REPORT OF PROCEEDINGS BEFORE

SELECT COMMITTEE ON THE LEGISLATIVE COUNCIL COMMITTEE SYSTEM

INQUIRY INTO THE LEGISLATIVE COUNCIL COMMITTEE SYSTEM

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At Sydney on Friday 29 April 2016

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The committee met at 10.00 a.m.

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CORRECTED PROOF

PRESENT

The Hon. S. G. Farlow (Chair)

The Hon. G. J. Donnelly
The Hon. T. J. Khan
Reverend the Hon. F. J. Nile
The Hon. Dr P. Phelps
The Hon. M. Veitch (Deputy Chair)

CHAIR: Welcome to the first hearing of the Select Committee on the Legislative Council committee system. Before I commence, I would like to acknowledge the Gadigal people who are the traditional custodians of this land. I would also like to pay respect to the Elders past and present of the Eora nation and extend that respect to other Aboriginals present.

Our current committee system in the Legislative Council owes much to the foresight of a small group of members in the mid-1980s tasked with proposing a committee structure that would reflect the contemporary role of an upper House. The committee produced a report in 1986 which provided a blueprint for the Council's modern committee system. Today this committee is seeking to build on the vision of its predecessor to ensure that Legislative Council committees continue to play a key role in policy development, law-making and in holding the executive government to account.

To assist with this process, we will hear from a number of witnesses today, including the current and former clerks of the New South Wales Legislative Council, the Clerk of the Australian Senate, the Clerk of the Parliament of Queensland, and the Deputy Clerk of the New Zealand Parliament. In addition, the committee will hear from four academics, Dr Luke McNamara, Dr Julia Quilter, Dr Laura Grenfell and Dr Rodney Smith. As several witnesses are interstate or overseas, the committee will be hearing from four witnesses via Skype or teleconference.

Before we commence I would like to make some brief comments about the inquiry and the procedures for today's hearing. Firstly, with respect to broadcasting guidelines, the guidelines for the broadcasting of proceedings are available from the Secretariat and must be adhered to. Media representatives who are not accredited to the Parliamentary Press Gallery should approach the Secretariat to sign a copy of the broadcasting guidelines.

Questions on notice: There may be some questions that a witness could only answer if they had more time or with certain documents to hand. In these circumstances, witnesses are advised that they can take a question on notice and provide an answer within 21 days. Mobile phones: Could everyone please turn their mobile phones to silent for the duration of the hearing.

DAVID MICHAEL BLUNT, Clerk of the Parliaments and Clerk of the Legislative Council, sworn and examined:

CHAIR: Would you like to start by making an opening statement?

Mr BLUNT: I thank the Chair and members for the invitation to make a submission and now to give to evidence to this very important inquiry.

The Legislative Council has what is now a mature, highly effective, well-respected and influential committee system. This is a result of a number of things that include: The clear vision of its creators; the hard work of members over many years to utilise the committee system effectively; the contributions of stakeholders to inquiries; the respect that governments have shown in responding to, and often implementing, recommendations; and the professional support provided by the outstanding committee staff.

Looking ahead for the next 25 years, this committee's goal, I understand, is to further enhance what is an already highly functioning system. In doing so and in looking at future reforms, I think it should be borne in mind that the Legislative Council committee system is unique. Whilst there are some things that Legislative Council committees do not do, there are other things that Legislative Council committees do that are not done anywhere else, or at least not with the same level of effectiveness anywhere else.

For instance, the record of Legislative Council standing committees in contributing to the development of social and legal policy is particularly strong, as is the role of the General Purpose Standing Committees [GPSCs] in conducting accountability-oriented inquiries into controversial decisions, along with the little-recognised but, I think, ground-breaking approach to the oversight of statutory compensation schemes.

As outlined in my brief submission, there appear to be three areas of key interest to other people who have made submissions and I have identified those as: Enhancing the Budget Estimates process, enhancing the scrutiny of legislation through committees and resolving outstanding issues in relation to committee powers.

Now apart from encouraging the committee to closely examine the committee systems in the Australian Senate and the New Zealand House of Representatives, I have not said anything substantive about either Budget Estimates or legislative scrutiny. I would, however, reiterate the request in my submission that, once the committee has further progressed in inquiry and is developing recommendations in relation to either of those two areas, and particularly legislative scrutiny, that I would be very keen to meet with the committee again to discuss issues about resource implications and recommendations in either of those areas.

The area of committee powers has been complex and in the absence of some clarity about some of those powers, Legislative Council committees have been required to find creative solutions to challenges to their powers over a number of years. But as we sit here today, it may be that in the wake of, for instance, the Operation Prospect inquiry, that Legislative Council committees are, at last, in a more advantageous position in relation to the issue of statutory secrecy as a bar to witnesses answering questions and likewise, following Brett Walker's recent 2015 advice that I have attached to my submission, Legislative Council committees may now have another route to go by—a very powerful route to go by—in which to require the production of documents.

I understand from the Secretariat that there may be an opportunity for some further involvement in some sort of roundtable-type discussions about committee powers at some stage down the track. Once again, I would be very interested to assist the committee, if I can, in that regard.

I will listen with great interest today to the evidence of John Evans, the drafter of the various resolutions and standing orders that have underpinned the work of the committee system over the last 28 years, together particularly with the evidence of the Clerk of the Senate, Dr Lang, and the representatives of the other Parliaments. I would be pleased to answer any of your questions.

CHAIR: Thank you, Mr Blunt.

The Hon. MICK VEITCH: Mr Blunt, as I would say to all witnesses to upper House inquiries, is that a prepared statement?

Mr BLUNT: It is.

The Hon. MICK VEITCH: Could you please hand it up? It would assist the Hansard staff.

Mr BLUNT: I would be delighted to do so.

The Hon. MICK VEITCH: I would like to explore with you the statutory secrecy issue. You mentioned that in your submission to the committee. Two aspects around the statutory secrecy which I think most members of this committee have been involved in committees where that has been raised as an issue, or become an issue in some of our inquiries. The Parliamentary Privileges Act and the pros and cons and the benefit of that, seeing that New South Wales does not have one and also the Bill of Rights and whether that would assist in overcoming some of the issues that arise over claims of statutory secrecy.

Mr BLUNT: In saying anything about privileges legislation, can I start with a bit of a preamble? Firstly, to indicate that privileges legislation has been recommended on a number of occasions by Legislative Council Privileges committees, so it is not a new idea, as a means of clarifying this area of the law. On the other hand, there have been numerous attempts, over the past 160 years, to enact privileges legislation in New South Wales—comprehensive privileges legislation—and they have all failed.

The two most recent moves in this area were, I understand, the draft Privileges Bill that was prepared for an Opposition leader about 20 years ago and the Exposure Draft Privileges Bill that was tabled in the Legislative Assembly on the last sitting day before the 2011 election by the former Speaker. Both those draft bills probably represent reasonable starting points for any committee or anyone else considering privileges legislation. However, I think the thing that has stopped privileges legislation ever being enacted in New South Wales is that we have never yet faced the sort of crisis in relation to Parliamentary privilege that the Australian Parliament saw in the 1980s and the New Zealand Parliament has seen in recent years, with judicial decisions that have been wrong and the Parliament has had to respond by making the law right by legislating.

The risks of privileges legislation: Once privileges legislation is in place, it will be easier for the courts to become involved as disputes about powers and about the respective roles of the courts and the Parliament become issues of interpretation of an Act, so that is a risk. Secondly, the ultimate content of any such legislation is absolutely critical, given the very strong position of the Legislative Council, in terms of its powers vis-à-vis the executive government in the wake of the Egan decisions about orders for the production of documents, great vigilance would be required by every member of the Legislative Council in scrutinising any such legislation, to make sure that in no way gives away the important powers that the Legislative Council is recognised—

The Hon. TREVOR KHAN: Indeed, that is the greatest danger, isn't it? It is rather like enacting legislation on something such as abortion, that once you open up the issue you might end up, in fact, limiting the powers that the Legislative Council now has, because they will be essentially drafted—and I am not trying to put any colour on this—by an executive government that is uncomfortable with the powers that currently exist with Legislative Council committees.

Mr BLUNT: That is certainly a risk and something that members would need to be very vigilant and careful about. On the other hand, there are undoubted benefits. These have been outlined in some detail in a recent paper in the *Australasian Parliamentary Review* by Stephen Frappell. So I would refer the committee to that report, in terms of detail.

First, it would provide clarity and consistency with other jurisdictions in terms of the correct meaning of various terms and phrases in article 9 of the Bill of Rights. Of course, the Bill of Rights of 1689 applies as part of the law of New South Wales by virtue of the Imperial Laws Application Act. Article 9 says that proceedings in Parliament cannot be impeached or questioned in any court or place out of Parliament. But in New South Wales there remains room for interpretation and doubt as to what is exactly a proceeding in Parliament, what does it mean to impeach or question and we know what a court is but what is a place outside of Parliament? Privileges legislation, like the Commonwealth Privileges Act, defines those three terms so there is the opportunity to settle once and for all the New South Wales law and what those three terms mean.

Secondly, there would be the opportunity to resolve some of the remaining areas of doubt about committee powers. That would depend upon, of course, on the content of the legislation. Thirdly, the other impetus to privileges legislation is that it would provide the opportunity to broaden the scope for action to be taken for contempt against non-members and broaden the suite of options in relation to the discipline of members so as to move away from the very blunt instrument of ICAC and expulsion.

The Hon. MICK VEITCH: With regard to government responses, you talk in your submission about the 2011 scenario where there was a change of government and there were a number of outstanding government responses from the former government that the new government essentially did not want to respond to and a motion was moved in the Chamber, after consultation with you, to make sure that we could get the government responses. In your submission you talk about the fact that there have been a couple of instances where the government responses may well have been in breach of or outside the standing orders of the Legislative Council. Could you explain a bit further what those breaches or scenarios were that were outside the standing orders?

Mr BLUNT: The requirement for government responses and the generally very good record of governments in responding to committee reports has been a real strength of the Legislative Council committee system since 1988. Successive Leaders of the Government in the Legislative Council have been really committed to ensuring that the Legislative Council gets responses to committee reports and their advisers have always been very tenacious in following up and that is very much appreciated. That is the case now with all those advisers to Leaders of the Government since 1988.

I think there have been three factors though that have been at work here that are worth highlighting and addressing. One is the issue that you have just adverted to, Mr Veitch, where the Department of Premier and Cabinet seems to be advising government based on Crown Solicitor's advice that the obligation to respond to a committee report expires at the end of a Parliament or where the committee that has reported is a select committee and, by reporting, the select committee ceases to exist. Of course, that issue arose, as you said, in 2011 and it led to the council insisting on the provision of responses to nine reports that had been tabled prior to the 2011 election.

As I suggest in my submission, a strong statement from this committee reinforcing the importance of government responses and the view expressed by the council in that resolution in 2011 that the Legislative Council, as a House of continuing existence, requires the provision of responses to a report despite an intervening election, would be very helpful. I think there are two other factors in relation to government responses though. Firstly, there has been a tendency for correspondence to be provided just before the six-month deadline rather than providing a response advising that the deadline will not be met and flagging that the response will be delayed for some time. That trend started in the Fifty-third Parliament in 2003 but it has continued. So that is something worth addressing, and I think there are probably a number of reasons for that.

