

**Submission
No 3**

**INQUIRY INTO CONSULTATION ON HIGHLY
CONTENTIOUS BILLS**

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Committee Secretary
Standing Committee on Procedure
Procedure Committee
Legislative Council of New South Wales
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Dear Committee,
Submission to inquiry - Consultation on highly contentious bills

Yours sincerely

The Hon. Kevin Rozzoli AM, Dip. Law

Submission

Consultation on highly contentious bills

Terms of reference

That the Procedure Committee inquire into and report on the parliamentary modernisation proposals that:

- (a) prior to its introduction in the Legislative Council, all highly contentious government legislation – defined as a bill likely to substantially alter economic, employment, social, legal or environmental conditions in New South Wales and to provoke widespread public interest in the proposed changes – be subject to a comprehensive and consultative Green and White Paper process, and
- (b) a modified research and deliberative process be available for highly contentious private members' bills to ensure that the intent and possible ramifications of the draft legislation are fully explored.

Background

Presumably, the reason for raising this issue was to explore ways and means of improving the parliamentary process in relation to consideration and debate of bills introduced into the parliament which have become contentious in the public arena and, therefore, within the parliament itself. While I can understand the frustration many feel with the current operation of the parliamentary process, I believe it proposes a wrong turning. The answer is not to bypass traditional parliamentary processes but to re-invigorate them.

The trigger for this was a motion moved by the Hon. Mark Latham which expounded the virtues of a proposal developed by a private organization, the newDemocracy Foundation. Their proposal, forming part (a) of the Terms of Reference, no matter how well intentioned, involves a process much the same as the government hiring consultants to do its work. Consultants should only be used when strict terms of reference can be framed, with a clear process of frequent consultation and a guiding hand on the process. The process of referencing out an issue to an organization like newDemocracy raises much the same issues.

Contracting out the consultation process to an unelected body such as the newDemocracy Foundation strikes at the heart of the notion of parliamentary democracy. Members of parliament

are elected by the people to express their views. It would be more sensible to give MPs more say and unfetter them from rigid party discipline than to turn to an unaccountable body. No-one disputes the value of evidence, investigation and consultation. It is a question of how they can best be achieved. There is no one simple answer and much to commend relying on traditional systems developed over time and from experience in parliament.

I am presuming therefore that the committee wishes to place this matter in context and explore the wider question framed by part (b). However, I note with concern this is confined to private member's motions. There have been many highly contentious bills introduced by government which would have benefitted from a more active role by the parliament itself.

The motion

I am aware that Dr. Percy Allan, and perhaps others, spoke with senior members of the Government and Opposition as well as the upper house cross-benchers, and that the Hon. Mark Latham was the one designated to formally introduce the concept to Parliament.

I note that the debate of 20 June 2019 on the Hon. Mark Latham's motion was, admittedly given the constraint of time, light on detail and was amended to what is the substance of the reference.

The concept of Green and White papers is a time-honoured one and remains a useful tool. However, I don't think there is a great deal of evidence that it has the stand-alone capacity to be a significant solution in the process of better decision-making at the parliamentary level. As I understand it, the research conducted by the newDemocracy Foundation looked primarily at examples of where the government appeared in the public mind to have got it wrong, without the balancing consideration of the many occasions, indeed the majority, where outcomes were satisfactory.

The newDemocracy Foundation's Proposal

I have no doubt that the intention of the newDemocracy Foundation was genuine. Nonetheless, their methodology, from what I heard when I attended a presentation of their findings, seemed to be to be very limited in scope and function. Indeed, in question time at that presentation I endeavoured to raise the lack of attention given to the legislative process and suggested that in their next stage of development they should extend their focus to engage this aspect. Having heard a brief presentation by Percy Allan recently I did not get the impression that they had expanded their thinking in this way.

David Clune, well-known and respected by us all, recently made the following comment, 'The scheme is superficially attractive, but it misdiagnoses the problem and risks leaving the government's dominance over parliament intact. The real problem in Macquarie Street lies not with parliamentary procedure but with the people who dominate them.'

