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**Co-operation and confrontation: Committees of the
NSW Legislative Council**

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Co-operation and confrontation: Committees of the NSW Legislative Council

In a paper presented to the Presiding Officers and Clerks Conference in Fiji in June 1999, the Deputy Clerk of the Senate, Anne Lynch, provided a salutary analysis of "the fragmentation of the Senate committee system".¹ Ms Lynch described the "flood of dissent" now contained in most reports of Senate Committees and the "confrontational and oppositionist" nature of much Senate Committee process in recent years. She examined the possible reasons for this trend, concluding that there were two primary reasons for what was happening to the committee system: firstly, unrealistically short timeframes, particularly for inquiries into legislation; and, secondly, the loss of the culture of "enforced reasonableness" which had previously been a hallmark of the work of members serving on Senate committees, including committees examining controversial legislation and subjects. The picture was not totally bleak, however. Ms Lynch suggested that, despite the futility of the reporting process (with majority, minority and third party reports now commonplace) even the most confrontational inquiries retained their usefulness through the quality of the evidence given. Ms Lynch's paper makes compelling reading. It is worthy of study by all of us who represent Parliaments with developing committee systems.

Taking Ms Lynch's paper as a starting point, I would like to discuss the committee system (or more accurately, committee systems) in the NSW Legislative Council. Following an outline of the structure of our committee system(s), this paper will analyse the presence of co-operation and bipartisanship on the one hand, and confrontation and dissent on the other hand, in the reports and work of the Committees of the NSW Legislative Council, with particular reference to the period since the March 1999 general election.

Development of the NSW Legislative Council committee system(s)

Following the 1978 constitutional changes which provided for a democratically elected upper house, and the decision of the Remuneration Tribunal in 1985 to provide members of the Legislative Council with a full-time salary, a select committee was appointed to investigate the options for the development of a formal system of committees.² The recommendations made by that committee were implemented, in part, by the establishment of two standing committees in 1988: the Standing Committee on Social Issues and the Standing Committee on State Development. In 1995 two further standing committees were established by the Legislative Council. With the establishment of the Standing Committee on Law and Justice, all ministerial portfolio responsibilities were able to be divided amongst the Legislative Council's standing committees. A Standing Committee on Privilege and Ethics was also established, replacing the pre-existing Privileges Committee, as well as taking on new responsibilities in relation to a Code of Conduct and ethical standards for Members. The Standing Committees on Law and Justice, Social Issues, State Development and Privilege and Ethics were each re-established in May 1999 and have continued to operate since that time.

With the exception of the Standing Committee on Privilege and Ethics, each of the standing committees were able to inquire into matters referred to them by the House or by a Minister. Up until 1999, each of the four standing committees had a majority of government members, and

¹ A Lynch, *Personalities versus Structure: The Fragmentation of the Senate Committee System*, Paper prepared for the 30th Conference of Presiding Officers and Clerks, Fiji, July 1999.

² *Standing Committees: Report of the Select Committee on Standing Committees of the Legislative Council*, November 1986.

were chaired by a government member. This remains the case with the Standing Committees on Law and Justice, Social Issues and State Development.³

The Standing Committees on Law and Justice, Social Issues and State Development have developed a reputation for conducting detailed inquiries into complex matters of public policy, and with rare exceptions they have developed bipartisan recommendations for addressing controversial policy issues. These committees have a good record of having their recommendations implemented and have developed a reputation amongst stakeholders for the high quality of their reports and the outcomes achieved as a result of their inquiries.

In 1997 the Legislative Council established five General Purpose Standing Committees. These replaced the Legislative Council's estimates committees which had been in existence during 1995 and 1996 and their primary role was to provide a forum for scrutiny of the budget estimates in 1997 and 1998. However, unlike the previous estimates committees, the General Purpose Standing Committees had an ongoing existence and, in addition to being able to receive references from the House, they also had a capacity to "self refer" matters for inquiry. In addition to scrutiny of the budget estimates in 1997 and 1998, the General Purpose Standing Committees conducted three inquiries, two of which (into Land Tax and Rural and Regional Health Services) were substantial undertakings. In May 1999 the Legislative Council re-established five General Purpose Standing Committees.

A distinguishing feature of the General Purpose Standing Committees is the fact that they have a majority of non-government members. Of the five General Purpose Standing Committees, three are chaired by cross-bench members and two are chaired by Opposition members. Another notable, and probably unique, feature of the General Purpose Standing Committees is their power to "self refer" matters for inquiry, following a request in writing from three members of a Committee. This has significantly expanded the use of these committees for inquiries into specific decisions of Government. To date, the House has not resolved to override a decision of such a Committee to "self refer" a matter for inquiry.