Back in the early days of the committee system, if a Legislative Council committee produced a report with recommendations about, for instance, juvenile justice, the Department of Juvenile Justice would prepare a response and, once the Minister was happy with it, the Minister would approve that response and submit it. As I understand, some years ago the requirement was put in place internally within government for government responses to either be signed off by Cabinet or, at the very least, by the Premier, adding some time to the development of responses.

The final area has been that there have been a number of examples of reports dealing with really difficult policy issues, the sorts of issues on which you would be granted conscience votes by your parties, where the responses that have been provided have been in very general terms rather than addressing each recommendation in turn, and there may be a number of reasons for that internal within the consideration of those reports within government that led to generalised responses rather than specifically addressing the recommendations.

The Hon. MICK VEITCH: One of the issues that have been put to me by some of the members is that we should strengthen or enhance the government response as part of our committee work because everyone invests a lot of time in the committee process. There are a number of suggestions of how we can do that, but one of the suggestions I would like to explore with you is the potential for, say, the Minister representing the Minister responsible for the committee, or even the Leader of the Government, initiating a debate around the government response where the Opposition shadow Minister responsible or the Leader of the Opposition would then respond and we could have a much broader debate about the government response. That process would inherently bring a lot more rigour and accountability to the government of the day around its reasons for supporting recommendations or the reasons for opposing or not implementing recommendations. What are your views about how we could implement that or whether that is something worthy for us to explore?

Mr BLUNT: There is no reason at the moment why there should not be take-note debates on government responses just as there are on committee reports. In fact, Standing Order 41, as drafted back in 2004, envisages that very thing happening.

The Hon. TREVOR KHAN: If it is envisaged why does it not occur?

Mr BLUNT: I think the answer is twofold. Standing Order 41 provides that:

> The House must appoint the day and time on which motions for consideration or adoption of reports of committees of the House and any government responses on such reports are to take precedence.

There is a sessional order which sets down Tuesday afternoon between 5.00 and 6.30 as the time for debate on committee reports. Perhaps that sessional order should also say "time for debate on committee reports and government responses". So if someone was interested in moving that way that would be possible.

I guess the other answer to the question is that it is a matter for the House to determine; it is a matter of members moving the relevant motions upon the tabling of the committee report. There are various mechanisms by which not only a government response but, indeed, any document that is tabled in the House can be the subject of subsequent debate. So the opportunity is there and if members are interested in doing so that is easily facilitated in a procedural sense.

The Hon. TREVOR KHAN: Would you be able to provide this committee with any amendment to the sessional order or whatever the instrument is that would assist in that process being undertaken?

Mr BLUNT: Absolutely.

Reverend the Hon. FRED NILE: Just following up the government response issue, we have had a situation where the Government has indicated that it is behind the deadline and do we have any objections to it. I had not had that situation arise before. I did not think we had any power to negotiate the timetable for government responses. If the response date is six months is there any provision for adjusting that or coming to some agreement on how it can be amended?

Mr BLUNT: There is nothing in the standing or sessional orders or the resolutions establishing committees that provides for such a negotiation for extending a deadline. The practice over the years has been that when correspondence has been received, usually just before the deadline, saying that the response is some time away, that correspondence has been tabled in the House for the information of all members and provided to the members of the committee for their information and for their follow-up action.

Reverend the Hon. FRED NILE: What power do they have then to insist that the government meet the deadline?

Mr BLUNT: It is really a matter for members to take up in the House either by moving a motion or in debating a take-note in relation to the correspondence that has been received.

Reverend the Hon. FRED NILE: Has there ever been a case of a response indicating that there will be further material in a few weeks or a month or something?

Mr BLUNT: Oh yes.

Reverend the Hon. FRED NILE: A part two response?

Mr BLUNT: Yes. As per my earlier answer, it has been a trend since about 2003.

Reverend the Hon. FRED NILE: It is a trend but is it legal according to our parliamentary powers?

Mr BLUNT: It has happened.

Reverend the Hon. FRED NILE: So the Government should be seeking the leave of us in the sense they are changing the procedure for their own convenience.

Mr BLUNT: It has not been something that members or the House collectively has pushed back or challenged. Also in answering that question I would come back to what I initially said about government responses. The practice over the years since 1988 has generally been very good, and one of the reasons why the Legislative Council committee system is so effective is that governments have shown respect for the committee system and have tended to respond and often implement recommendations of the committee. So I would not want my evidence to be seen as being overly critical or suggesting that there has been a lack of respect for the committee system.

Reverend the Hon. FRED NILE: But there is no power for the committee chairman to negotiate with the Government for an extension?

Mr BLUNT: No.

Reverend the Hon. FRED NILE: It has to be done by the House by a motion?

Mr BLUNT: Yes, or for the House to express its displeasure at the lateness of the response.

The Hon. Dr PETER PHELPS: In the evolution of committees in the New South Wales Legislative Council is it not true that social policy, law and justice and state development are the vestigial tail which could probably be dispensed with given the remit now given to the general purpose standing committees?

The Hon. GREG DONNELLY: The question contains argument.

The Hon. Dr PETER PHELPS: I just think back on my own experience on that. We did a committee inquiry into coal seam gas drilling in State Development and then three years later did an inquiry into coal seam gas development in GPSC5. Is it not the case that while there may have been an argument for those initial three committees, the growth and evolution of the committee system in the New South Wales Parliament means that the remit of the GPSCs are now wide enough to encompass the very things that the three original committees were set up for? I can certainly understand you would have ad hoc committees like this that clearly falls outside the normal remit of GPSC1, which is where you would normally appear, and I can certainly understand that the statutory committees exist because of their nature, but those three original committees seem to have outlived their usefulness, have they not?

Mr BLUNT: Ultimately that is a judgement for you all to make, and your colleagues.

The Hon. Dr PETER PHELPS: Is there a good reason that you can see for them to be retained, given the breadth of GPSCs powers these days?

Mr BLUNT: If I can answer the question in this way. I deliberately included in my brief submission a quote from the Hon. John Hannaford in which he articulated his original vision for the general purpose standing committees in terms of the detailed scrutiny of government agencies and members really coming to grips with the operations of the bureaucracy and ensuring the accountability of the public service to the Parliament. The GPSCs, as you have suggested, have evolved so we no longer only see accountability-oriented inquiries conducted by the GPSCs but we also see them grappling with difficult and complex policy issues as well. Some of their inquiries crossover—they are both accountability-oriented and policy-oriented—and during the last Parliament we saw the recourse to a large number of select committees.

In terms of the ongoing role and significance of the standing committees on social issues, law and justice and state development, as I say, it is really a matter for all of you to come to a judgement about but I do have a view though that the record to date of those three committees, and particularly the Law and Justice Committee and the Social Issues Committee, in being able to deal with very complex policy issues and to come up with, often, unanimous, bipartisan reform recommendations that are often implemented by government, is particularly strong. Personally I would caution about any direction that could diminish that very important work.

The Hon. Dr PETER PHELPS: Just on that point, if they are so good—and one of the reasons that happens is because it is written in that there is a requirement that the chair seek unanimity on a range of matters—then why would you not just get rid of the GPSCs and have a whole range of new broadly thematic committees, some of which I could think of that would involve economic rationalism, social conservatism and a whole range of other things? I could create a thematic structure that would tend towards what I would like to achieve as opposed to just having a GPSC system which can look at things and say, "This is within our purview;

this is something we should look at." As opposed to having thematic committees which are instructed to look towards consensus and achieving a common agreed outcome, even to the detriment of members on the committee who would like to see a significant different outcome, would it not be better to just have a GPSC system where you can have the fight and then work out where we go from there?

Mr BLUNT: Just as I included—

The Hon. Dr PETER PHELPS: I am sorry. It is an unfair question. I should not have asked you that.

Mr BLUNT: I am happy to respond to it. Just as I included that quote from the Hon. John Hannaford, I also attached to my submission a paper by a former Deputy-President which articulated, I guess, the reasons for having the dual committee system—three policy-oriented standing committees on the one hand and the accountability-oriented GPSCs agile enough to be able to self-refer—

The Hon. Dr PETER PHELPS: That actually goes to my next question. No doubt you are aware of the Senate system?

Mr BLUNT: Yes.

The Hon. Dr PETER PHELPS: What is your view of the Senate system with the bifurcation of the committees—one responsible for legislation and the other responsible for references?

Mr BLUNT: I am not an expert in the committee system. I will be really interested to listen to Dr Laing's evidence later today.

The Hon. Dr PETER PHELPS: I will also be interested in what she has to say. I am sure she will say it is a great system.

Mr BLUNT: I do think though, again as I say in my submission, there are some signposts from the Senate committee system that maybe worth examining when you are talking to Dr Laing. For instance, it would appear at the moment that the number of matters referred for inquiry is beyond perhaps the capacity of the number of senators to effectively prosecute those inquiries and for the resources of the Senate to support. Whilst I do encourage you to look very carefully at the Senate committee system, I am not sure that everything that is at work there is—

The Hon. Dr PETER PHELPS: But that is not so much the references side; that is the legislation side because such a high number of bills get referred off to committees. That is really where the significant load for the Senate is, is it not?

Mr BLUNT: Again I would encourage you to explore those issues with Dr Laing.

CHAIR: I know you are not an expert on it but from your perspective is that part of the nature of the system or is it from the composition of the Senate, and perhaps the political composition of the Senate at present? From your outsider perspective do you see that there is a fundamental flaw in that system?

Mr BLUNT: Once again I would encourage you to explore those issues with Dr Laing. What I would say though in terms of the discussion about the design of the committee system is that it feels a little bit like the sort of discussions I have with senior managers in the Department of the Legislative Council from time to time about the structure of how we provide the administrative support to committees in the House and so on. There is ultimately no ideal perfect administrative structure for the department, but ultimately you have to make a decision on the structure you have and provide the support. I think the same could be said with the committee system. I think there will be strengths and weaknesses of the Senate committee system, the New Zealand committee system, and the Queensland committee system that you will look at. They are well worth looking at but do not lose sight of the strong record of success of the Legislative Council committees operating within the framework that you currently have.

The Hon. GREG DONNELLY: From your position as Clerk of the Parliaments and Clerk of the Legislative Council, what are your thoughts as to how we might be able to improve and enhance the participation of the community at large in the process of engaging with the inquiries undertaken by committees? Obviously today technology is facilitating opportunities that did not exist in past times but in addition to the

technology do you have any other thoughts about how we can reach broader and deeper into the community to provide them with information that there are inquiries being undertaken by these committees and to encourage and facilitate their participation?

Mr BLUNT: Legislative Council committees have a strong record of innovation in engagement and consultation with the community. For example, I note the committee's discussion paper lists a 2003 paper by Merrin Thompson and Beverly Duffy and then a 2011 paper by Beverly Duffy and Madeleine Foley about innovation in consultation. Those papers explore such techniques as roundtable meetings, forums, online consultation and the initial sort of use of social media. Of course face-to-face engagement is also really important, as exemplified by the strong support that Legislative Council committees receive when they hold site visits and hearings in regional and rural New South Wales. I also note, of course, the recent experience of the Law and Justice Committee in the Bowraville inquiry, GPSC3 and the State Development Committee with innovative approaches to consultation with our Indigenous people in New South Wales.

