

**Submission
No 12**

**INQUIRY INTO LEGISLATIVE COUNCIL COMMITTEE
SYSTEM**

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The Director
Select Committee on the Legislative Council Committee System
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Director,

Thank you for the invitation to make a submission to the Select Committee on the Legislative Council Committee System.

My substantive comments in response to the terms of reference and some of the key questions identified in the Select Committee's Discussion Paper begin on the next page.

I am interested in attending any symposium held as part of the inquiry and am happy to give further evidence at a hearing.

Yours sincerely,

Rodney Smith, PhD
Professor of Australian Politics

1. Introduction

The committees of the NSW Legislative Council have developed substantially since 1988. The current committee 'system' has not been planned or preordained. It has evolved over time as a result of political opportunities, conflicts and compromises. The system seems reasonably settled but that does not imply that it cannot be improved. This Select Committee inquiry provides a valuable and rare opportunity to assess the strengths and weaknesses of the committee system as a whole.

While I have views on many of the issues raised in the Select Committee's *Discussion Paper*, in this submission, I will concentrate on the matters that seem most critical to the three broad goals of the Terms of Reference: government accountability, developing sound policy and encouraging community engagement.

Each of these three goals is likely to conflict with legitimate goals of the government of the day: that it should be allowed to go about the work of running the state and should have its legislative program passed in a timely manner. In that sense, the inquiry goes to the heart of the question of whether the NSW Parliament should favour, to use David Clune and Gareth Griffith's terms, decision or deliberation¹.

2. Holding the Government to Account

Holding the government to account is one of the crucial functions of parliaments. It is a function that can often be carried out effectively via committees. The government will tend, for a variety of reasons, to resist efforts to hold it to account. In Westminster systems such as New South Wales, which feature very strong party loyalty and discipline, backbench parliamentary members of the governing party or coalition tend to act in the interests of their colleagues in the executive. For this reason, the most effective committee work directed at holding the government to account develops in chambers where the governing party or coalition lacks a majority.

¹ David Clune and Gareth Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*. Leichhardt: The Federation Press, 2006, pp. 14-15.

The history of the development and operation of committees in the Legislative Assembly and the Legislative Council since 1988 supports these points in the case of New South Wales.²

These points suggest some principles of committee design necessary to maximise the extent of executive accountability. The most important are:

1. That committees with an executive accountability function should have a non-government majority.
2. That the chairs of such committees should be drawn from non-government committee members.
3. That initiation of committee inquiries should not be subject to veto by the government or its representatives on the committee.
4. That the committees should have the resources (time, expertise, staffing, legal powers etc.) necessary to carry out effective inquiries.
5. That the government should be required to respond formally in a timely way to any findings and recommendations of the committees.

The six NSW Legislative Council General Purpose Standing Committees generally conform to these principles, particularly since the Government agreed that the GPSC chairs be drawn from the Opposition and crossbenches in 2015.³

One specific weakness in the GPSCs' capacity to pursue government accountability concerns their current inability to compel the production of State papers. The work of specialist committees conducting specific accountability inquiries would benefit from such a power, subject to the same restrictions that currently apply to the Legislative Council's power to order State papers. The

² See Rodney Smith, Parliament, in Martin Laffin and Martin Painter (eds.), *Reform and Reversal: Lessons from the Coalition Government in New South Wales 1988-1995*, Melbourne: Macmillan, 1995, pp. 33-34; Clune and Griffith, *op cit.*, pp. 546-549; 656-665; Rodney Smith, Parliament, in David Clune and Rodney Smith (eds), *From Carr to Keneally: Labor in Office in NSW 1995-2011*, Sydney: Allen and Unwin, 2012, 70-71.

