

INQUIRY INTO LEGISLATIVE COUNCIL COMMITTEE SYSTEM

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LEGISLATIVE COUNCIL

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The Hon Scott Farlow MLC
Chair, Select Committee on the Legislative Council
Committee System
Legislative Council
Parliament House
Sydney NSW 2000

Dear Mr Farlow

Thank you for your letter (ref D15/33827) inviting me to make a submission to the Select Committee on the Legislative Council Committee System.

Many current and former members engaged with the C25 program of events in 2013 celebrating the 25th anniversary of the modern Legislative Council committee system. The establishment of this committee is one practical outcome of those events and the committee has the opportunity to help build on the achievements of the past 28 years to ensure the continued effectiveness of the Legislative Council Committee system for the next 25 years.

Thank you for your preparedness to accept this submission out of time. Making this submission at this time means that I have had the benefit of being able to read the submissions already received and made public by the committee. The committee has received many insightful contributions which indicate strong support for the work of Legislative Council committees and make practicable and thoughtful suggestions for enhancements.

There appear to be two key areas of interest to those who have made submissions:

- options for enhancing the budget estimates process, and
- options for enhancing the scrutiny of legislation through committees.

Given the coverage of these matters in other submissions and their nature as policy issues for the consideration of the committee, I have not thought it appropriate to comment upon either of those matters (apart from posing one question). The committee will no doubt be assisted in its deliberations on these and other issues by an examination of how these matters are dealt with in other jurisdictions, particularly the Australian Senate, the New Zealand House of Representatives

and the UK House of Commons. I would be pleased to assist the secretariat in obtaining information from those and any other relevant jurisdictions through contacting the Clerks of those Houses.

This submission focusses upon the following issues identified in the committee's Discussion Paper:

- the Legislative Council committee system,
- the role of secretariat,
- committee powers, and
- other procedural matters.

Scrutiny of legislation

I note that a number of the submissions received by the committee focus on the scrutiny of legislation and encourage the committee to recommend changes to current arrangements for the scrutiny of both bills and regulations.

One question for the committee to consider in relation to the scrutiny of bills is to determine the nature of the enhanced scrutiny that is being encouraged in submissions. Will this involve technical (but nevertheless very important) scrutiny, for example for compliance with or breaches of human rights instruments or other prescriptions of individual rights (along the lines of the role of Senate Scrutiny of Bills Committee)? Or is it proposed that bills be subjected to a more general form of scrutiny and consultation, along the lines of the reference of approximately 40% of bills to Senate Committees and the reference of bills to Standing Committees in New Zealand? Perhaps the two types of scrutiny are not mutually exclusive.

Any recommendation of the committee that is adopted by the House to enhance the scrutiny of legislation, either through a new Legislative Council committee or existing Legislative Council committees, will have implications for Members of the Legislative Council in terms of their workloads as well as resource implications for the Department of the Legislative Council, if it is to be done properly. I would welcome the opportunity to have some dialogue with the committee in this regard, when the committee is further progressed with its inquiry and has formed its view about the sorts of recommendations it might make on this issue.

Legislative Council committee system

The contributions by members, former members and other stakeholders during the C25 events in 2013 are a testament to the fact that the current committee system has served the Legislative Council well. The submissions received by the committee are further evidence of the high standing of the current committee system. The submissions from the Department of the Senate and from the Department of the House of Representatives provide detailed accounts of

alternative committee systems. The Committee would no doubt also benefit from access to information (perhaps gathered by way of video-conference) in relation to the latest iterations of the committee systems operating in the New Zealand House of Representatives and the UK House of Commons. As noted above, I would be happy to assist the secretariat to obtain information about those systems through contacting the Clerks of those Houses.

The following observations may be of some further assistance to the committee in considering the future of the Legislative Council committee system.