One of the key lessons from that 2003 paper by Merrin and Beverly was that it is in less partisan inquiries that innovation in consultation really works, whereas formal traditional consultation mechanisms tend to be the most appropriate mechanisms in those inquiries dealing with controversy or contested subject matters. There is no doubt that more could be done in this area of engagement and consultation to explore and facilitate even more innovative forms of engagement. Some other jurisdictions I suspect may be even more advanced than us in this regard. Of course, in part new methods of engagement and consultation may require resource allocation. So if the committee in its examination of practices in other jurisdictions, and in talking to other experts, came to the view, for instance, that it would be a good idea for the Department of the Legislative Council to employ the services of the staffer with particular expertise in the area of social media in order to support committees innovation in consultation and our Twitter account and so on, then any such recommendation from this committee would, of course, the influential and considered very carefully.

The Hon. GREG DONNELLY: In terms of the response that comes back to the House from the government of the day in regard to the recommendations that have been made by a committee—I should know the answer to this question but I don't—is a copy of that response, which is normally a covering letter with a schedule of each recommendation listed on one side and the Government's position in response to the recommendation on the other side, sent to individuals and/or organisations that made a submission or gave evidence to the inquiry? Do we follow that practice or not?

Mr BLUNT: It is my understanding that stakeholders are at least provided with advice that the response has been received and it is accessible at this place on the Parliament's website. So committees do publish the responses received.

The Hon. GREG DONNELLY: I just wanted to know whether they are directly informed. Finally, I am interested in your thoughts about the capacity for members of a committee dissenting from either all or some of the committee's recommendations or indeed elements of the report that may be contested during the deliberative meeting to finalise the report. There is provision at the moment for the making of a dissenting statement of a particular length—there could be argument advanced that that length is perhaps not that long.

The Hon. Dr PETER PHELPS: It is 1,000 words or three pages.

The Hon. GREG DONNELLY: Dr Phelps, I am not directing my question to you. Mr Blunt, with your knowledge of other jurisdictions and the capacity of members who have a dissenting view on an issue or issues associated with an inquiry; do you have any thoughts about matters that this committee could consider when dealing with dissenting issues or statements by members of inquiries?

Mr BLUNT: Standing Order 228, which is headed up "Members' opinions to be reflected" sets out the rules for dissenting statements. It begins with subparagraph 1, as I think Dr Phelps referred to earlier, "The report of a committee is, as far as practicable, to reflect a unanimity of opinion within a committee." I recall when Standing Order 228 and its predecessor, as a sessional order, were drafted this was quite innovative. It seeks to balance the traditional House of Commons type approach, which is that there is only one report from the committee; there is no capacity for dissenting statements. At least back then there was not.

The Hon. TREVOR KHAN: That is reflected in the Legislative Assembly [LA], is it not? I do not think the LA allows dissenting statements.

The Hon. Dr PETER PHELPS: They do not allow dissent full stop.

Mr BLUNT: I would have to take that on notice or refer that to my colleague, the Clerk of the Assembly.

The Hon. TREVOR KHAN: I would invite you to do so because I think there is a difference in approach between the two Houses.

Mr BLUNT: This is quite an innovative approach. Of course, dissenting statements can be very influential. I remember former clerks of the Senate talking about times when there were Senate committee reports when, really, the most important part of it was the dissenting statement because that reflected the view of a particular party that might have held the balance of power and ended up negotiating with the Government on the way particular legislation—I think the example was the implementation of the GST.

The Hon. Dr PETER PHELPS: There is also take note debate.

CHAIR: Unfortunately, time for questions has expired.

The Hon. TREVOR KHAN: Can I ask a couple of questions, seeing I have not had much of an opportunity? I realise we are moving on to another witness. There are a couple of things that arise out of material—

CHAIR: If they are brief, but we will allow Mr Blunt to answer questions on notice.

The Hon. TREVOR KHAN: Then I will interfere more actively during the time. With regard to the operation of committees, one chaired by Reverend the Hon. Fred Nile was the successful inquiry into the provocation defence. During that inquiry the committee sought access to Parliamentary Counsel for the drafting of a legislative amendment. You may remember that the committee was blocked—I do not want to be too emotive—in respect of that approach. Have you a view as to the rights of parliamentary committees to seek access to bodies such as Parliamentary Counsel?

Mr BLUNT: I recall that the Chair's committee examined that matter during the last Parliament and that there was a referral to the Procedure Committee, but that matter was not reported upon before the expiry of the last term of Parliament. I am reluctant to express a view on a matter where your colleagues may end up expressing a view through the Procedure Committee.

The Hon. TREVOR KHAN: Noting that the question is generally relevant, I invite you to express an opinion.

Mr BLUNT: If that instance happened again, if a committee was to utilise that standing order to seek to have a bill drafted by Parliamentary Counsel and the Minister said no, then I would invite the committee chair or committee members to have some discussions with the President and me. I cannot speak for the President, but there may be other mechanisms for the drafting of the bill. Whilst all bills in New South Wales that come before the Parliament are at the present time drafted by Parliamentary Counsel, in years gone past there were some bills that were drafted by other people. I understand in other jurisdictions, from time to time—on the margins—there are bills drafted by other people in Parliamentary Counsel that are presented.

The Hon. TREVOR KHAN: Thank you, Chair.

CHAIR: Are there any further questions? We will spend a couple of more minutes with Mr Blunt if there is any desire.

The Hon. MICK VEITCH: There are several questions on notice.

The Hon. TREVOR KHAN: Seeing that Mr Blunt is before us, do I take it there will be an opportunity to recall Mr Blunt perhaps towards the end of these proceedings for him to make further comment on the evidence?

CHAIR: Mr Blunt has expressed that he is very happy to have a dialogue with the committee.

The Hon. TREVOR KHAN: I know he has expressed that view.

CHAIR: It is also for the committee to determine later on whether we wish to have another hearing.

The Hon. MICK VEITCH: I think it would be quite prudent to bring the Clerk back, if only for the reason that I enjoy having a forum where I can ask the Clerk some questions.

Reverend the Hon. FRED NILE: To follow up on an earlier issue raised by Dr Phelps, such as the importance of those three major committees, I think they are very important because the Government uses those to give them a reference. That is the difference from the General Purpose Standing Committees [GPSC].

The Hon. TREVOR KHAN: I think they are important too, that is why they will not allow me on them.

CHAIR: Thank you, Mr Blunt, for attending the hearing. Given questions have been taken on notice, and I suspect you will receive some more from members, the committee has resolved that answers to questions taken on notice be returned within 21 days. The secretariat will contact you about the questions you have taken on notice.

(The witness withdrew)

JOHN EVANS, Former Clerk of the Parliaments and part-time ethics adviser to members of Parliament, Department of the New South Wales Legislative Council, sworn and examined:

CHAIR: Would you like to commence by making a short opening statement? I note from the laptop, probably yes.

Mr EVANS: I would, Mr Chairman. Perhaps for the benefit of some of the newer members I might go through a bit of the background to the establishment of committees in the Legislative Council, because from 1985 when I was Deputy Clerk and 1989 when I became Clerk of the House, I think it is fair to say that along with the political will of the various members of the House, from Government, Opposition and the Crossbench, I was the procedural architect of many of these reforms in the Legislative Council.

Starting off, 1985 saw the appointment of a Select Committee on Standing Committees under the chairman of the Hon. Ron Dyer from the Labor Party. That committee recommended four committees: State Development, Social Issues, Country Affairs and Subordinate Legislation and Deregulation. It was in 1988, following the election of the Greiner Government, that the Legislative Council appointed its first two standing committees—the Standing Committee on State Development, and Social Issues. The motion for the appointment of that committee was moved by the Hon. Ted Pickering, Leader of the House, and it was passed as formal business. I was then Deputy Clerk, and I worked with the Hon. John Hannaford from the Liberal Party in preparing a submission to the Premier for the funding of—from memory I think it was four committees and subsequently the drafting of the motion for the appointment of the two committees that were agreed to. Of course, true it would only provide the necessary funding for the appointment of two committees. It was in October 1988 on the motion of the Hon. Bryan Vaughan, a Labor Party Opposition member that the House agreed to the appointment of a Standing Committee on Parliamentary Privilege.

In regard to subordinate legislation, the Council first had a committee for the scrutiny of subordinate legislation in 1960, passed on the motion of the Hon. Colin Begg from the Liberal Opposition, and that motion was agreed to on division. It its later life, under the chairmanship of the Hon. Ron Dyer, the committee managed to have a part-time legal adviser to assist the committee in its review of delegated legislation. Of course, the role of that committee was subsequently subsumed with the appointment of the Joint Regulation Review Committee in 1987 and the introduction of the Regulation Review Act. Whilst the Opposition and Crossbenches protested against having a joint committee, the bill nevertheless passed the Council. Of course, this committee has been later replaced by the Joint Legislation Review Committee. It was not until May 1997 that the Standing Committee on Law and Justice was appointed.

The five General Purpose Standing Committees were first appointed in May 1997 on the motion of the Liberal-National Opposition. They were of course modelled on the Senate committees and their distinguishing feature was their self-referral powers. The year of 1991 saw the introduction of joint estimates committees as a result of the Charter of Reform with the independence in the Legislative Assembly. It was following the election of the Carr Labor Government in 1995 that the Council established its three on estimates committees on the motion of the Hon. John Hannaford, Leader of the Opposition. In 1996, the Council rejected a request of the Assembly for the appointment of joint estimates committees. In 1997 the Council itself proposed the appointment of joint estimates committees but the Houses were unable to reach agreement on the mode of operation of those committees. It was then that the Council referred the Budget Estimates and Related Papers to the General Purpose Standing Committees, a practice which has now continued to the present day.

I have read the various submissions made to your committee and a common theme appears to be, first, a need for a reform of the budget estimates process, particularly regarding the time allocated to members regarding questioning; secondly, the scrutiny of bills and subordinate or delegated legislation. I note, in particular, the submission of the Hon. Ron Dyer in this regard; the Law Society; and Mr Blunt, the Clerk of the House. Particular mention has been made in various submissions about comments made in a speech by the Chief Justice the Hon. Tom Bathurst regarding recent legislation and the need to protect human rights and the principles of natural justice. Last, the third theme was the need for resourcing to the House regarding the protection of witnesses. I will leave it there, Mr Chairman, and answer questions.

CHAIR: Thank you very much, Mr Evans. I note you have a written copy of your opening statement. Would you wish to share that with Hansard? I know it is on a computer.

Mr EVANS: I will be able to give it to them on a USB stick or email it to them.

The Hon. Dr PETER PHELPS: I will start with my previous question, which is, are not the Law and Justice, Social Issues and State Development committees really a vestigial tale that could be dispensed with, given the powers that already exist under the GPS3 system? I can understand the historical reason for their creation, but surely they have now been transcended by a GPSC system, which is not purely an estimates process system but has a far wider range of investigative powers than previously?

Mr EVANS: As you well know, the two systems of committees are set up differently; they have different powers. The three standing committees have more policy roles, and probably their reports are more of a consensual nature and not so many dissenting reports, whereas the General Purpose Standing Committees have a different role. They have self-referral powers and they are probably more political in the way that they operate. I have not seen the way they have operated over the last eight years and cannot really comment on whether the merging of the two types of committees into the one committee would operate successfully. I cannot necessarily comment on that.

The Hon. Dr PETER PHELPS: I refer to the need for committee oversight, particularly of subordinate legislation, but also of legislation in general. The Senate does that by referring bills to committees. We have an automatic reference to the joint committee for every bill. Surely our system is more administratively efficient than a system of referring every bill to its own particular committee. The joint committee of the New South Wales Parliament has a specific role to look at the implications for rights in all bills and subordinate legislation.