In effect, the NSW Legislative Council has two parallel committee systems. There are three Standing Committees, on Law and Justice, Social Issues and State Development, which are controlled by the government, and which receive references from the House or from Ministers. There are five General Purpose Standing Committees which are not controlled by the government, and which as just outlined, in addition to receiving references from the House may also 'self refer' matters for inquiry. (There is also a Standing Committee on Privilege and Ethics and one Select Committee is currently in existence.)

It is worth noting that in May 1999, there was a strong movement from the Opposition and cross-bench members to discard the government controlled standing committees in favour of the General Purpose Standing Committees. However, an understanding was reached that, at this stage in the development of the Legislative Council's committee system, such a move would not be appropriate. A key concern was the risk that such a move could result in the Government no longer including the upper house committees in their policy development and policy review processes. As the analysis contained in this paper suggests, the decision to retain the two committee systems has proven to be critically important.

³ The Standing Committee on Privilege and Ethics is now chaired by a cross-bench member. There are four government members, two opposition and two cross-bench members on the committee.

Work of the Legislative Council's committees: May 1999 – June 2000

In the period between the re-establishment of the committees in the current parliament in May 1999 and 30 June 2000 there have been 36 inquiries conducted. 24 reports have been tabled, containing 190 recommendations. 1958 submissions have been received, and 674 witnesses have given evidence at 91 hearings. Overall, more than 3,000 people have participated in inquiries.

In February 2000 a *Report on Performance: Legislative Council Committees – 1 July – 31 December 1999* was published and subsequently tabled in the House by the President. This document outlines the work of the committees during the period 1 July – 31 December 1999, including detailed information about inquiries and statistical information. A *Report on Performance* covering the entire 1999/2000 financial year is currently being prepared, for publication and tabling in House.

Co-operation and confrontation in the work of committees: May 1999 – June 2000

Standing Committees on Law and Justice, Social Issues and State Development

During the period May 1999-June 2000 the Standing Committees on Law and Justice, Social Issues and State Development have generally continued to operate in the bipartisan, consensual manner of previous years. During this period these committees have been investigating controversial and contentious areas of public policy, which in one case has included a thorough review of a particularly controversial decision of Government, to which stakeholders have brought widely divergent views. A brief outline of the work of these committees follows.

Standing Committee on Law and Justice

The Standing Committee on Law and Justice has tabled two reports during this period, dealing with *Crime Prevention through Social Support*, and the *supervision of the Motor Accidents Authority and Motor Accidents Council*. The Committee did not divide in relation to either of these reports and there were no dissenting statements included in either report.

Standing Committee on Social Issues

The Standing Committee on Social issues has tabled three reports during this period, dealing with *De Facto Relationships Legislation*, *Residential and Support Services for People with Disability*, and *Adoption Practices*. The report on De Facto Relationships Legislation contained 26 recommendations, and the report on Disability Services contained 42 recommendations, all of which had unanimous support. The Committee did not divide in relation to any of these reports and there were no dissenting statements included in either report. Each of these inquiries has been, or at least has had the potential to be, contentious. The inquiries into De Facto Relationships Legislation and Adoption Practices continued from the previous Parliament. The inquiry into Disability Services, which was referred to the Committee by the House in September 1999, had a reporting deadline of ten weeks.

The report tabled in relation to Disability Services dealt with a decision of the Government to tender out the management of a number of Group Homes currently managed by the Department of Community Services. This decision attracted a certain amount of criticism and

the inquiry was conducted in a highly charged context. During the course of the inquiry, the Committee made an order for the presentation of relevant Government papers, the first time a committee of the Legislative Council has exercised its powers to order the presentation of such papers since the decisions of the High Court and the NSW Court of Appeal upheld the powers of the House to order the production of state papers.⁴

The report on Adoption Practices consisted of the transcripts of a number of hearings. During some of these hearings serious allegations were made about individuals. The Committee spent a considerable amount of time deliberating over the appropriate approach to take in relation to the publication of this evidence. Ultimately, the Committee resolved to publish the evidence, with the names of the individuals against whom allegations had been made suppressed.

Standing Committee on State Development

The Standing Committee on State Development has tabled one report during this period, dealing with the *Use and Management of Pesticides*. Again, this is a controversial subject, in relation to which the views of stakeholders are often at loggerheads. This report included a dissenting statement in relation to five of the 48 recommendations that were included in the report. This inquiry continued from the previous Parliament.