Two parallel committee systems and an original vision for the GPSCs

Enclosed as an attachment to this submission is a paper delivered by then Deputy President at the Presiding Officers and Clerks Conference in 2000. This paper was an attempt to explain and analyse the Legislative Council's "two parallel committee systems." According to this analysis the Standing Committees on Law and Justice, Social Issues and State Development, with Government Chairs and a Government majority, and which receive references from ministers and the House focus on complex matters of public policy, while the General Purpose Standing Committees, which are not controlled by the Government, and may self-refer inquiries (as well as receiving references from the House), tend to conduct accountability oriented inquiries. Over the years since 2000 the Legislative Council's committee system has continued to develop. GPSC's have from time to time conducted policy oriented inquiries. Of course, some inquiries include elements of both accountability and policy development. There was a return to the establishment of many select committees during the 55th Parliament from 2011 to 2015. Nevertheless, the analysis in the 2000 paper remains relevant in identifying the dual roles undertaken by Legislative Council committees although the manner in which those roles have been performed has varied over time.

A particularly interesting aspect of the C25 events in 2013 was the first stage of an oral history program for the Legislative Council. Five former members who were instrumental in the establishment of the modern committee system were interviewed and a monograph, *Keeping the executive honest: the modern Legislative Council committee system*, referred to in the committee's Discussion Paper, was produced. The Committee may find of interest the following quote from the Hon John Hannaford, one of the architects of the GPSCs, in relation to the role originally envisaged for those committees, particularly in relation to the opportunities for members to gain a detailed working knowledge of the public sector, as an aid for example to the transition to government:

"We went through a lot of steps during that period of 1995 to 1999 of putting in place appropriate governance frameworks for the accountability of the administration and Ministers to Parliament - more particularly, to the Legislative Council because the Lower House did not want to know. I am not quite certain that a lot of people still understand the concept of that governance framework that has been put in place. If you are going to have a call for papers, it does mean that people actually need to be taking notice. But that again comes down to the fact that there has got to be an understanding that even staff within

Ministers' offices are public servants that are answerable to the Parliament; they are not answerable to their Minister only, they are ultimately answerable to the Parliament.”

Hannaford argues that the General Purpose Committees also have much potential to help Members enhance their knowledge of the public sector and prepare for transition to government:

“You would get a better government, better oppositions and better transitions of government if there was a more comprehensive understanding of how departments actually operate. You would get that if there was, rather than questioning of the budget in a political point scoring manner, a critical scrutiny of the way in which the bureaucracy actually operated. People think that Ministers control their departments; they do not. The department heads control the department. A Minister is meant to set a policy agenda ... There is not a good understanding of governance in transition to office. Ministers have to learn ... [Shadow Ministers] should be wanting to understand all the operational procedures of the department.”

Ministerial references

One issue in relation to committee systems that has been the subject of some debate over the years is the role of ministerial references. A view is sometimes expressed that ministerial references are inappropriate in principle for upper house committees, as the committees run the risk of capture or use by the executive government. Given the significant inquiries conducted and effective public policy solutions developed by the Standing Committees on Law and Justice, Social Issues and State Development, in response to ministerial references, in my view there remains a role for ministerial references (just as there remains a role for self-references to GPSCs). However, there have been occasional examples over the years of ministerial references apparently being made (or joint select committees established) to “head off” accountability inquiries being conducted by GPSCs. Whilst perhaps convenient in the short term, these inquiries have rarely been effective and it might be thought the use of the process in this way has had a tendency to create cynicism about the committee system.

Committee workload

Paragraph 2.17 of the Discussion Paper deals with the committee workload. The number of members available to serve on committees and devote sufficient time to them acts as a natural limit on the overall amount of work able to be undertaken by Legislative Council committees. The recent experience of the Australian Senate with an exceptionally large number of references to committees that are perhaps beyond the resources of Senators and the Department of Senate to reasonably undertake and support is a salutary lesson. Fortunately, the good sense of the Members of the Legislative Council acts as a brake on unrealistic workloads for committees, although there are occasions when the capacity of members, and available resources, are placed under considerable pressure. (An example is the late 2014 and early 2015 election period when there were ten concurrent inquiries conducted in a highly charged political context.)