Mr EVANS: When a joint committee examines matters like this, it is generally the will of the popularly elected House that will prevail.

The Hon. TREVOR KHAN: Generally or inevitably?

Mr EVANS: In all cases it is probably the will of the majority of the committee that prevails. As a former Clerk of the Parliaments, I would be an advocate for a system whereby the Legislative Council would be able to scrutinise appropriate bills. That should not necessarily be all bills; we all know that many are machinery bills. However, sending principal pieces of legislation to committees for scrutiny, along the lines followed by the Senate, and using an appropriate mechanism would be a valuable exercise.

The Hon. MICK VEITCH: What about regulations? Do you mean legislation and regulations?

Mr EVANS: The same would apply to regulations. Without necessarily reflecting on the present mechanism, I feel there is probably not adequate oversight of some bills and subordinate or delegated legislation simply because of the sheer volume of it.

The Hon. Dr PETER PHELPS: Having sat on the joint committee, your argument would be valid if there were an interventionist attitude on the part of the chair, who is inevitably a lower House government member, or the government members on that committee. Provided the committee is willing to accept the draft report as presented, I am not sure how you can say that the Government will have its finger in the pie in the assessment of the rights implications of a piece of legislation or delegated legislation. If the role of that committee is merely to oversight what impartial officials have drafted then why would we need an additional body in the upper House?

Mr EVANS: I am not sure how the present committee operates in that regard.

The Hon. Dr PETER PHELPS: Mr Shoebridge can tell you. I think it is fair to say that the draft report is presented and, generally speaking, there is negligible if any change. Unfortunately, Mr Pearce is not here; he is a member of the committee.

Mr EVANS: I cannot comment on that.

The Hon. GREG DONNELLY: Thank you for appearing before the committee. I will ask a couple of questions about budget estimates hearings. It has been eight years since you were Clerk of the Parliaments. I think it is fair to say that the budget estimates hearings that you would have observed were similar to the hearings that are held today; there have been no major changes. Although in days gone by we were given a lovely dinner pack with various titbits when we sat in the evenings. That is the one change; we no longer get

them. I gather that that was an efficiency reform. Setting that aside, today's estimates hearings are similar to the hearings held when you were the Clerk of the Parliaments. What are your thoughts about how we can enhance and improve the conduct of budget estimates hearings?

Mr EVANS: When I was the Clerk of the Parliaments I was not, and even nowadays I am not, in favour of the present system of the allocation of time to members and the various parties for the questioning of witnesses before the budget estimates committees.

The Hon. Dr PETER PHELPS: What about the quantum of time allocated to Ministers in total?

Mr EVANS: I believe that if a member has a particular line of inquiry, he or she should be allowed to continue until it is concluded. At present the member cannot pursue a line of questioning when the time expires. They are interrupted and the floor is given to another member, perhaps from another party, thereby losing the focus of the questioning. Governments never like being scrutinised by any committee, including estimate committees. You must have regard for the fact that the New South Wales budget deals with more than $50 billion. Do upper House committees have adequate time to scrutinise it? Perhaps there should be more sitting days and longer hearings to allow members to properly pursue the questioning of witnesses before the committees.

The Hon. Dr PETER PHELPS: No doubt you are aware of the Senate system where Ministers are required to attend committee hearings from 9.30 a.m., and sometimes earlier, until 10.00 p.m., 11.00 p.m., midnight, or even after midnight. Of course, lower House members do not appear at those hearings. What problems would you envisage if lower House Ministers refused to attend? Presumably they could not be subpoenaed. Would we have to move to a system where we had to rely upon Parliamentary Secretaries to represent Ministers?

Mr EVANS: That would obviously be the case if Ministers refused to attend.

The Hon. Dr PETER PHELPS: But there would not be a problem because there would still be accountability measures and all the bureaucrats would be there.

Mr EVANS: Yes. The questioning should necessarily be directed to the bureaucrats because they must implement Ministers' policy decisions. It is generally the bureaucrats who have all the information and answers to questions. The Senate system involves some questioning of the Ministers and Parliamentary Secretaries, but the majority of the questioning is directed to the bureaucrats appearing before the committees.

Reverend the Hon. FRED NILE: Self-referrals are now occurring more frequently. I am a realist and am interested in the Government's response to them. We conduct inquiries and spend a lot of money in the process, but because the Government does not agree with the report the recommendations are ignored. Is it better to be a realist, as I am, and to have all referrals endorsed by the House so that the Government takes them seriously and implements the recommendations? My observation of inquiries conducted as a result of self-referrals is that the recommendations go nowhere.

Mr EVANS: To the best of my memory, a self-referral must be reported to the House. If my memory serves me correctly, I think there have been occasions when the House has quashed self-referrals, but I will stand corrected. There is a mechanism whereby the House can stop a referral going ahead if it so wishes.

Reverend the Hon. FRED NILE: I do not remember that happening, but it could have.

Mr EVANS: I believe it might have happened on one occasion. However, it was so long ago I may be wrong.

The Hon. MICK VEITCH: You can take that question on notice.

Mr EVANS: There would be nothing stopping the House from saying to a committee, "Sorry, you will not take on that reference." Once a self-referral is reported the House can resolve to prevent the committee undertaking that inquiry.

Reverend the Hon. FRED NILE: But our procedure is that we simply note it and there is no debate.

Mr EVANS: No.

The Hon. MICK VEITCH: I refer to your comments regarding the Legislation Review Committee. You noted in your opening statement that a number of the submissions talk about the adequacy or otherwise of the current mechanism. The submission from Mr Blunt refers to a bill of rights. Given your experience as Clerk of the Parliaments, can you advise the committee how far that was progressed? Was it explored? Was the need for a bill of rights as opposed to a legislation review committee pursued?

Mr EVANS: There have been various arguments in the past for and against a bill of rights. As far as the Parliament is concerned, issues regarding bills of rights mainly focus on the rights of witnesses appearing before committees, confidentiality of evidence, and where they make adverse reflections on other people. There is probably room for the House to pass resolutions rather than necessarily having a bill of rights. At present it is an administrative process for the House to pass resolutions governing those matters and to give more authority to the protection of those witnesses appearing before committees of the House.

The Hon. MICK VEITCH: I make it clear that the current Clerk of the Parliaments does not advocate for or against a bill of rights.

Mr EVANS: Yes.

The Hon. MICK VEITCH: I refer to government responses and the process followed for the Chamber to accept them.

Mr EVANS: I am aware of the present system that requires government responses to be tabled within six months. With the hindsight of experience, that process could probably be expedited by requiring governments to respond within three months. I believe that various other jurisdictions allow three months rather than six months for governments to respond. Of course, the bureaucracy would not be happy with that, but so be it.

The Hon. MICK VEITCH: What do you think about the Chamber debating government responses as a whole or individual responses rather than the current tabling process?

Mr EVANS: There is nothing preventing the House from moving a take-note motion with regard to the response. Alternatively, there is nothing preventing the House from developing a procedure to consider government responses to the recommendations of a committee, considering the individual recommendations and the government response to those recommendations.

The Hon. TREVOR KHAN: We have had a number of inquiries recently that have been reasonably contentious. I refer particularly to Operation Prospect 1 and Operation Prospect 2. Do you have a view as to how the rights of witnesses are protected before such committee inquiries?

Mr EVANS: How the rights of witnesses are protected?

The Hon. TREVOR KHAN: For instance, the obligation to answer questions that may involve, if they are answered, a degree of self-incrimination for example. How do we deal with the conflicting purposes that we are dealing with here? One is the individual right and the other is the right of the committee to reach a conclusion?

Mr EVANS: Of course, all witnesses appearing before a parliamentary committee are protected by parliamentary privilege and if they are signed under the Parliamentary Evidence Act by the relevant provisions in the Parliamentary Evidence Act.

The Hon. TREVOR KHAN: Can I just respond to that and say people who appear before ICAC are also provided with extensive protections if they exercise their rights under whatever the relevant section is but the public opprobrium that may befall the witness as a result of the answers given before ICAC may well exceed any criminal penalty that may be imposed if that evidence were available in the Tamworth Local Court, for instance. So there is an impact of an answer given which may be highly disadvantageous.

Mr EVANS: Evidence given before a parliamentary committee should not or cannot be used in a court of law because of the protection provided by parliamentary privilege. I know there have been instances in the

past where the courts have transgressed on those rights of the Parliament that evidence given before a committee should not be impeached or questioned in any court or other place outside of Parliament. That is a long standing parliamentary privilege and protection that has applied since the Bill of Rights in 1688.

The Hon. TREVOR KHAN: I understand that entire concept. The question, however, is should there be some limits where a witness is compelled to answer a question even if it is incapable of being used in court?

Mr EVANS: Perhaps not. The Parliament is the grand inquest of the nation, if you want to put it that way. Why should not the Parliament be able to get all information it needs? Why should the courts in some instances or independent inquiries like the Independent Commission Against Corruption or the Ombudsman or those various other investigative bodies be able to get access to information that the Parliament cannot? Surely members of Parliament should be able to get access to all information in the same way as any other investigative body should be able to.

The Hon. TREVOR KHAN: Even where, for instance, it disclosed a police informant? Do you see no limits at all?

Mr EVANS: There are ways of suppressing that information given before a parliamentary committee. I know in the past there have been lots of arguments about what is a lawful question under the Parliamentary Evidence Act. To me a lawful question is a question of fact.

Reverend the Hon. FRED NILE: It can be heard in camera.

The Hon. TREVOR KHAN: I understand that.

The Hon. Dr PETER PHELPS: No committees have ever leaked.

The Hon. TREVOR KHAN: Prospect demonstrated a number of things could happen.

The Hon. Dr PETER PHELPS: If we were to move to a system of legislative review by upper House committees, if you like, become the standard, do you see it preferable to have a system where every bill is referred, unless it is not referred; or a system like we have at the current time where effectively it is a second reading amendment where a bill is of such a contentious nature that it goes off to committees? In other words, should the default position in your view be refer everything unless it is considered there is no need to refer, or should it be purely this bill is of a contentious nature so it should be referred basically as under the current arrangements?

Mr EVANS: I would not be in favour of a default system where every bill was sent off to committee. As I mentioned earlier, there are lots of machinery bills which would unnecessarily be sent off to committee. But you could have some kind of process, whether it is a chair's committee or a selection committee given a better name, that could choose and select relevant bills that need more thorough examination on principles of natural justice and human rights.

CHAIR: The committee has resolved that answers to questions taken on notice be returned within 21 days. The Secretariat will contact you in relation to the question you have taken on notice and any others that may be asked by committee members.

(The witness withdrew)

(Short adjournment)

ROSEMARY LAING, Clerk of the Senate, before the committee via teleconference, affirmed and examined:

CHAIR: Members of the public are present and the proceedings are being recorded by Hansard. Do you want to make a short opening statement?

Dr LAING: I realise Chair that your time is precious so I will not make an opening statement. I have provided the committee with a submission and I am happy to take any questions on that. I will make one very general point and that is about Parliaments and committee systems in general. It is a very obvious point but perhaps worth making. Each House of Parliament has to evolve and choose the committee system that suits its own particular constitutional or cultural conditions. While looking around at other systems is always helpful, I think that you will always find that there is a need to adapt to your own conditions.

Reverend the Hon. FRED NILE: Thank you for assisting this committee with its inquiry.

Dr LAING: It is my pleasure.

