

## **INQUIRY INTO LEGISLATIVE COUNCIL COMMITTEE SYSTEM**

**Organisation:** Department of the Legislative Assembly, New South Wales  
**Date received:** 14/04/2016

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LEGISLATIVE ASSEMBLY  
OFFICE OF THE CLERK

12 April 2016

D16/11109

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

Dear Mr Farlow

**Re: Select Committee into the Legislative Council Committee System**

I write in relation to recent submissions received by the Select Committee's Inquiry into the Legislative Council Committee System.

I note that of 16 submissions published, a number concern the operation of the Legislation Review Committee. I have provided the Speaker with my observations on certain issues that have been raised in these submissions.

I am enclosing these observations with this letter to assist the work of your Committee. I also hope that this provides a clearer picture of the overall work of the Legislation Review Committee.

Yours sincerely

Ronda Miller  
Clerk of the Legislative Assembly

Encl.

### **(1) Limited timeframes for the Committee to consider legislation**

A recurring theme throughout some of the submissions was that there was a limited timeframe for the Committee to effectively scrutinise legislation before it.<sup>1</sup> This is because there is a very short turnaround time to respond to bills. In the Legislative Assembly, debates on bills must be adjourned for five clear (calendar) days, not excluding weekends.

However, where Standing Orders are suspended, debates on bills can commence immediately, and there is no obligation to pause consideration of a bill until the Committee has deliberated on it. Section 8A(2) of the *Legislation Review Act 1987* expressly provides that a House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

Both the Law Society and the NSW Council for Civil Liberties submitted that the utility of the reports could be enhanced if each house is required to adjourn debate pending the publication of the Committee's report.

These timeframes are beyond the control of the Committee, which works to ensure that a digest is finalised by the time Government Business commences on the Tuesday of every sitting week. This is to enable Members to have access the Committee's comments before debate on a bill commences.

### **(2) Changes in the Committee membership**

A concern raised by the NSW Council of Civil Liberties was that a change to the makeup of the Committee has meant that the membership has been almost halved with members of the Legislative Assembly forming a majority of Committee members.<sup>2</sup> This comment was drawn from a speech given by the Hon. Tom Bathurst, Chief Justice of the Supreme Court of NSW. This assertion is incorrect. The makeup of the Committee, as provided for under section 5 of the *Legislation Review Act 1987*, is that there should be five Members from the Legislative Assembly and three Members from the Legislative Council. This has been the case since the Committee was reappointed in 2003 and it has not been amended since then. Prior to the Regulation Review Committee's name change in 2002 as a consequence of the Legislation Review Amendment Act, the Committee was comprised of 7 members of the Legislative Assembly and only 2 members of the Legislative Council. As noted above, the Legislation Review Committee is smaller, comprised of 5 members of the Legislative Assembly and 3 members of the Legislative Council.

### **(3) Concerns that the Committee merely echoes the Government position**

Another concern raised by the NSW Council of Civil Liberties was that the Committee reports 'echo' the language of the Government in explaining why a potential issue in a bill is not a breach of human rights. In particular, the NSW Council of Civil Liberties explained:

*Whereas in the past the Legislation Review Committee drew the attention of the House of Parliament to intrusions on human rights which might need to be corrected, now it appears to see its role as providing excuses for those intrusions, or merely reiterating material from the relevant Minister's second reading speech.*<sup>3</sup>

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<sup>1</sup> For example, *NSW Law Society*, Submission No 6, p4

<sup>2</sup> *NSW Council on Civil Liberties*, Submission No 11, at p4

<sup>3</sup> *NSW Council on Civil Liberties*, Submission No 11, at p4

A particular example was provided with respect to the *Terrorism (Police Powers) Amendment Bill 2015* where the Committee identified potential human rights implications with the Bills but did not find that they impacted unreasonably on human rights and liberties in the circumstances.

It is commonplace for the Committee to flag issues of potential concern, even if on closer reflection the provisions appear justified, or on balance the provisions are reasonable in the circumstances. The Committee highlights these issues for general awareness and discussion, as well as providing an opportunity for the Committee to demonstrate that it has considered all issues, and has not ignored or overlooked them. The Committee will therefore often finalise a bill report in neutral language where, following a discussion of the issues, 'the Committee makes no further comment'.