The role of the Secretariat

Chapter Six of the Discussion Paper deals with the role of the committee secretariat, the provision of expert assistance and resources. Paragraphs 6.1 to 6.4 briefly describe current staffing arrangements.

The current staffing structure was put in place in 2000, in response to a proposal from the then Clerk Assistant Committees and Usher of the Black, Mr Warren Chill, and approved by the then Clerk, Mr John Evans, and President Meredith Burgmann. The model effectively involves staff having roles rather than positions. Staff at various levels have particular areas of responsibilities (eg procedural advice, project management of inquiry processes and liaison with stakeholders, research and writing, and administration) that each contribute to the support of inquiries. They are not, however, assigned to a specific committee or committees. Assignment of staff to particular inquiries is dynamic and flexible, with staff allocated to particular inquiries as workloads require. This involves detailed and continuous consultation between the three committee Directors and oversight by the Clerk Assistant Committees.

It is my submission that the current model serves the Legislative Council very well. It would have been impossible to support the number or sorts of inquiries conducted by committees, within resource levels, with a less flexible structure. Furthermore, the current structure assists to provide a flexible workplace which assists in retaining talented and dedicated staff, as well as enhancing their professional development. The system works because of the commitment of all staff to it, the high level of co-operation and collaboration between committee directors, and the extraordinary leadership qualities of successive Clerks Assistant Committees. It also works because of the co-operation of Committee Chairs. At the time the structure was put in place it was visionary and remains unique in parliamentary departments. The model, however, is currently being adopted across the NSW public sector under the terms of the *Government Sector Employment Act 2013*. This structure has worked very well in the Legislative Council Committee office.

Committee powers

Chapter Four of the Discussion Paper provides an excellent account of relevant current issues in relation to committee powers and challenges to those powers. The key issues are:

- challenges to the power of committees to order the production of documents, and
- the assertion by some witnesses of statutory secrecy as a ground to refuse to provide information or answer questions.

The Committee has already taken account of the following recent scholarly journal articles referenced in the compilation of the Discussion Paper:

- Stephen Frappell's recent paper on "A case for a parliamentary privileges act for New South Wales," *Australasian Parliamentary Review*, (2015), 30 (1), pp 8-25
- Beverly Duffy (and my) paper entitled "Information is power: recent challenges for committees in the NSW Legislative Council," (Paper presented at 45th Presiding Officers & Clerks Conference, Apia, Samoa, 30 June – 4 July 2014)
- Beverly Duffy and Sharon Ohnesorge's recent paper, "Out of step? The New South Wales *Parliamentary Evidence Act 1901*," (2016) 27 Public Law review, pp 37-53
- Steven Reynolds, Sam Griffith and Tina Higgins paper, "Asserting the inquiry power: parliamentary privilege trumps statutory secrecy in New South Wales," (Paper presented at 46th Presiding Officers & Clerks Conference, Hobart, Tasmania, July 2015).

Attached for the information of the committee is another recent source of important information in relation to these matters, the opinion of Bret Walker SC, entitled "Parliament of New South Wales, Legislative Council: Orders for Papers from bodies not subject to direction or control by the Government," tabled in the Legislative Council on 18 November 2015. Whilst concerned with the powers of the House to order the production of documents from statutory bodies, this advice also includes some very interesting implications for committees. Mr Walker advises that the power of the House and committees, under the *Parliamentary Evidence Act 1901*, to attend and give evidence includes a power to require the production of documents as part of the giving of such evidence.