Reverend the Hon. FRED NILE: I assume you have been embarrassed by the bad publicity in the media about current Senate inquiries and the lack of attendance of Senators, and sometimes Senators who have set up an inquiry not attending its hearings? Do you have a process to ensure that Senators attend hearings? Should they have leave from the President if they cannot attend the hearings or participate in committee activity?

Dr LAING: I think what I would say to that is that this is a very live issue at the moment and the committee concerned is yet to report to the Senate but, yes, from media reports we know that a Minister ordered by the Senate to attend an inquiry by this particular committee did not attend the hearing yesterday. And that is now, I guess, being considered by the committee in question.

The committee itself has not been delegated the power by the Senate to deal with any disobedience or disorder of that nature. Like any committee, the committee has only the powers that the parent body has delegated to it. The Senate has never delegated to a committee the power to deal with or punish or inquire into possible contempt other than the privileges committee. I think that is all I can really say at this point.

Reverend the Hon. FRED NILE: Just following up on the lack of attendance of senators at Senate hearings, which apparently has been quite serious, if they have a genuine excuse should senators be required to seek leave from the President? Do you have any procedure to deal with that?

Dr LAING: Could I clarify are you referring to members of committees?

Reverend the Hon. FRED NILE: Yes, the senators themselves.

Dr LAING: Members, not witnesses?

Reverend the Hon. FRED NILE: The senators, including some of the senators who established the inquiry.

Dr LAING: I think the press reports of that phenomenon have been quite inflated. Committees cannot proceed without a quorum. The quorum is set down in the standing orders. When senators are under pressure from the sheer number of inquiries and the number of committees which they are individually members of there has always been an inbuilt flexibility in the system. Committees have the power to appoint subcommittees to do particular things. That in itself is reasonably rare, but there have been very few examples of committee hearings not being able to proceed for want of a quorum. I think what you are reading in the press on that point may be exaggerated.

Reverend the Hon. FRED NILE: Do you have a system of self-referrals in the Senate?

Dr LAING: To some extent, but most referrals come from the Senate or they are standing referrals under the standing orders. The exception is in relation to our legislation committees. You may be aware that our legislative and general purpose standing committees are divided into two streams. In each subject area there is a pair of committees. One is a references committee, which undertakes inquiries referred by the Senate. On the

other side the legislation committee examines bills referred by the Senate, the estimates of expenditure. Legislation committees also have the capacity to initiate inquiries into the performance of agencies within their sphere of interest. Some of our committees, particularly in the rural and regional affairs area, have used that self-initiating power quite extensively to monitor developments or events or policy changes in both the rural sector, particularly relating to quarantine matters, and also in the regulation of transport, particularly air transport.

The Hon. GREG DONNELLY: Could you please explain the provision of access to legal advice for committees presiding over inquiries undertaken by the Senate?

Dr LAING: Yes, I think there are two categories of advice here. The first is relating to the legislative and general purpose standing committees, which are our subject area committees. Those committees may, with the approval of the President, engage specialist advisers to assist them. That is not necessarily legal advice. The process there is that the committee identifies a need, puts a submission to the President explaining the need and the potential ways of filling that need and if the funds are available the President will authorise the committee to appoint a specialist adviser for that purpose. That is one side of the coin.

The other side of the coin is that our legislative scrutiny committees—which are the regulations and ordinances committee, which examines delegated legislation, the scrutiny of bills committee, which examines all bills from particular technical criteria, and the joint committee on human rights, which examines bills and delegated legislation against seven international human rights instruments to which Australia is a party—each have the capacity to engage counsel, again with the approval of the President, or specialist advisers with the approval of the President. It has been the practice for those committees to have a legal adviser to assist them.

With the regulations and ordinances committee, which is the oldest of the committees going back to 1932, the practice of having a specialist legal adviser dates back to the 1940s. The other two committees have had such an adviser since their inception in 1981 and in the past few years in relation to the human rights committee. The legal adviser is provided with copies of the bills or the instruments that the committee is scrutinising and provides a report to the committee against the committee's terms of reference and the committee uses that report and usually the physical presence of the legal adviser in the meeting to assist it to discharge its functions under the standing orders.

The Hon. GREG DONNELLY: Take for argument's sake a committee that was examining a matter and a member or members of the committee were looking for some advice about the drafting of an amendment to a bill or an Act. Would that advice come via that legal adviser that you have referred to in answer to my first question or would that advice come via Parliamentary Counsel through a different mechanism?

Dr LAING: Probably neither. If a committee or members of a committee want to develop amendments to a bill that would probably come from our own in-house capability. We have staff who draft private senators' bills and amendments and we have maintained that expertise within the Department of the Senate since the late 1970s or early 1980s. While you would not rule out the legal adviser to a scrutiny committee being able to do that, that is not really their function. Their function is to advise the committee against its terms of reference. If members of that or any other committee want to have amendments drafted we have that capacity in house to help them.

The Hon. MICK VEITCH: I want to explore your thoughts around government responses and the mechanism for government responses to committee reports. As you would be aware, we invest significant time and effort into exploring an issue and the committee then prepares a report. An important part of that process is the government response. It is my understanding that the Senate requires government responses within three months.

Dr LAING: That is right.

The Hon. MICK VEITCH: How does the Senate then deal with that Government response? Is it debated as a part of the committee report or do you wait for the Government response prior to debating the committee report? What is the Senate's process?

Dr LAING: The process is in two stages: First, when the committee report is presented, there is an opportunity to debate the report, if it is presented on one of three days in the week when there is an hour available under the Routine of Business for the presentation and debate of committee reports. So Tuesday,

Wednesday and Thursday that happens. Government responses are also presented at that time. So, on any Tuesday, Wednesday or Thursday at this time we might have one or two reports to present and a Government response to present. So the opportunity is there to debate each of those within the time available and then there is a spill-over opportunity to come back to committee reports and Government responses every Thursday afternoon. This means that we do not hold up debating the committee report until the receipt of the Government response but it provides two opportunities I guess, firstly, to debate the committee report and then, when the Government response comes in, also to debate the Government response, if Senators wish to do that.

The Hon. MICK VEITCH: Thank you, Dr Laing. So, the three months reporting requirement for the Government, for presenting its response, has that caused a problem in the past for the Government of the day? Are there many instances where there are delays in achieving that three-month reporting deadline?

Dr LAING: Yes, there are many instances where there are delays. There are two mechanisms for monitoring or following up outstanding responses. The first is that under the Standing Orders there is a requirement for the President to report twice a year to the Senate on those Government responses that are overdue and the Government, in turn, does a response to the President's report on those responses that are outstanding. That mechanism is a way of keeping government on its toes and providing regular reminders of the need to do a Government response.

The other mechanism has emerged in recent times and that is that sometimes committees, or individual members of committees, will put up a motion for an order for the production of the response. So, just like you have your orders for production of State papers, a category of orders that the Senate deals with are orders for overdue responses to be produced pronto and that has had some success.

The Hon. MICK VEITCH: How often has that mechanism been utilised?

Dr LAING: It is no more than a handful of times. As I say, it is a recent phenomenon and something that has emerged in recent months really and has been used sparingly.

The Hon. MICK VEITCH: Another matter relates to the Parliamentary Privileges Act. As you will be aware, in New South Wales we do not have a Parliamentary Privileges Act, we rely on the Bill of Rights 1688, Article 9. How does the Parliamentary Privileges Act operate? What are the Senate's mechanisms?

Dr LAING: The Commonwealth has a Parliamentary Privileges Act 1987 which was enacted essentially in response to some decisions of the New South Wales Supreme Court which both houses felt did not reflect accurately what Parliamentary privilege was supposed to do. So it was a responsive mechanism and it operates really to keep the courts out of Parliamentary territory by defining exactly what is meant by the term "proceedings in Parliament" in Article 9 of the Bill of Rights 1688—or 1689, depending on whether you are using old-style or new-style dating. It is not an Act that guides the operation of committees, if you want to look at it in that way. It is really something that ring-fences Parliamentary operations from outside interference.

As well as those New South Wales court decisions that caused the problem, both houses had, in the years preceding 1987, been engaged in a Joint Select Committee inquiry into Parliamentary privilege and the report of the Joint Select Committee had come up with numerous suggestions about dealing with Parliamentary privilege. Some of them needed statutory expression and others were to be achieved through resolution of the houses. So, as well as defining "proceedings in Parliament" in the statute and defining the role of the courts in Parliamentary privilege, the Parliamentary Privileges Act did some other incidental things, such as: Abolishing the right of the Commonwealth houses to expel their members; abolishing the contempt of defamation of the House or a member, so that people could say what they wanted to basically about Senators, members and houses; and it did a number of other things as well.

But perhaps the main area for the operation of our committees was achieved through resolutions passed by the Senate after the enactment of the Parliamentary Privileges Act. You might have heard of the Senate Privilege Resolutions of 25 February 1988. These do a number of things including, in privilege resolution 1, setting out a binding code on Senate committees about how they will deal with witnesses. So there are some basic rules in there about proper process, fair treatment, rights of witnesses and obligations of witnesses. And it is those resolutions that have a much greater impact on the day-to-day operations of our committees.

The Hon. MICK VEITCH: Did that resolution then go to the protection of witnesses?

Dr LAING: Yes.

The Hon. MICK VEITCH: Thank you, Dr Laing.

CHAIR: Dr Laing, it is Scott Farlow here. Firstly, I want to commend you and your department on the quality of your submission and how detailed it is and the benefits of your committee system which is often referred to as the gold standard.

One of the things I am interested in, in terms of your committee system and the point has been made often, and I think you made it yourself earlier, about the demand on members' time in the committee process and definitely, in terms of some of the discussions with the Reverend the Hon. Fred Nile earlier. Do you see that as partly because of the political complexion of the Senate or do you see that as a more structural issue with the way that the Senate's References and Legislations Committees are implemented?

Dr LAING: I am not sure if there is a simple answer to that, Chair. But it is certainly the case that, over the past three Parliaments—in other words, since the 42nd Parliament, which was the end of 2007 to 2010, so that is the last Parliament of the Rudd-Gillard Labor Government; the following Parliament, the 43rd Parliament, which was the hung Parliament; and the current Parliament—we have seen an explosion in the number of committee inquiries being undertaken by Senate committees. So it is not just a factor of the current complexity of composition of the Senate, it has been something that has been evolving for much of the past 10 years and I am not sure if I can give an explanation for that. It is as if a Senate inquiry has become a panacea for anything and a remedy of first resort: Have a press conference. What shall we do? We will have a Senate inquiry.

It means that Senate committees have, in some senses, become the victim of their own success in that the demands on them are very great and it does affect the amount of time committees can devote to inquiries. But I suppose each committee has to work out its own way of prioritising and dealing with the workload that it has been given by the Senate and there are still many inquiries of fairly long duration, deep inquiry, multiple public hearings around the country, and large numbers of submissions being given to the committees. That means that, in most cases, the same thorough job is being done, it is just that committees have had to prioritise and put some inquiries on the backburner until they can get to them.

CHAIR: Thank you, Dr Laing. Further to that, in terms of the sensibility to implement subcommittees for those committees, has that been used often or is it something that is not often used by Senate committees?