Standing Committee on Privilege and Ethics

The Standing Committee on Privilege and Ethics has conducted one inquiry into a matter of privilege during the period May 1999 – June 2000. This inquiry was concerned with controversial statements made in the House by the Leader of the Opposition, Mr Gallacher, and the former Leader of the Opposition, Mr Hannaford. The Committee was required to examine whether the statements constituted an abuse of privilege and, if so, what sanctions should be applied. Clearly, this was a contentious matter and the inquiry was highly charged. Although the Committee divided once during its first, somewhat fractious meeting, the Committee was ultimately able to produce its report without dividing and without any dissenting statements. The report included four resolutions which had unanimous support. This inquiry, which was referred to the Committee by the House in September 1999 had no reporting deadline.

General Purpose Standing Committees

During the period May 1999 – June 2000 the five General Purpose Standing Committees have conducted 18 inquiries. (This includes ten budget estimates inquiries, as each of the five General Purpose Standing Committees has examined the 1999/2000 and 2000/2001 budget estimates during this period.)

Examination of budget estimates

The examination of the 1999/2000 budget estimates took place in September and October 1999. The examination of the 2000/2001 budget estimates took place during June 2000. The estimates process was significantly different from that in previous years, and generally more in keeping

⁴ *Egan v Willis and Cabill* [1998] HC 71; *Egan v Chadwick, Evans & Cabill* [1999] NSWCA 176.

with the procedures developed over many years for the Senate's estimates hearings, with provision for additional and supplementary hearings to be conducted. Additional hearings were held for a number of portfolios. An important similarity with previous years, however, was the voluntary attendance of Ministers from the Lower House, to answer questions during the budget estimates process. At the end of the examination of the budget estimates brief, descriptive reports are prepared by each of the General Purpose Standing Committees. There was some contention about these reports in relation to the 1999/2000 budget estimates, and there were four divisions during consideration of these reports. The consideration of the reports on the 2000/2001 budget estimates was less contentious, with no divisions taking place.

General Purpose Standing Committee inquiries – late 1999

Apart from the examination of the 1999/2000 budget estimates, there were three General Purpose Standing Committee inquiries completed during the second half of 1999. These inquiries were concerned with: Olympic Ticketing; the Proposed Closure of Seaforth TAFE; and the M5 East (Motorway) Ventilation Stack. It would be fair to say that each of these inquiries were concerned with controversial issues and were highly "political". It is therefore not surprising that each of these inquiries was more confrontational than many others.

Most of you would be aware of the inquiry into *Olympic Ticketing*, which was a high profile inquiry and had the potential to be embarrassing for the Government. There were a number of unusual aspects of this inquiry. In parallel with the Committee's inquiry, the Minister for the Olympics appointed his own review of the issues, and the results of that review were provided to the Committee. There was considerable debate about the Committee's access to relevant documentation, with one option being an order for papers from the House. In the end the Committee was given access to the relevant documents, but these documents did not come into the Committee's possession, and remained confidential. The Committee's report did not contain any dissenting statement, and, although the Committee divided on ten occasions in relation to the inquiry process and the report, confrontation was reduced by the conscious efforts of the Minister for the Olympics to work with the Committee and of the Committee Chair to seek to achieve consensus wherever this was possible. Including extensions, the Committee was given five weeks in which to conduct this inquiry and report to the House.

The inquiry into the *Proposed Closure of Seaforth TAFE*, while dealing with a confined issue, of particular interest in a specific geographic area of Sydney's northern beaches, was also controversial. This inquiry proved to be the first of a number of General Purpose Standing Committee inquiries which have examined specific decisions of Government. The views of the local community where the TAFE was to close and the Department of Education and Training were clearly at odds. Once again, this inquiry was conducted by General Purpose Standing Committee No. 1 and, despite the contentious nature of the subject matter, the Committee Chair sought as far as possible to reach a consensus outcome. While the Committee's report included a dissenting statement, the Committee did not divide during the inquiry or consideration of the report. Including extensions, the Committee was given just over six weeks to conduct this inquiry and report to the House.

The inquiry into the *M5 East Ventilation Stack* was also concerned with a particular decision of Government, this time in relation to the form of ventilation system to be provided for a long tunnel which was part of a new motorway in Sydney's south. Once again, this inquiry was controversial and the view of residents near the proposed ventilation stack and the Roads and Traffic Authority were diametrically opposed. The report included a dissenting statement from

the Government members on the Committee. The Committee Chair also referred, in his foreword, to one of his proposed recommendations that had been rejected by the rest of the Committee. The Committee divided once in relation to the proposal to pursue this inquiry, and on 16 occasions during the consideration of the report. The Committee set its own reporting deadline, of seven weeks, for this inquiry.