³ Select Committee on the Legislative Council Committee System, *Legislative Council Committee System Discussion Paper*, Sydney: NSW Legislative Council, November 2015, 2.6 and 2.7, pp. 5-6.

principle behind treating the House as a whole and its committees differently in this regard is unclear.⁴

A more general weakness in the accountability functions of the GPSCs concerns their role as estimates committees. Although the NSW Legislative Council Estimates Committees give members some opportunities for holding the government to account, this process could be improved to encourage a stronger focus on government expenditure and the operation of government agencies. Hearings could be lengthened to allow both a wider range of topics to be addressed and particular topics to be addressed in more detail. Hearings could be held twice yearly. The interpretation of relevant questioning could be narrowed to promote more focus on public expenditure and administration, and less on contentious ministerial policy announcements and the like.⁵ Hearings could be reported in more than the current dot-point manner. Committees could be encouraged or expected to include, as part of their reports, recommendations to government for improving expenditure practices, budgetary reporting, agency administration and the like.

One approach to achieving these goals would be to increase the time and resources provided to the GPSCs for their estimates hearings, to bring them more into line with current Senate practice.⁶ Another approach that is worth considering would be to replace the GPSCs with a single Estimates Committee. Such a committee would be likely to attract members with a genuine interest and expertise in matters of public expenditure and administration. It could conduct hearings over several weeks to consider each portfolio area in turn, and produce a report that covered specific issues regarding particular portfolios, overall patterns, and recommendations for government consideration. A model for such a committee (albeit one operating as a joint committee) is the Parliament of Victoria's Public Accounts and Estimates Committee.⁷

⁴ Select Committee on the Legislative Council Committee System, *op cit.*, 4.12 and 4.13, pp. 19-20.

⁵ See Legislative Council, Budget Estimates Manual 2015-16, July 2015, Sections 4.2 and 4.3, p. 11. Available at: [http://www.parliament.nsw.gov.au/prod/web/common.nsf/cbe381f08171c2e8ca256fca007d6044/2a1439467dbc93f8ca257f48001f7c09/\\$FILE/150730%20Budget%20Estimates%20manual%202015-2016.pdf](http://www.parliament.nsw.gov.au/prod/web/common.nsf/cbe381f08171c2e8ca256fca007d6044/2a1439467dbc93f8ca257f48001f7c09/$FILE/150730%20Budget%20Estimates%20manual%202015-2016.pdf)

⁶ Select Committee on the Legislative Council Committee System, *op cit.*, 3.23 to 3.25, p. 13.

⁷ Parliament of Victoria, Public Accounts and Estimates, no date. Available at: <http://www.parliament.vic.gov.au/paec>

3. Developing Sound Policy for New South Wales

In Westminster systems where one party (or long-standing coalition) holds a majority in the lower house, parliamentary committees do far less work initiating policy than they do in legislatures where governments are formed by more fluid multi-party coalitions.⁸ In Westminster systems, cabinets tend to set the policy agenda to which parliaments and their committees respond.

This pattern does not mean that parliamentary committees in Westminster style systems such as New South Wales cannot play a valuable role in *developing* sound policy. They can do this in two major ways:

1. Examining government legislation and suggesting ways in which it could be improved.
2. Exploring policy areas that are neglected, for whatever reason, by governments.

As the Select Committee's Discussion Paper notes, the current process for NSW Legislative Council committee inquiries into legislation is *ad hoc*.⁹ It could be made more systematic by adopting the processes developed in the Senate, with a new selection of bills committee recommending bills for inquiry and report by one of a set of legislation committees. The GPSCs could act as legislation committees for this purpose, building on their existing portfolio expertise.

The practice of referring all bills to legislation committees, as occurs in New Zealand in Queensland, seems to have developed as compensation for the absence of an upper house.¹⁰ In the New South Wales context, a properly constituted selection of bills committee would allow legislation committees to focus their resources on the more significant, complex and contentious bills.

Work on policy areas neglected by government seems to be covered adequately by the existing subject standing committees and select committees. Although the three subject standing committees do not comprehensively cover public policy

⁸ Ingvar Mattson and Kaare Strøm, Committee Effects on Legislation. In Herbert Döring and Mark Hallerberg (eds), *Patterns of Parliamentary Behaviour*. Aldershot: Ashgate: 2004.

⁹ Select Committee on the Legislative Council Committee System, *op cit.*, 3.1 to 3.3, p. 9.

¹⁰ *ibid.*, 3.7, p. 10.

areas in the way envisaged by some reformers of the 1980s,¹¹ the case for expanding them into a more comprehensive set of standing committees does not seem strong. While the existing subject standing committees have conducted valuable policy inquiries, their attention to policy developments has been quite variable. The existing use of select committees to explore policy issues not taken up by the GPSCs or the subject standing committees seems to give the Legislative Council the necessary flexibility to address emerging or neglected policy questions.