Dr LAING: It is used from time to time and it is a handy thing to have in reserve. The quorum requirements of committees, generally speaking, are either a majority of a committee—a majority of members—or two members of the committee, where one member has been appointed on the nomination of the Leader of the Government in the Senate and another member is appointed on the nomination of the Leader of the Opposition. There is also a requirement for subcommittees—I am turning to the right Standing Order so I get it right—subcommittees also have a particular membership requirement which I just cannot quite put my finger on at the moment. But the combination of those provisions means that committees need to plan their hearing programs quite meticulously, to make sure who will be available and therefore, what means they need to adopt, whether they need to form a subcommittee to carry out the particular task. I would see subcommittees as just providing additional flexibility.

CHAIR: Thank you, Dr Laing.

The Hon. Dr PETER PHELPS: Hello Clerk, Peter Phelps.

Dr LAING: Hello.

The Hon. Dr PETER PHELPS: Could you explain how legislation committees get the bills which they inquire into? Is it an automatic referral of every bill which makes its way into the Senate or is there some sort of selection process for legislation committees?

Dr LAING: It is actually mostly the latter. We have a committee called the Selection of Bills Committee, whose role is to consider every bill introduced into the Senate and to make a recommendation on the basis of representations made to the committee about which bills should be referred to which committee at which stage and for what duration? At the same time, there are, under the Standing Orders, the usual

mechanisms for referring bills to committees. For example, by ordinary motion on notice or by motion after the second reading motion is agreed to. So, it is through the Selection of Bills Committee's recommendations and their adoption by the Senate that the vast majority of bills are referred to the Legislation Committees.

The Hon. Dr PETER PHELPS: Would you be able to outline the make-up of the Selection of Bills Committee?

Dr LAING: The Selection of Bills Committee has an open membership, because it consists of the Government Whip and two other senators nominated by the Leader of the Government in the Senate, the Opposition Whip, and two other Senators nominated by the Leader of the Opposition in the Senate, together with the Whips of any minority groups.

The Hon. Dr PETER PHELPS: Does that committee work on a consensus or a majoritarian basis?

Dr LAING: It works on a consensus basis because it usually meets while the Senate is sitting, so it is limited in what it can do, but it knows that any disagreements within the committee can only be nutted out by the Senate itself. So what the committee would do in its generally weekly reports to the Senate would be to recommend that a list of bills be referred to particular committees with reporting dates. There might be a bill in which it says "We think it should be referred to this committee but we could not agree on the reporting date". The mechanism there is that when the report is presented and a motion is moved for its adoption, somebody will move an amendment to insert the reporting date.

That mechanism also works where the committee cannot agree on the referral of bills. They might say, "We recommend that this lot be referred but we could not agree on whether to refer this lot" and if there is a will in the Chamber to have that referral then somebody will move an amendment to the motion to adopt the report to effect that referral and it will come down to a vote in the Senate.

The Hon. Dr PETER PHELPS: There was a period of time, as I recall, when the legislation and references committees were combined. Essentially, that is a comparable situation to what we have here in New South Wales. What is your view of the effectiveness of combining the two into a single committee?

Dr LAING: That was between 2006 and I think about 2009 and it came about when the government of the day had a majority of one in the Senate and the legislation and references committee pairs were combined into one. It is certainly the case that because of the composition of the Senate at that time there were many, many fewer references to committees but the committees were kept quite busy with the references of bills. So while they were always busy they were close-shifted towards the legislation away from the general inquiries.

The Hon. TREVOR KHAN: Could I just go to another issue, budget estimates, which is on pages eight and nine of the submission? Are you able to assist with how long the budget estimates hearings go for? You are obviously aware that ours are rather compact, I think would be a succinct way to describe it.

Dr LAING: Ours are rather extensive. If I could describe the general pattern: we have three rounds of estimates hearings each year; one of them, usually in February, is for the additional estimates bills and that is essentially eight committees divided into two groups, four of them meeting at one time. Group A meets for the first two days of the four days set aside and group B meets for the second two days. The normal hours are 9.00 a.m. to 11.00 p.m.—that is by convention rather than rule—and then there is a possibility of a spillover day on the Friday, again with the limitation of no more than four of such committees meeting at one time. In budget estimates it is the same pattern, group A and group B, but we have two weeks for the hearings, essentially Monday to Thursday of each week, with spillover days possible on the Friday.

Spillover days occur when committees agree that they need more time to complete their program, but we have a relatively new mechanism where any three members of a legislation committee may, in writing, require an additional hearing to be held either on the spillover Friday or at another time to be determined by the committee where those members feel that more time is needed on particular programs. So they are very extensive processes. The second round occurs after the budget estimates round, which is in May/June. The third round occurs usually around October and that is a supplementary budget round whose point is to follow up matters dealt with in the budget round but had not been satisfactorily resolved or for which Senators have further lines of inquiry.

The Hon. TREVOR KHAN: Could I go to perhaps a more procedural issue or a performance issue in terms of those hearings? Our process is to divide up the disputably limited time between opposition, crossbench and government. How do the Senators use their time during the committee hearings? Is it a strictly divided exercise in terms of time or is it a more freewheeling approach that is adopted?

Dr LAING: Each committee determines its program and, informally at least and sometimes on a more formal footing, times are allocated to particular programs on the basis of indications from Senators about the questions they have. It does not work perfectly; there is often some dispute about allocation of time. Another recent rule of the Senate to deal with such disputes was that chairs of legislation committees could not close programs off and move on to the next one until Senators had indicated that they had finished their questioning or they were prepared to put their questions on notice to the witnesses or they had agreed to have one of these spillover hearings. But there has been some tension about the allocation of time and practice varies from committee to committee—some committees run quite smoothly with everybody agreeing on the allocation, some committees find that it is easier for them to work if they have a specific allocation of time to Senators and other committees are more freewheeling and cooperative. There is a whole gamut here.

The Hon. Dr PETER PHELPS: Just to follow up on that question, the Government is not allocated a specific amount of time for questioning and the Opposition is not allocated a specific amount of time; for example, to use your own estimates, presumably the Opposition would say, "We will need one hour to talk about DPS, one hour to talk about the Library, two hours to talk about the Department of the Senate". That is the sort of allocation you are talking about; you are not talking about the first hour shall be allocated to the Government, the next hour allocated to the Opposition, the next hour allocated to the crossbenches.

Dr LAING: It sometimes goes down to that level of detail, depending on the particular committee and how they operate.

The Hon. Dr PETER PHELPS: But as a general rule.

Dr LAING: As a general rule the times will be notionally allocated to programs and within those programs the committee may well be aware that Senator A, who might be the Opposition spokesperson on that area, will have the bulk of the questioning, and then there will also be some other questions from the crossbench or from government Senators.

The Hon. Dr PETER PHELPS: But you would not have a situation where an amount of time is exclusively reserved for the government and if the government chose not to use that time it would be removed from the program?

Dr LAING: That has not been our practice, no.

The Hon. TREVOR KHAN: Clerk, having relatively recently appeared before one of the Senate inquiries into a matter, could I thank you and ask that you pass on to those involved the courtesy that was shown by, I will call it, the secretariat in terms of the organisation for our attendance and the way we were dealt with on the day in terms of giving that evidence. It was a positive experience from my personal point of view.

Dr LAING: I am very pleased to hear it. Thank you for that; I shall pass on your thoughts and thanks.

The Hon. GREG DONNELLY: I refer to your submission on pages 11 through to the top of page 12, under the heading "Community Engagement". You might have nothing more to add than what you have said but I will probe you anyway. With respect to the second-last paragraph on page 11, and your comments, "Perhaps even more important is that committees manage the expectations inquiries may generate", and you go on to say a few words in that regard, has the Senate or the Commonwealth Parliament had particular issues or problems arising or is that just a general reflection on your part?

Dr LAING: It is a general reflection and observation on our part over many years of very sensitive inquiries in particular areas—to give you some examples: inquiries into children in institutional care, forced adoptions, those very profoundly concerning social areas on the one hand—but also in the economic area, people who have been victims of schemes that have gone wrong, people who have felt that financial regulators have let them down. There have been numerous inquiries of that kind by Senate committees over many years and from which those observations come, that while many people find the opportunity to come before a

committee to tell their story is deeply satisfying and deeply healing in some senses, others are disappointed at the fact that their problems have not been solved and that the committee cannot address individual cases.

The Hon. GREG DONNELLY: Can I ask you from a practical point of view of trying to manage expectations, within a given committee secretariat for a particular inquiry do all members of the secretariat involved in that inquiry play a role in trying to manage expectations from witnesses and perhaps submitters or are there some specific resources allocated whereby individuals participating through either hearings or submissions are engaged directly and spoken to about expectations?

Dr LAING: I think that within the secretariats engaged on inquiries of this type all staff discuss amongst one another and with the committee about what message to provide to people who contact the secretariat. In such inquiries staff may spend a lot of time on the phone with individuals just talking through the things the committee is interested in, what the committee hopes to achieve through the inquiry and what the limits of what the committee can do are. That does involve all members of the secretariat from most junior up to the secretary. Obviously the secretary and the principal research officer will handle the more difficult and taxing calls, but everybody is involved. I am not sure if that answers your question.

The Hon. GREG DONNELLY: I think it does. With respect to follow-up after an inquiry and after recommendations have been made from an inquiry and submitted to the government and then the government response is returned to the Parliament or to the Senate, as the case may be, is there follow-up or is there specific required follow-up via either procedures or standing orders back to participants, namely those who made submissions or gave evidence?

Dr LAING: Generally not after a government response. For the presentation of a committee report submitters are advised that the report has been presented. In the old days, of course, we used to send everybody a hard copy of the report; these days we send them a link to the electronically published version on the Parliament's website. There is that degree of closing the circle on the reporting but there is not anything formal in place for the government response back to individuals except that, of course, on our website as we archive each inquiry you can get access to the submissions, the transcript of evidence, the report and the government response in one location when that inquiry is wrapped up.

Reverend the Hon. FRED NILE: At the moment we have a six-month period for the government response; yours is three months. What action is taken by the Senate when that the Government does not respond within the three months?

Dr LAING: As I mentioned earlier, we have two follow-up mechanisms—one is a report every six months by the President, which is tabled and identifies the overdue responses; and the second is the ability for senators to individually move motions to require the production of the government response, to hasten it that way. Then there is the usual availability of privileged debate to comment on government performance in lack of response to a committee report.

The Hon. Dr PETER PHELPS: I have a quick double-barrelled question. Do parliamentary secretaries have the ability to represent lower House Ministers in Estimates? What is the historical basis for lower House Ministers not appearing at Estimates? Is it a matter that they were asked and have said no or is it based on comity between the Houses that they do not get asked in the first place?

Dr LAING: In relation to the first question, parliamentary secretaries may represent a lower House Minister. The second question is a little more complex. I guess there have always been practices in place for Ministers in one House to represent the Minister in the other House based on comity but also possibly on something a bit stronger, because a Senate committee cannot do the sorts of things to a member of the House of Representatives that it can to one of its own, in terms of holding them to account and punishing them if necessary. The system of ministerial representation means that you have available to the Estimates committees a senator who is a Minister or a parliamentary secretary who can speak for all of the portfolios. You can cover the field using the Ministers representing. An interesting rule relating to parliamentary secretaries is that they can represent Ministers in the House but they cannot represent Senate Ministers in respect of their own portfolio. To give an example, we have a Minister for Defence in the Senate and the Minister for Defence represents various portfolios in the House of Representatives.

The Hon. Dr PETER PHELPS: And appears at Estimates in that capacity?