General Purpose Standing Committees – early 2000

In addition to examination of the 2000/2001 budget estimates, the General Purpose Standing Committees have reported on five inquiries during the first half of 2000. Overall there appears to have been a significantly higher level of co-operation in the conduct of these inquiries, in comparison to those conducted in late 1999. In part, this may be the result of the fact that none of the inquiries was as highly charged as the inquiry into Olympic Ticketing, for example. Perhaps more significant, however, has been the longer timeframe for each of these inquiries. Another important factor has been the increased familiarity of Members with the sorts of inquiries undertaken.

One of the reports tabled was a very brief interim report which advised the House of progress on the inquiry into *Oil Spills in Sydney Harbour*. In effect, the report merely pointed out that, due to court proceedings, the inquiry had been put on hold.

A second interim report was tabled, in relation to the inquiry into the *Current Provisions for the Appropriation of Moneys and Authorisation of Expenditure in NSW*. This was a more substantive report, dealing with a matter about which the former Auditor-General had expressed concern, namely practices for the retrospective authorisation of expenditure of moneys from the Consolidated Fund. The Committee's report contained no dissenting statement and the Committee did not divide during this inquiry. This inquiry was referred to the Committee by the House in June 1999. The Committee's Interim Report was tabled in April 2000.

The inquiry into the *Contract of Employment of the Commissioner of Police* was another inquiry which reviewed a specific decision making process of Government and which was contentious. (The inquiry was concerned with the process by which the Commissioner's contract was arrived at, rather than the content of the contract itself.) The Committee's report included a dissenting statement from the Government members, which went to the heart of some of the report's recommendations and findings. The Committee divided once during the course of the inquiry and on nine occasions during consideration of the report. The Committee commenced this inquiry in November 1999 and reported at the end of May 2000.

The inquiry into *Multiculturalism* commenced in February 2000. The interim report tabled at the end of May 2000 dealt with one aspect of the terms of reference, namely Government legislation to replace the Ethnic Affairs Commission with a Community Relations Commission. This was controversial legislation with a range of stakeholders opposed to the change of name of the Commission. During the course of the inquiry, an order for papers was made and complied with by the Government. The Committee's report contained dissenting statements by the Opposition members of the Committee and one of the cross-bench members on the Committee. The Committee divided once during consideration of the report. It is worth noting, though, that there were times when this inquiry was quite tense. This was particularly so when the staff of the Committee, who were at the same time working to a deadline for the inquiry into the Contract of Employment of the Commissioner of Police, were unable to present a draft report within a

particular deadline, due to the Government's wish to have the legislation which the inquiry was considering debated in the House on a certain date.

Unlike the inquiries referred to above, which have been focussed on specific decisions of Government, the inquiry into the *Rural Fire Service* ranged over a number of aspects of the operations of this organisation and stakeholder concerns. Once again, this was a potentially contentious inquiry with stakeholders holding opposing views on key issues. The Committee's report includes a dissenting statement from one cross-bench member, dealing with one specific issue. The Committee divided on two occasions during consideration of the report. The Committee commenced this inquiry in November 1999 and reported in late June 2000.

Select Committee on Increase in Prison Population

There has been one Select Committee appointed during the period May 1999 – June 2000. In November 1999 a *Select Committee on the Increase in Prisoner Population* was established in order to investigate the reasons for the increase in prisoner numbers in NSW over recent years. The Committee was required to first examine the reasons for the pronounced increase in the number of women prisoners. This committee had three Government members, two Opposition and two cross-bench members, and has been chaired by an Opposition member. The inquiry process has included visits to a number of prisons and the taking of evidence from prisoners. The House has granted the Select Committee a number of extensions for the tabling of its interim report dealing with women prisoners. It is understood that, although the inquiry has, particularly in its early stages, been somewhat fractious, the Select Committee recently agreed to a unanimous report, with no dissenting statements. The Committee did not divide during consideration of the report.

Conclusions

From the foregoing analysis, a number of things are clear. Firstly, the Standing Committees on Law and Justice, Social Issues and State Development have continued their in-depth inquiries into complex matters of public policy, in a co-operative manner. In most of these inquiries it has been possible for a consensus, unanimous report to be produced. Furthermore, these Committees have continued to see positive outcomes result from their inquiries with a good record of implementation of recommendations by Government.