Basically, the Green Paper/White Paper process is a system devised by bureaucrats whose expertise and empathy, for all their subject knowledge, on their own admission, is not with the legislative process or the parliamentary committee system. It is far too easy in the suggested process to bypass significant pockets of information, or even public opinion, and once the reports are written they seem then to be set in concrete as the final and definitive statement on the subject.

The offer by the newDemocracy Foundation to provide their services (free of charge) for the first two years seems trite. Can they be held to account if they get it wrong? Their analysis is based on the benefits of hindsight, the challenge lies in the provision of foresight and the restraint of total responsibility. What happens after the first two years? Does the contract get renewed? Does it go to tender? If so, how will rival bids be assessed?

In my opinion, contracting out the consultation process to an unelected body strikes at the heart of the notion of parliamentary democracy. Members of parliament are elected by the people to express their views. It would be more sensible to give MPs more say and unfetter them from rigid party discipline than to turn to an unaccountable body.

The process as represented in the debate on the motion seems to weaken the role of parliament by largely absolving it from having to think about any subsequent legislative proposal. If a bill passes through this process, carried by, say, an ill-informed opinion of a vocal public minority, what moral authority does the parliament have to over-ride the process? A classic example of the consequences of attempting to take decision-making away from parliament is the current Brexit debacle in the United Kingdom.

I agree with David Clune that the new Democracy proposal is relatively superficial. Your committee should be encouraged to consider the wider question of restoring substance and integrity to the functions of parliament when major issues are under consideration.

And, after all, what is the parliament in reality but a citizen's jury having a membership drawn from a wide cross-section of the community, with a constitutional mandate to work in the interests of those it represents, and with responsibility for the consequences of its collective decision.

A modified research and deliberative process be available for highly contentious private members' bills to ensure that the intent and possible ramifications of the draft legislation are fully explored.

As indicated above I would suggest your committee's deliberations should not be confined to private member's bills.

Research developed by the Australian Election Study indicates a decline in the centrist vote, and growth in left and right-wing voters, resulting in greater confrontation within the electorate. If, as has always been held, the composition of parliament represents the community that elects it, it is easy to understand why parliaments have become more confrontational. Good decision-making in parliament involves a recognition that a balance must be struck on those matters where there is a strong division of opinion. It is thus incumbent on all parties to find this middle ground and therefore gain the support of the majority of citizens.

The parliament cannot by itself direct a change in the electorate's attitudes but it can set an example of good behavior and tolerance towards those who enunciate a vigorous difference of opinion, through measured and constructive debate, particularly with regard to contentious issues.

My observation of the recent passage of the Reproductive Health Care Reform Bill was that it was conducted with remarkable decorum given the wide and strongly-held differences of opinion on the subject. The debate in the Legislative Council on euthanasia a few years ago was conducted similarly. These examples show that parliament is more than capable of handling complex and controversial issues if it is allowed to.

Perhaps this was due to the fact that it was a conscience debate and that partisan differences were put aside. It does show, however, the value of reasoned and balanced debate. Clearly all debates cannot be conscience debates but we must find a path that harnesses objectivity and altruism, where a government proposes and the opposition puts a proposal to a forensic test, in pursuit of the best legislation that will deliver the desired outcome. If the government does not accept logic and common sense, it must later face the challenge of the ballot box.

David Clune further commented. 'Of course, a key factor in any debate on parliamentary reform is the role of MPs. The best designed systems won't work without appropriate human material. In the past, MPs valued the right to speak in the house, today, the government doesn't need to gag debate because MPs often can't be bothered to participate, seeing parliament of little relevance. Making an impression in the Chamber is no longer a way to advance a career: Twitter and Facebook are seen to perform that role. Members need to start taking their parliamentary responsibilities seriously rather than treating sittings as a tedious duty.

'In fact, the chamber, rather than being an object of respect as in the Westminster tradition, has become a de facto centre and auditorium for vaudeville antics. If members don't respect themselves and the institution, how can they expect community respect? We need to get back to the idea that representing the people as a member of parliament is a tremendous privilege and responsibility.'