Dr LAING: Yes. If the Minister for Defence was not available or had to be temporarily absent from the Defence estimates a parliamentary secretary could not represent her; instead, it would have to be another Senate Minister rostered on to fill in for that Minister. They are just practical considerations.

CHAIR: Thank you for being so generous with your time in attending our hearing. The committee has resolved that answers to any questions taken on notice be returned within 21 days. I do not think you have taken any questions on notice?

Dr LAING: No, I have not.

CHAIR: But some may possibly come to you from committee members.

Dr LAING: Certainly. Thank you very much to the committee for your wonderful questions. It has been a very interesting period of time for me.

The Hon. Dr PETER PHELPS: Send our regards to your excellent Black Rod.

Dr LAING: Yes, she is my excellent Black Rod now.

(The witness withdrew)

RAFAEL GONZALEZ-MONTERO, Deputy Clerk and Senior Manager of Select Committees, Office of the Clerk, New Zealand House of Representatives, before the committee via Skype, and

EDWARD SIEBERT, Clerk of Committees, New Zealand Parliament, before the committee via Skype, sworn and examined:

CHAIR: I welcome Mr Rafael Gonzalez-Montero and Mr Edward Siebert who are joining us by Skype from Wellington, New Zealand. My name is Scott Farlow. I am the Chair of the Select Committee on the Legislative Council Committee System. This hearing is being conducted in the Macquarie Room of the NSW Parliament. Seated to my left is the Hon. Mick Veitch, the Deputy-Chair of this committee, the Hon. Greg Donnelly, Reverend the Hon. Fred Nile, the Hon. Dr Peter Phelps, and to my right is the Hon. Trevor Khan. Members of the public are also present, although I note that most of them are employees of the Parliament, and the proceedings are being recorded by Hansard. Would you like to make a brief opening statement?

Mr GONZALEZ-MONTERO: I thank the committee for the invitation. I mention to the committee that Mr Edward Siebert is joining me. He is the principal Clerk in select committees. I suppose it would be very useful for the committee if I gave you a brief overview of the select committee system in New Zealand. As you may be aware the New Zealand Parliament does not have an upper House. Really the functions of the upper House are undertaken by our select committees. This obviously includes doing the checks and balances on government bills and other bills. So the detailed work of our legislation is done through our select committee system. It then goes back into the House once it has been scrutinised by the select committee.

Reverend the Hon. FRED NILE: What period of time does the Government have to respond to committee recommendations?

Mr GONZALEZ-MONTERO: It is 60 days. It is 60 days when it is a recommendation about a bill. Sorry, they have got 60 days when it is an inquiry; they do not need to respond to recommendations when it is a bill.

Reverend the Hon. FRED NILE: It is only when there is an inquiry with recommendations that they respond within 60 days?

Mr GONZALEZ-MONTERO: Yes.

Reverend the Hon. FRED NILE: What action does the House take if they do not respond in 60 days?

Mr GONZALEZ-MONTERO: It is in the Standing Orders so the Speaker would probably write a letter to the relevant Minister asking for a reply.

The Hon. Dr PETER PHELPS: How many committees do you have? Are they divided by portfolio or by broad thematic topic? What is the nature of the chairmanship and majority of a committee?

Mr GONZALEZ-MONTERO: We have got 13 subject select committees and they are pretty much aligned to their government portfolios. I will give you an example—we have a Commerce Select Committee, a Health Select Committee and a Finance and Expenditure Select Committee. Then we have got other select committees that are not subject select committees—I am talking about the Privileges Committee and the Regulations Review Committee. Those committees are not aligned to any of the portfolios; they are specialist select committees. The Business Committee determines the membership of the select committees but they are done in proportionality to the representation in the House. Really the chairmanship of the select committees is determined by the Business Committee.

The Hon. Dr PETER PHELPS: Is there an informal arrangement that non-government members be chair or is it accepted that government members and their Coalition partners be chair?

Mr GONZALEZ-MONTERO: There is an arrangement that Opposition members will be chairs. I think largely it has been convention. So for quite a few Parliaments, for example, our Government Administration Committee has been chaired by an Opposition member and the Regulations Review Committee has also been chaired by an Opposition member.

The Hon. Dr PETER PHELPS: Do you have a mandatory requirement that every bill goes to a committee or is it done on an arranged basis that, "This bill is particularly controversial so we will send it off to a committee" or do all bills go to the relevant committees?

Mr GONZALEZ-MONTERO: All bills go to the relevant committees with an exception, and that exception is when the House goes into urgency. In that case the bill will pass all stages and will not go to a select committee.

The Hon. Dr PETER PHELPS: How does that factor on the workload of the individual committees if they have to deal with every bill? Would that necessitate public inquiries, open inquiries, or is it a matter of a tick-and-flick arrangement?

Mr GONZALEZ-MONTERO: No, every bill will be referred to a select committee, and the select committee will go for submissions. The committee will go for submissions on all the bills. It is up to the committee how many submissions they want to hear and, as you point out, that will depend on the controversial nature of the bill but, in general, the committee will try to hear all submitters.

The Hon. Dr PETER PHELPS: On that basis, is there some sort of moral imperative or agreed convention that you will not unduly delay a bill coming before the Parliament for final resolution? If you have got a hostile chair to a Government bill, what is to stop them from stringing along the bill so it does not get to the Parliament? Are there mandatory reporting dates that the committee has to report back by, or is it an agreed convention that you do the right thing?

Mr GONZALEZ-MONTERO: There is a standing order and most reports from committee on a bill will need to be reported within six months and no longer than six months. There are some bills, however, that will have different reporting times, and that will depend on the instruction of the Minister. I do not know if you want to add something to that, Ed.

Mr SIEBERT: Even though there are a few committees that have an Opposition chair, the Government maintains the majority on those committees, so it is not a matter of a hostile chair being able to slow down the Government's bills just because they are the chair.

The Hon. Dr PETER PHELPS: Thank you very much.

CHAIR: To take up one point you raised before, Mr Gonzalez-Montero, in regards to the urgency provisions, how often is that used? We in our Parliament have similar provisions and they are used maybe a little bit more commonly than in some other Parliaments.

The Hon. TREVOR KHAN: Do not say "more commonly"—all the time.

CHAIR: Is an urgency provision used rarely or is it a common occurrence?

Mr GONZALEZ-MONTERO: If you do not mind me giving a very brief history, it used to happen very often in previous Parliaments, but this Parliament introduced something called extended sittings. Extended sittings are used to go through legislation that requires a little bit longer time in the House. Mostly it is used to go through treaty bills. We are going through some settlement bills with iwi in New Zealand. Those extended sittings are used mostly so that these bills can go through. Since we have introduced the extended sittings, the number of the times that urgency has been called has reduced dramatically. Mostly I will say urgency, almost without fail, will occur after the budget, and in other occasions it will be up to the Government if it wants to pass some legislation that is urgent. Earlier in the year there was some legislation proposed to allow bars to open earlier outside the normal trading hours before the Rugby World Cup, so urgency was called to pass that bill through all stages.

The Hon. Dr PETER PHELPS: Very important. That would have had unanimity, surely.

CHAIR: The Government does not use the urgency provisions as a way to bypass the legislation review process?

Mr GONZALEZ-MONTERO: I would say that the Opposition members sometimes will tell you, if you are asking them, that some of the bills are passed through urgency to bypass the submission process. From a

completely independent point of view, I would not be able to answer that question. You will probably have to ask a Government member, but I would say that that is how the Opposition sees it. Sometimes the legislation, like the one I just mentioned, needs to be passed quickly, and I think there have been probably three or four in the past year that you could argue were urgent.

The Hon. GREG DONNELLY: With respect to the committees and the capacity for committee members, as individuals, to dissent from the majority position that is being articulated with an inquiry, could you explain how that is provided for and how individual members are able to express that they wish to dissent from majority positions of inquiries?

Mr GONZALEZ-MONTERO: All of the committees will present in the report on the specific bill or the inquiry, and the Opposition has a tool at their disposal called a minority view. If they want to set themselves aside from what the main report is saying, which is written by the committee, they will insert into the report a minority view. The minority view is prepared specifically by the Opposition parties, I would say their research units. Generally, when the committee looks at the minority views, it still has to be agreed by the core committee to be included into the main report. It is not, "Here is the minority view", and they just chuck it into their report. Normally, I understand, they will discuss with each other. Sometimes the committee will say to the Opposition member or members putting in a minority view, "If you take this out, that is fine. If you add it in, then the committee will agree to include the minority view." It is not automatic. In general, what I understand from the chairs is that in respect of keeping good relationships within the committee, more times than not they will agree to the minority view.

Mr SIEBERT: That is right. There is a strong presumption in a committee and in its vigorous rulings, which is an adjunct to our standing orders, minority views will be accepted, but like Raf said, that is a matter for the committee ultimately to decide and there is sometimes some bargaining or horsetrading around language. Ultimately, if the committee decides not to accept that minority view, it is up to the committee to decide. It is rare and often when a committee decides not to include a minority view, and I have seen that happen a couple of times on committees, it becomes quite a fire storm.

The Hon. GREG DONNELLY: Relating to shall we say controversial matters or matters that go to questions of conscience, or what is being claimed as conscience issues by committee members, you can have the potential situation of a Government member on a committee dissenting from a majority position that is being asserted by the majority members on that committee. Does that Government member equally have a right to put forward a position, in the same way as you have described with an Opposition member, and have that discussed?

Mr GONZALEZ-MONTERO: Yes.

Mr SIEBERT: I would say yes on a matter of a conscience issue. Like I say, there would not strictly be party views and there could be eight members' views.

The Hon. GREG DONNELLY: One final question on a new area. With respect to the review of Government expenditure via the Finance and Expenditure committee you mentioned in your earlier comments, Deputy Clerk, can you explain succinctly the process of that examination and the general framework in which that is done?

Mr GONZALEZ-MONTERO: Sure. Each committee examines the account of the entities that are aligned to the committee. For example, if it was the Health Committee, they will review the accounts. We have got two systems, so we have two processes. One is that after the budget there are the annual reviews, so that is examining what was happening in the previous financial year, but we also have the estimates process, which is looking at the following year.

The Hon. GREG DONNELLY: Yes. I am particularly interested in those.

Mr GONZALEZ-MONTERO: Yes. For example, for the estimates each committee will align to the department of their subject area. As I was saying, health will examine the Ministry of Health and the District Health Boards. The role of the Finance and Expenditure Committee [FEC] is to allocate the entities to each of the subject committees, which can vary. They are done in a similar fashion, so they will normally get the same entities year after year, but it is allocated by the Finance and Expenditure Committee. The Finance and

Expenditure Committee reviews the accounts of the entities that are aligned to it, for example Treasury. Which others will be with the FEC?

Mr SIEBERT: Earthquake, so specialised ones.

Mr GONZALEZ-MONTERO: They have specialised entities that will report to them.

Mr SIEBERT: The Finance and Expenditure Committee has the power to retain any entity it wishes to examine. If one should go to another subject select committee, FEC can retain it and examine it for annual reviews and similarly with the estimates process that Raf mentioned about the budget, all the votes for the various departments would similarly be allocated by the FEC to the appropriate subject committees.

The Hon. GREG DONNELLY: Thank you very much. That is very helpful.

The Hon. MICK VEITCH: Are your committees broadcast into the public domain. If so, how do you achieve that?