As suggested in Stephen Frappell's paper the key advantages of a parliamentary privileges act for NSW would be in consistency in the interpretation of key terms in article 9 of the *Bill of Rights* 1688, providing clarity around contempt powers and processes, and a broader range of powers for the Parliament of NSW to deal with conduct. A secondary advantage could be as a vehicle for clearly putting beyond doubt the powers of committees in relation to the areas of challenge listed above. I have read with interest the discussion of parliamentary privileges legislation in the submission from the Department of the Senate about the genesis of privileges acts enacted by the Australian and New Zealand Parliaments (in response to particular, wrongly decided judicial decisions) and their primary purpose in delineating the respective roles of the courts and the parliament in relation to parliamentary privilege. I also note the observation that such legislation has not been aimed at asserting powers and recognition of the critical importance of the common law powers of the NSW Parliament as recognised in the *Egan* cases. I am very alert to any risks of threats to those essential powers. In my view, provided great care is taken to protect the common law powers of the NSW Parliament, the advantages of exploring a privileges act for NSW do outweigh the risks. However, it would be important for all members to be vigilant to protect the powers of the Parliament, and great care to be taken with the process by which any such legislation is developed, initiated and considered.

The Discussion Paper also raised the possibility that either in lieu of, or complementary to, a parliamentary privilege act, consideration could be given to the adoption of "privileges resolutions" along the lines of those adopted by the Australian Senate. The Discussion Paper suggests that such privilege resolutions could:

- Set the boundaries of what committees may do
- Provide procedural protection to witnesses
- Provide a formal framework within which difficult issues can be resolved.

I agree that there would be merit in the committee considering recommending the adoption of privileges resolutions along the lines of those adopted by the Australian Senate. I would be pleased to have a sample set of such resolutions prepared for consideration by the committee during this inquiry.

One other procedural matter

Government responses

There is one further procedural matter which is highlighted in the Discussion Paper upon which I would like to comment. Paragraphs 3.26 – 3.29 deal with government responses to committee reports. The requirement for government responses and the practices of successive governments in complying with requirements for the tabling of such responses has been a strength of the Legislative Council committee system. The requirement for government responses to be tabled, or provided out of session if the House is not sitting, within six months of the tabling of a committee report is generally well complied with, although there has been a trend in recent years for correspondence to be provided within that timeframe advising of various reasons for delays in the provision of a full response.

Two issues are worthy of mention though. Firstly, there are occasions on which the requirements for government responses are not entirely addressed. Sometimes when a report has dealt with a particularly contentious aspect of public policy, the response received does not technically comply with the standing orders in that it may consist of general statements rather than addressing each recommendation in turn.

Secondly, government responses have become overdue when reports are tabled towards the end of one parliament and the response is due in the next parliament. The executive government (on the advice of the Department of Premier and Cabinet) has asserted that in such instances there is no obligation to provide a response. This issue arose and was addressed by the House in October 2011, with the House agreeing to a motion which insisted on the government providing a response to a list of reports for which responses were. The motion asserted that, as the Legislative Council is a House of continuing effect, the obligation to provide a response to the Legislative Council committee report was not obviated by the expiration of the Legislative Assembly. A statement by this committee endorsing this view would be of assistance should this issue arise, and particularly should the contrary view be put forward by DPC, in future. Moreover a general statement from this committee about the importance of government responses being provided within the six months timeframe and addressing all recommendations made in a committee report would also be of assistance in future. Full and detailed government responses are an important way of further enhancing the committee system for the future.

As outlined in the Discussion Paper, there was some discussion at the C25 seminar in 2013 about options for enhancing debate on committee reports (including the possibility of timing the debate to include debate on the relevant government response). There is currently nothing to prevent a motion being moved in the Legislative Council to take note of any government response when it is tabled (just as there is nothing to prevent a system being put in place for debate on the taking note of answers to questions) as occurs in the Australian Senate.

I trust this information is of assistance to the committee. I would be happy to assist the committee in any other way that I can, including elaborating on this submission at a hearing if required.

Yours sincerely

David Blunt
Clerk of the Parliaments