The complexities of trying to improve the decision-making process go much further than was canvassed in the debate on the Latham sponsored motion. There seems to be little appreciation that the process discussed, at least as evidenced by the debate, was a vehicle that would diminish rather than enhance the role of parliament. Indeed, one that would strengthen the position of the bureaucracy and non-elected, vested interest groups.

It seems today that whatever decision is made there is always some person or group that will vociferously oppose it. With the advent of social media and on-line debate on social media almost any subject can become contentious. Parliament must not fall into this trap. While fervently upholding the right of free speech, every right must be balanced by the responsibility that comes with it to ensure that the execution of a right does not unfairly impact on another person's rights. Such safeguards are enshrined in the rules governing parliamentary debate and should be honoured with strict adherence.

In considering improvements to decision-making within the province of parliament what then are the matters the parliament should be seeking to address? These may be defined as follow:

- Detailed guidelines are needed to determine what government policies should be subject to detailed scrutiny and at what stage a policy takes a form that makes it subject to the process of greater consultation
- Opening up the process of investigation and consultation to social media seems a formula for disaster. Complex and/or contentious legislation needs long, detailed and deeply considered attention. Snippets of ideas and brief comments add nothing to the gravamen of such issues
- What is the formula for developing White and Green papers? Should the parliament fund this or should it be able to direct the government to undertake this process at its cost prior to its consideration by a parliamentary committee
- What role should parliamentary committees play in the process?
- Given the trend towards less and less speaking time in parliament, to what extent can parliament give contentious matters the attention they deserve, including testing their veracity.

If these are the problems, I find it of concern that a proposal to address them, which is of major significance for both houses, was considered without any reference to, or involvement of, the Legislative Assembly. Given that the impact of the proposed changes effects both houses, should not the Legislative Council have initially proceeded by way of resolution to obtain the agreement and participation of the Legislative Assembly by way of a joint committee? I would suggest that, should such a committee be formed, it should have equal representation from both houses with joint chairs, one from each house, alternating between individual meetings.

Further, there needs to be careful consideration of the increased cost to the legislature and the need for appropriate funding to be allocated to provide the additional necessary resources, staff and

overheads, which will undoubtedly be considerable. Can we, should we, put a price on better and more constructive decision-making? Or should we contract it out?

Defining a contentious matter

The terms of reference use the words 'highly contentious'. Is this not tautology? After all is not a 'contentious' matter by definition just that? How many degrees of contentious are there?

Somewhat, mildly, generally, highly, cataclysmic? One must immediately ask, is the use of an adjectival word even appropriate?

Who decides if a matter should be defined as 'contentious', highly or otherwise, and in the case of a difference of opinion, how is that difference to be resolved? For example, the Companion Animals Bill (1998) would not have been recognized as such prior to the first reading. However when the bill went to the second reading it certainly emerged as a contentious bill. This was a bill for which there was extensive consultation between all interested parties but somewhere after the consultation process there was a hiatus that produced a bill that bore no resemblance to the consultation output. Thus, even if this issue had been committed to a Green paper/White paper process it would still have gone off the rails. One can only speculate why this happened but a committee process within the parliament may well have picked up the discrepancy between the consultation process and the bill before it reached the second reading.

Another example is the Workers Compensation Legislation Amendment Bill (No. 2) 2001 which was contentious well before it was introduced into parliament because of disputation between the government and the unions. Again it would not have been saved by a Green paper/White paper process because it was a matter of internal politics within the Labor Party. The dispute came to a head when the government, in the face of union opposition, pushed ahead with the introduction of the bill. Bitter differences between the Labor Government and the Trade Union movement split the ranks of Labor's team which in turn led to the infamous picket of the parliamentary buildings.

Where does this put the concept of representative democracy?

In my opinion, both houses of the parliament should be looking at ways by which the parliamentary process can be reformed to achieve the goal of better decision-making. One approach may be a reformed system of legislation committees. David Clune, agrees with this proposition. In his article he states. 'Parliamentary committees, with their extensive hearings are an established means of allowing community input into policy. Particularly in the Legislative Council, governments acknowledge their value by referring issues to them for investigation, and often adopting their recommendations. The Legislative Assembly briefly had a system for referring legislation to committees, as the British House of Commons has long done, and it could be usefully reinstated. There's no reason why committees shouldn't be strengthened and their conclusions made a central input into the policy process.'

