upper House committees conducting inquiries that scrutinise the activities of private sector companies is the involvement of lawyers. For example, law firms were engaged by Orica Limited, Cabcharge, private property developers and the former electricity company executives during the committee inquiries referred to above. In these examples legal representatives acted on behalf of the private entities and individuals in their most of their dealings with the Committee.<sup>34</sup> Our experience has been that the involvement of lawyers quickly creates an adversarial atmosphere and, in the examples referred to earlier, contributed to the use by the committees of their power to summons.

### **Increased use of select committees**

The Legislative Council has a strong record in the use of select committees to examine matters arising from time to time, having established 21 select and 16 joint select committees since 1988. In the current Parliament this trend is set to increase exponentially, with four select committees and one joint select committee established in the first 15 months.<sup>35</sup> Each of the select committees established in the current parliament have had a non-government majority and a Cross-Bench chair

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evidence would be protected by parliamentary privilege. The Committee then wrote to the President requesting that the President seek a warrant from a judge of the Supreme Court for the apprehension of seven of the former directors under section 7 of the *Parliamentary Evidence Act 1901*, with a view to compelling them to appear. This was the first time such a request had ever been made. The President at the time, the Hon Amanda Fazio MLC, refused the request, indicating her view that the refusal of the witnesses to attend was, in the circumstances, with 'just cause or reasonable excuse' under section 7, given that the witnesses had no guarantee that they would be protected by privilege should they appear and give evidence.

<sup>32</sup> For further detail see: GPSC 1, *The Gentrader transactions*, Report 36, February 2011, pp 3-13.

<sup>33</sup> Earlier in this paper the high level of cooperation between the Executive and the Council's committees in terms of the willingness of Ministers to appear before committee inquiries was noted and this was true in the Gentrader inquiry as well, which involved the Premier, Treasurer and Leader of the Opposition all appeared voluntarily before the Committee and gave evidence.

<sup>34</sup> In the case of the Orica Inquiry the company obtained the permission of the Select Committee to have a legal representative present in an advisory capacity during questioning of Orica employees and the CEO. Legal representatives were also permitted to accompany witnesses from the private sector during hearings for the Badgery's Creek inquiry.

<sup>35</sup> Select Committee on the Kooragang Island Orica chemical leak: established 25 August 2011, reported 23 February 2012; Select Committee on the provisions of the Funding, Expenditure and Disclosure Bill: established 23 November 11, reported 15 February 2012; Joint Select Committee on the Workers Compensation Scheme, established 2 May 2012, reported 13 June 2012; Select Committee on the Partial Defence of Provocation: established 14 June 2012, report due 21 November 2012; Select Committee on the Cronulla Fisheries Research Centre for Excellence: established 21 June 2012, report due 23 October 2012.

and each have been established on the motion of a member of the Opposition, with the Government dividing only once.<sup>36</sup>

There are a number of reasons for the establishment of select committees rather than members seeking to have matters referred by the House to the existing standing committees or utilising the self-referral mechanism for GPSCs.

First, the establishment of a select committee by the House is seen as an appropriate response to high profile, controversial, or otherwise significant issues.<sup>37</sup> The creation of the Select Committee into the Kooragang Island Orica chemical leak in August 2011 is such an example, where significant public concern generated political heat for decisive action to be taken to examine the incident. The Select Committee into the provisions of the Election Funding and Disclosure Amendment Bill 2011 is another example where the member who was Chair of the Committee, Dr John Kaye MLC, had had a long history of campaigning about election funding reforms.

Second, select committees enable members with a particular interest in a matter to come together to conduct an inquiry. The current Select Committee on the Partial Defence of Provocation is an example of this, where a number of members from various political parties had spoken publicly on the need to review this aspect of the law and those members were not all members of an appropriate standing committee.<sup>38</sup>

The specific membership and dynamic on a relevant standing committee or general purpose standing committee may be another reason for the choice of a select committee as the appropriate vehicle to examine a particular matter.

With the high rate of select committees established in this parliament, and the enthusiasm with which members are embracing their committee work, the use of select committees will be an interesting trend to watch.