4. Promoting Community Engagement

The traditional committee inquiry process, involving community engagement via calls for written submissions and witness appearances at formal inquiry hearings, has value; however, it is likely to privilege the more organised and better-resourced sections of the community. This privileging begins with awareness that an inquiry is being conducted, which is more likely to be registered by organisations that are invited to make submissions or that have staff dedicated to policy or issues management. Although NSW Legislative Council committees make it clear that written responses to inquiries can take various forms, community members may feel unable to conform to the implicit standards of presentation and argument. Committee inquiry hearings may be unfamiliar and intimidating for some witnesses. The fragmentation of traditional news media increases the difficulty faced by committees that wish to encourage diverse community engagement and inform communities of the outcomes of inquiries.

These problems indicate the value of recent innovative recent efforts by the Legislative Council committees to engage sections of the community that would otherwise not be aware of, or involved in, inquiry processes. Given the different needs of various sections of the community, along with rapid developments in new media use, consideration should be given to funding a dedicated community engagement officer, to ensure that Legislative Council committees adapt to the most effective modes of engagement.¹²

¹¹ See interviewees in David Clune, *Keeping the Executive Honest: The Modern Legislative Council Committee System*, Sydney: NSW Legislative Council, 2013, pp. 19-22.

¹² Select Committee on the Legislative Council Committee System, *op cit.*, 5.8, p. 24.

There is likely to be a wider benefit for the NSW Parliament through greater community engagement with Legislative Council committees. Too many citizens in this state form their knowledge of the NSW Parliament through the prism of snippets of Question Time and other high conflict parliamentary behaviour that circulate via traditional and new media. Those snippets tell part of the story; however, exposing members of the community to the more deliberative elements of parliamentary committee work is likely to moderate the more negative public impressions of the institution and its members.

5. Costs and Benefits

The suggestions in this submission obviously entail resource costs. For a house of 42 members, the NSW Legislative Council has a developed committee system, when comparison is made with Victoria's 40 member Legislative Council or Western Australia's 36 member Legislative Council. The Senate, with almost double the NSW Legislative Council's numbers (76) has roughly twice as many committees.¹³ Whether this means that the NSW Legislative Council has reached its committee capacity, or whether there is capacity for further effective committee work, is difficult for an outsider to assess.

As Ingvar Mattson and Kaare Strøm have noted in their study of European parliamentary committees, committee capacity depends partly on the level of committee staff support. This support varies quite substantially across parliaments of similar sizes and with similar levels of committee activity.¹⁴ Any changes to committee structure and activity within the NSW Legislative Council should be accompanied by a review of committee support, with enhancement where necessary to ensure any new committees or new committee functions can be effectively achieved.

¹³ Parliament of Australia, *Senate Committees*, Senate Brief No. 4, February 2016. Available at: <http://www.aph.gov.au/Home/About%20Parliament/Senate/Powers%20practice%20n%20procedures/Senate%20Briefs/Brief04>; Parliament of Victoria, List of Committees, August 2015. Available at: <http://www.parliament.vic.gov.au/committees/list-of-committees>; Parliament of Western Australia, Current Parliamentary Committees, 2016. Available at: <http://www.parliament.wa.gov.au/parliament/commit.nsf/WCurrentCommitteesByName>

¹⁴ Mattson and Strøm, *op cit.*

It is often easier to measure costs than benefits. No systematic research has been conducted on the impact of NSW Legislative Council committees. As Meg Russell and Meghan Benton demonstrate in their recent analysis of the policy impact of select committees in the UK House of Commons, such systematic research is difficult but not impossible. They identify a range of factors that influence the variability in policy effectiveness of different House of Commons committees.¹⁵ Whether the same factors apply in NSW would require local research at the same level of detail.

Rodney Smith
20 March 2016

¹⁵ Meg Russell and Meghan Benton, *Selective Influence: The Policy Impact of House of Commons Select Committees*. London: The Constitution Unit, 2011.