Secondly, the work of the General Purpose Standing Committees has been less co-operative and five of the eight reports of inquiries (apart from the examination of budget estimates) by these Committees, during the period May 1999 – June 2000 have included dissenting reports. There has been some confrontation evident during the conduct of some of the inquiries of the General Purpose Standing Committees, and some of these committees have divided on a number of occasions during the conduct of inquiries or during consideration of their reports.

It would be easy to draw the conclusion from this analysis that structural reasons are central in the level of co-operation or confrontation in our inquiries. The Standing Committees on Law and Justice, Social Issues and State Development have a majority of Government members and are chaired by Government members. The General Purpose Standing Committees have a non-government majority and are chaired by either opposition or cross-bench members. There is no doubt something in this.

However, structure does not provide a full explanation. The Select Committee on Increase in Prisoner Population has the same make up as the General Purpose Standing Committees. Although there was some confrontation in the early stages of the Select Committee's inquiry, that committee has ultimately produced a unanimous report. Further, the inquiries conducted by the General Purpose Standing Committees during the first half of 2000 have been more co-operative than those conducted during late 1999. There has even been one unanimous report of a General Purpose Standing Committee, which was later the subject of complimentary comments in the House from the Leader of the Government in relation to his portfolio responsibilities as Treasurer.⁵ Another of the reports included a dissenting statement by one cross-bench member in relation to one specific matter (peripheral to the main focus of the report).

There are two things that distinguish the General Purpose Standing Committee inquiries conducted during 2000 and the inquiry by the Select Committee on Increase in Prisoner Population from the General Purpose Standing Committee inquiries conducted in late 1999. Firstly, the inquiries reported on in the first half of 2000 have each been conducted within significantly longer timeframes. The provision of adequate time for the conduct of inquiries is a key factor in the ability for a committee to conduct an inquiry in a co-operative manner and to achieve a consensus on the issues under review. This is a point that was made in Ms Lynch's paper in relation to Senate Committees. Secondly, whilst all of the inquiries conducted over the last twelve months have been somewhat controversial, there has been nothing in recent months that has approached the level of controversy or public interest as the inquiry into Olympic Ticketing. It is interesting to note that the inquiry that has been perhaps the next most politically sensitive, that concerning the contract of employment of the Commissioner of Police, was the one inquiry reported on in 2000 in which the Committee divided on a significant number of occasions and in which there was a dissenting report that went to the heart of the issues dealt with in the report.

There is one other point that should be noted. A number of highly controversial inquiries have been conducted in a reasonably co-operative manner. Even the highly "political" inquiry into Olympic Ticketing never degenerated into the confrontation we heard about from Ms Lynch in relation to the inquiries into the GST legislation. Furthermore, a potentially controversial inquiry into Multiculturalism was conducted in a generally co-operative manner. The interim report on the inquiry into Appropriations and Expenditure was unanimous and contained no dissenting statement. Each of these inquiries was conducted by General Purpose Standing Committee No. 1. As previously mentioned, the Minister for the Olympics adopted a constructive approach to the inquiry into Olympic Ticketing, which had a dramatic effect on the tone of the inquiry. Indeed, there is a new inquiry into Olympic related matters, this time Olympic Budgeting, and the Minister has again indicated his support for the Committee's work.⁶ Furthermore, the Chair of this Committee has often stated his desire to find a consensus position wherever possible and has made every effort to do so in the inquiries referred to the Committee. Therefore, as Ms Lynch suggested last year, personalities and the approach of individual members, and the Government also has a significant bearing on the level of co-operation or confrontation in committee inquiries.

To summarise, whilst there has been confrontation in some recent inquiries conducted by Legislative Council committees, co-operation remains firmly entrenched in our committees. This can partly be attributed to the structure of the committee systems, with the two parallel sets of

⁵ *NSW Parliamentary Debates (Hansard) (LC)*, 2/5/00 per the Hon M Egan MLC, in relation to the Appropriations (Budget Variations) Bill 2000.

⁶ Evidence, General Purpose Standing Committee No 1, 4/7/00, per the Hon M Knight MP, pp 1, 3.

committees handling different types of inquiries. Inquiries which have been conducted in tight timeframes have tended to be more confrontational; where there has been more time, committees have been better able to achieve consensus on the issues under review. The increasing familiarity of members with the sorts of inquiries being undertaken and the ability of staff to meet deadlines and produce high quality draft reports has also been helpful in achieving a co-operative approach. Finally, personalities are important – an indication from a Minister of a willingness to work with a Committee or a committee chair or member intent on working in a co-operative manner and seeking a consensus outcome can be instrumental in that process. However, there will always be certain inquiries where the issues are of such sensitivity that it will be a real struggle for the Committee to work in a co-operative manner, and where as a result consensus may not be achievable.