### **Taking the Council to regional and rural NSW**

In recent years, committees have increasingly become an avenue by which the Council has been taken to the people of NSW, with site visits, public forums and hearings held in a range of urban, regional and rural places throughout NSW.<sup>39</sup> For example, during its 2011 *Inquiry into coal seam gas*, GPSC 5 visited Alstonville, Taree, Mittagong and Narrabri and in 2010 the Select Committee on

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<sup>36</sup> The Government voted against the motion of Mr Whan to establish the Select Committee on the provisions of the Election Funding Expenditure Disclosures Amendment Bill: *LC Debates* (23/11/2011) 7620.

<sup>37</sup> The rate of dissent to select committee reports could reflect this, with dissents made to 67 per cent of LC select committee reports, and 45 per cent of reports of Joint Select Committees administered by the LC. This compares to an average of 29 per cent of reports by general purpose standing committees and 11 per cent of reports by the three standing committees (the Standing Committee on State Development has had no dissents to any of its 23 reports to date).

<sup>38</sup> Established 14 June 2012, report due 21 November 2012.

<sup>39</sup> On a smaller scale, Council committees also travel interstate to inform themselves of the way in which other jurisdictions deal with subject matter under investigation. For example, in 2012, the Standing Committee on Law and Justice visited the Victorian Civil and Administrative Tribunal as part of its *Inquiry into the consolidation of tribunals*. During its *Inquiry into Coal Seam Gas* GPSC 5 visited Chinchilla in Queensland, the epicenter of the coal seam gas industry in Australia (which was the first time a GPSC has obtained the authorisation of the House, with the approval of the President, to travel interstate).

Recreational Fishing visited six regional areas including Nowra, Port Macquarie and Griffith. Given that Council members are elected by a system of proportional representation with the whole state as a single electorate, the desirability for Council committees to consult and conduct their inquiry activities in all parts of the State is keenly felt by committee members. Committee visits to regional areas have facilitated a recent innovation - the educational outreach for regional secondary schools, where the Council's training and support unit use committee regional hearings as an opportunity to provide training sessions for local school students.<sup>40</sup>

### **Scrutiny of Bills**

The committees of the Legislative Council do not have a formal scrutiny of bills function as exists in the Senate. From time to time, however, the House has referred bills to committees for inquiry, mainly standing committees or select committees. The rate at which this has occurred over the past seven parliaments has remained fairly static with 19 bills having been referred in total, to a range of committees including standing, select and GPSCs.

### **Privileges Committee and Procedure Committee**

In terms of what might be called the 'standing domestic committees' – the Privileges Committee and the Procedure Committee – the notable feature of the last five years is the increasing use being made of the Procedure Committee. First formed in 2004 under the new standing orders, it did not produce its first report until 2008. A second report followed in 2009. However, in the current 55th Parliament commencing in early 2011, the Committee has already published three reports in relation to private members' business and notices of motion, and has a new inquiry in progress in relation to cut-off dates for the introduction of Government bills. It will be interesting to see whether this trend continues.

### **Conclusion**

In a House that has not had a Government majority since 1988, the committees are arguably being viewed by the Executive as a means of ventilating issues, facilitating public consultation and testing legislative reform proposals. Government Ministers trust the quality of the Legislative Council's committee system to conduct effective inquiries and produce reports with useable outcomes. In some cases the resulting reports, through their analysis of the issues and recommendations, have 'paved' the way for the successful passage of reform bills. On the other hand, the Opposition and Cross Bench trust the committee system to vigorously pursue the Executive over accountability issues. The conflict and co-operation described in this paper are indications of a robust and active committee system that is working well and contributing to the Legislative Council fulfilling its role as a House of Review.

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<sup>40</sup> In the previous Parliament, education and training officers accompanied the Select Committee on Recreational Fishing in Bateman's Bay and Griffith. In the current Parliament, the State Development Committee *Inquiry into economic and social development in central western NSW* and GPSC 5's *Inquiry into the management of public lands* have provided similar opportunities to students in Forbes, Broken Hill and Deniliquin.

**Appendix 1: NSW Legislative Council Committee system**



**Appendix 2: NSW Legislative Council Committee Section - current staffing model**