I would suggest a model in which legislation committees are joint committees. While the government may well consider such a practice would slow the passage of legislation, legislation is often months in the making before it even reaches parliament, and certainly the Green paper/White paper process would present the same problem. More constructive time to achieve a better result in parliament would seem a more productive outcome for the problem under consideration and may well, in the end, save time and discord, to say nothing of increasing the respect and esteem in which parliament is held.

My suggestion is that there be a fixed number of legislation committees, say between eight and twelve, covering the full range of ministerial portfolios and that all back-bench members be apportioned between these committees.

Thus, all bills initiated in either house would be subject to a first reading debate addressing the basic concept and principles of the bill, and, where the bill met a predetermined and detailed criterion, would be referred to the appropriate committee for consideration and report.

The relevant minister should sit on the committee for the purpose of that bill or at the very least appear as a key witness. The committee would consider the general aspects of the bill, its philosophy and practical intention, the financial impact, societal impacts, as well as the justification for the legislation. It would also consider amendments and where necessary seek expert advice in the determination and drafting of amendments. The committees would sit according to a structured schedule of sitting days and these days would be considered formal sitting days. We often hear criticism of the limited number of days parliament sits with no consideration given to the days spent on committee work.

When a committee report is presented to parliament its recommendations should be binding on the government unless it chooses to reject or amend them on the floor of the house. The rationale for this is that, having gone through a detailed process of consideration, the legislation should be in an acceptable form. Nevertheless, the government still has the final say and in doing so faces the test of public scrutiny.

Community Engagement

This is clearly an area in which there is scope to capture a wider input of information to inform committee deliberations. Committees currently utilise a number of procedures to assist potential witnesses to engage with them. However, simply accessing the parliamentary website does not readily reveal these possibilities. I would suggest an addition to the website by which details of committee hearings are in an easily accessible, user friendly format. Additionally, I would suggest the committee investigate an interactive element which would open up the process to a much wider cohort. Presently the system relies on some degree of pre-knowledge to activate interest. Using an appropriate tool, a series of key words could be developed that would direct information to persons interested in a particular subject. It could be set up to draw attention to inquiries that were current as well as concluded. It could also include the opportunity to suggest an area of inquiry on a particular subject that is relevant to the community. It could have a 'Q and A' format that would inform and advise the community. It could also allow citizens to subscribe to a register which would allow them to be automatically advised of matters coming within the purview of a committee in their field of interest.

I appreciate that all this takes resources and resources require finance. I have always been critical of penny-pinching when it comes to the democratic process. It may well be that it is not so much a matter of saving money but an excuse to keep the system as closed as possible. Governments seem to hate the 'pesky public' which actually has an opinion on what is needed and how that need should be addressed.

I believe there should be a dedicated section servicing both the Legislative Council and the Legislative Assembly comprising at least three specialist staff which could devise, manage and continually upgrade ways and means of engaging the community. This would be a comparatively small cost for an initiative that would be a major step forward in participatory democracy. For example, the use of an interactive dashboard of community issues could be very helpful.

I would suggest that public funds would be much better spent in this way rather than engaging consultants – and this is the logical outcome of what the committee is considering – to tell parliament what the electors are thinking.

One of the problems of engaging public input is that there are cases where members of the public affected by legislation have little or no capacity to engage, for example, social welfare, mental health and disability. In other instances powerful lobby groups, for example, mining, property development and major economic interests, can sway the process their way. Only a process within the remit of parliament can give any sort of guarantee that this imbalance will be addressed.

For the greater effectiveness of parliament your committee should consider:

- more sitting days
- designation of prescribed committee days as parliamentary sitting days
- longer hours of sitting
- greater emphasis on committee work, the involvement of all members, the attention given to committee reports and the responses from government in terms of committee recommendations.
- An increase in the speaking times for members. The gradual diminution of time allocated to legislative debate does not allow the opportunity for fully developed contributions.

In sum, this proposal is a classic instance of 'throwing the baby out with the bath water'. What is needed is not a new process but a revival and re-invigoration of traditional ones.