As a delegated parliamentary body, the Committee reports its conclusions to both Houses. On bills in which the Committee is concerned about human rights implications, a bill report will typically include language that will 'refer a matter to Parliament for further consideration'.

Committee reports are not drafted to provide 'excuses' for legislation, as suggested nor to provide the Committee's endorsement of the legislation under review. The legislation brought forward to Parliament is a function of the Government's legislative program, decisions about which do not fall within the Committee's ambit.

On the second point about 'reiterating the relevant Minister's second reading speech', it is correct that the Committee routinely quotes from the Minister's second reading speech in the 'Background' section of its reports. This is for ease of reference and to provide all readers of the Committee's reports on bills with the context of the issues under consideration. As the second reading speech is supporting material, critical to understanding the origins of a bill, it is incumbent on the Committee to refer to it in the consideration of issues within the bill itself. As such, the Committee routinely refers to material provided by the Minister and considers it appropriate to do so. The Committee may also refer to other materials publicly available, including from non-Government bodies, stakeholder groups, newspaper articles, and submissions from consultation processes.

#### **(4) Legislative Council as the better placed house for the scrutiny of legislation**

The submissions from the Labor Party, The Hon. Ron Dyer, and the NSW Council of Social Services all stressed that the Legislation Review Committee should be administered by the Legislative Council as it is better placed as the house of review to undertake scrutiny of legislation functions. The Labor Party submission notes that:

*The current arrangements for reviewing legislation and regulation utilising the Legislation Review Committee are inadequate and in need of reform... It does not assist or complement the Legislative Council as the house of review.<sup>4</sup>*

Similarly, the Hon. Ron Dyer provided that:

*I am very strongly of the opinion that these review functions are very much more suited to an upper house, which after all is a house of review in both Federal and State jurisdictions. In addition, upper house members have greatly reduced electorate responsibilities and can therefore devote more time to parliamentary scrutiny responsibilities.<sup>5</sup>*

Reference had also been made to the Senate Scrutiny of Bills Committee and that it may be preferable to model the Legislation Review Committee on the workings of the Senate Committee.

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<sup>4</sup> *State Parliamentary Labor Party*, Submission No 9, at p5

<sup>5</sup> *The Hon, Ron Dyer*, Submission No 3, at p2

However, it should be noted that all joint committees in NSW are currently administered by the Legislative Assembly and there is currently a majority of Members representing the Government parties. While the equivalent Senate Committee has equal representation of Government and non-Government parties, and is currently chaired by an Opposition Member, this may well alter depending on changes to the composition of the Senate.

#### **(5) Reduced function of the Committee over time**

The Labor Party submission has noted that the Committee has not tabled an annual report in Parliament since 2009, 'resulting in further degradation of the understanding of the work of this committee'.<sup>6</sup> Annual reports used to be published as a yearly summary of the key issues considered by the Committee. The reports contained supplementary material that was not statutorily required, and therefore did not form part of the core work of the Committee. Further, there was little original material in the annual reports as it was mostly a summary of key issues and contents of Legislation Review Digests that had been published in the preceding year.

The work of the Legislation Review Committee continues to be recorded by the Department of Legislative Assembly's Annual Report which includes key statistics and summaries.

#### **(6) Regulations not being sufficiently reviewed**

The Law Society submitted that greater attention needs to be paid to the scrutiny of regulations, and that a separate Committee should be established to achieve this.<sup>7</sup>

As the overwhelming majority of regulations are machinery in nature, the number of regulations that the Committee reports on is relatively small when compared with the total number of bill reports published.

However, the Legislation Review Committee reviews every regulation that is made, and does so within the regulation's disallowance period (15 sitting days). At every meeting, the Committee considers and formally notes a list of regulations that it has determined do not require individual reports. Although currently not published, this list includes the explanatory notes of those regulations that the Committee determined to not warrant particular comment. Other regulation reports are considered in the same way as bill reports, and adopted for inclusion in the weekly digest.

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<sup>6</sup> *State Parliamentary Labor Party*, Submission No 9, at p5

<sup>7</sup> *NSW Law Society*, Submission No 6, pp 5 -6