Mr GONZALEZ-MONTERO: Over the past two years we ran a pilot of broadcasting the select committee proceedings, like we do with the House, with the Chamber. We stream it on the web. It was a pilot and it cost a lot of money. We did it very rustically; it was not moving cameras. We just stopped the pilot, because we found that it was not really being viewed by a lot of members of the public. Most of the complaints we had were from Government departments. People were angry because they could not see their mates presenting evidence to the committee, and because it was so rustic we did not even have a way to archive the select committee proceedings, so we have stopped that pilot. We have paid for funding to make it widely available, but we have not heard about our funding yet.

One thing I will say about the broadcasting of committees, it is probably 50:50, especially from the members. Some are convinced it is the right thing to do, some are not. The reason for that is the way select committees work here is very—there is a lot of cooperation between the parties, a lot of conversation. It is not what you see when we broadcast Parliament from the Chamber, which is more adversarial and I guess members want to make sure that they score their political points. In committees, it is much more collegial. Members are quite concerned that if it was broadcast, it would change somehow the way that select committees members interact with each other.

The Hon. MICK VEITCH: That is interesting.

Mr GONZALEZ-MONTERO: To be honest, I do not know what the future will hold for the broadcasting of select committee proceedings. We will wait to see.

The Hon. MICK VEITCH: Did the pilot involve teletexting? Could the hearing impaired observe and understand the proceedings?

Mr GONZALEZ-MONTERO: Yes. The advantage was that anyone could watch it. Members could not see themselves because it was live, but I am sure members' staff watched and provided feedback.

The Hon. MICK VEITCH: Was there teletext or closed captions?

Mr GONZALEZ-MONTERO: That is very new to us in New Zealand. We are currently trialling a system to caption the proceedings in the House. It is not live yet, but we hope it will be within the next few months. Select committees were not captioned.

The Hon. MICK VEITCH: Do your committees travel to conduct hearings? Our committees often hold hearings in regional New South Wales so that more people can participate in the parliamentary process. If that occurs in New Zealand, what supports do you provide to members when they are conducting those hearings?

Mr GONZALEZ-MONTERO: Committees decide when they want to conduct hearings outside Wellington. If there is a controversial bill and the committee is receiving a lot of submissions from across the country, members may decide to hold hearings in the main centres. They might schedule hearings in Auckland and Christchurch to enable more people to participate. The *Māori* Affairs Select Committee, which deals with

indigenous affairs, travels more widely because the members want to hear from the tribes at their meeting places. That committee will travel much more than the others. However, the others decide which centres they will visit and how many hearings they will have outside Wellington.

The Hon. MICK VEITCH: What support do you provide for committees that have hearings away from Wellington? Are they accompanied by committee secretariat staff or Hansard reporters?

Mr GONZALEZ-MONTERO: The committees have three staff members: a clerk; a deputy-clerk, who writes the report; and an administration officer. Committees that hold hearings away from Wellington are generally accompanied by two members of the secretariat—the clerk and the deputy-clerk or the administrator. We do not send Hansard staff. The majority of external hearings are recorded and a transcript is produced.

Mr SIEBERT: I am not sure about that because I do not know whether we have the appropriate recording facilities.

Mr GONZALEZ-MONTERO: We would not send Hansard editors. Only the secretariat staff would accompany the committee, and they would take notes. In some cases the committee allows the hearings to be recorded and the recording will be brought back here.

The Hon. Dr PETER PHELPS: Are delegated legislation, regulations and ordinances sent to the 13 committees or do you have a dedicated committee to deal with such legislation?

Mr GONZALEZ-MONTERO: We have a dedicated committee—the Regulations Review Committee.

The Hon. Dr PETER PHELPS: I refer to the time commitment required of Ministers during your estimates process. Presumably Ministers appear and they are accompanied by bureaucrats who can be questioned by parliamentarians. Going back to your example of the Minister for Health, how long would he or she be required to appear before the committee to fulfil his or her estimates commitments? Would it be one hour, one day or one week?

Mr GONZALEZ-MONTERO: I had a conversation with Mr Siebert this morning about your system of dedicating a whole week to the estimates process. Our system is less formalised. When the estimates hearings are scheduled, the committee clerks will do a lot of work to ensure that the Ministers are available when the committee wants to hear from them. It is fair to say that sometimes it becomes a movable feast.

Mr SIEBERT: It is up to each committee to decide how long they want a Minister to appear. It could be half an hour, an hour, or even an hour and a half. It would be very unusual for a Minister to appear for more than an hour and a half before a committee. I have never seen that happen. An hour is the standard and it is a matter of scheduling. Unlike in New South Wales, we do not have a dedicated week. It is usually a couple of weeks after budget day. We try to have Ministers appear over a couple of weeks in June. Usually it is during a sitting week, but sometimes it is during a non-sitting week depending on the Minister's schedule. The committee will usually be very flexible in accommodating a Minister. He or she might have several portfolios and might be required to appear before different committees. The process is not as long as yours.

The Hon. Dr PETER PHELPS: So you would not have a situation like that in the Australian Senate where a Minister is expected to spend eight or 10 hours answering questions in relation to a portfolio?

Mr SIEBERT: No.

Mr GONZALEZ-MONTERO: No.

The Hon. Dr PETER PHELPS: Is the Opposition happy with that? Do they think they can ask all the questions they want to ask in 90 minutes?

Mr SIEBERT: Most members of the Opposition would be very happy for the hearings to be longer. Again, it is a matter of bargaining when the committee determines how long it wants to set aside for a hearing.

The Hon. Dr PETER PHELPS: But the committee would have a majority of government members and it would be in their interests to maintain a one-hour or 90 minute limit.

Mr SIEBERT: Yes. I do not want to be political, but I think government members would try to limit the amount of time set aside for the questioning, and Opposition members would try to increase it. This is the only time of the year when Ministers appear before the committees, so Opposition members are especially eager to have that time and to use it as best they can. I think they would be thrilled to have more time. Questions are usually divided equally between the parties. However, there is a convention that a majority of the time for questions will be allocated to the Opposition in estimates committees and annual review hearings. It is the Opposition's time to scrutinise the Government. Again, it is up to each committee and the chair to decide how they want to run hearings. However, most chairs try to give a majority of the time to the Opposition.

The Hon. Dr PETER PHELPS: You said there is an end-of-financial-year review. Does the Minister not attend that review? Is it only the bureaucrats who attend?

Mr SIEBERT: That is right. The Ministers attends only the estimates hearings related to the budget for their portfolio or portfolios. The annual review, which is the review of the previous year's performance, is attended by the chief executive officer and senior officials of the relevant organisation.

The Hon. Dr PETER PHELPS: How long do those hearings last?

Mr SIEBERT: About the same time. Smaller entities may appear for half an hour and larger entities would appear for an hour to an hour and a half. It would be extremely rare for such a hearing to last more than an hour or an hour and a half.

CHAIR: Can you provide a brief explanation of your e-committee system? How does it work for members and the public?

Mr GONZALEZ-MONTERO: The e-committee system is eight years old. It was designed to make it easier for members to access the information they need to do their committee work. It was also designed to minimise the amount of paper we use. The system was redesigned about two years ago to make it more accessible for members and to modernise it. The portal contains all the papers that members need for their select committee meetings and they can access them on any device. It is a web-based system and members can access it from their iPad or tablet. The system is available only to members; it is not available to the public.

Mr SIEBERT: Members' staff also have access to the online system and the papers.

Mr GONZALEZ-MONTERO: We updated it to make it more accessible and modern. It has in some ways reduced the amount of paper we use. Members are generally happy to look at small documents online, but they still want larger documents printed. It depends on each member's preferences. In the past documents were available only to members of the relevant committee and their staff. During the last Parliament, members requested access to all of the documents for all of the committees. That move was fuelled by the smaller parties that did not have members on of all the committees. A request was made to the standing orders committee to allow all members of Parliament and their immediate staff to have access to all of the documentation available regardless of the committee membership, and that was agreed to.

Members can now nominate any immediate staff members they wish to have access, and that has proved useful for them. Initially our definition of "immediate staff member" was quite narrow and members wanted it expanded. For example, Opposition parties have asked for access to include staff in research units, and that has been provided. The standing orders committee also determined that if members allowed access they would need to be explicit about the consequences of releasing confidential information. We have not faced that situation yet, and it seems to have worked well. That is how the system works in a nutshell.

The Hon. MICK VEITCH: You referred to the confidential nature of submissions. How do you provide parliamentary privilege to witnesses appearing before committees?

Mr GONZALEZ-MONTERO: Okay, let me make the caveat that the proceedings of committees are confidential until the committees report to the House; that is except for hearings of evidence. So no material, there cannot be a disclosure of what has been discussed in the committee until it has been reported. Once the committee has reported then all the information is released, including the advice, and draft reports are released and they are published on our web site. There is an exception to this, that is, when, for example, a submitter asks

for his her evidence to be heard in secret or private. Not when it is private it is released after when the committee reports—

Mr SIEBERT: Until that point.

Mr GONZALEZ-MONTERO: Until that point it is released. When it is presented as secret evidence it is never released to the public and it is kept in a safe, in the secret evidence safe which I actually have not ever seen so I would not know how to find it.

The Hon. Dr PETER PHELPS: It is very secret.

Mr GONZALEZ-MONTERO: So that is the protection available to submitters or witnesses that they can ask for the hearing to be heard in secret. For a hearing to be heard in secret it has to be unanimously agreed to by leave by the committee.

The Hon. Dr PETER PHELPS: Just quickly Deputy Clerk, does New Zealand have a statutory enactment of parliamentary privilege or does it rely on 1689 and common law conventions?

Mr GONZALEZ-MONTERO: No, last year we passed the Parliamentary Privilege Act.

The Hon. Dr PETER PHELPS: Was that because of court cases or was that the conscious decision of the Parliament to move towards a statutory enactment?

Mr GONZALEZ-MONTERO: No, there were a couple of very famous cases in New Zealand. If you want I can send you some information about them if you want to read about them. But there were two cases: the first one was about a member of Parliament who said something in the House—

The Hon. Dr PETER PHELPS: And repeated it outside?

Mr GONZALEZ-MONTERO: Exactly. Came out of the House and the media asked the member "Do you stand by what you said in the House?" and that member said "Yes I do stand by what I said in the House." The court differed in that—

The Hon. Dr PETER PHELPS: It was not protected?

Mr GONZALEZ-MONTERO: That is right. There was another case where a member accused a communications adviser of incompetence, from what I can remember of the case. This communications adviser took offence and said that she had been defamed. She brought a defamation claim initially against the member but it was decided that because it was a member who said it in the House it could not go any further. But then this person decided to sue the official that had given the member advice, or the Minister advice, and so the question was whether that was privileged. So I think the Parliament here took quite a firm stance in terms of keeping its independence and for that reason it went through the Parliamentary Privilege Bill which then became the Act. It just clarifies for the court what proceedings are protected.

The Hon. Dr PETER PHELPS: Deputy Clerk, would it be fair to say that apart from a couple of very bad court decisions, which is what they were, the New Zealand Parliament would have relied upon the existing powers which it believed it had?

Mr GONZALEZ-MONTERO: Yes, that is right.

CHAIR: Thank you for attending across the ditch. You are the first people to attend via Skype in this Parliament House so congratulations on that milestone.

The Hon. MICK VEITCH: Without closed captioning as well.

The Hon. Dr PETER PHELPS: We almost needed it at the start.

CHAIR: I think you took one question on notice but the committee has resolved that answers to questions taken on notice be returned within 21 days. The Secretariat will contact you in relation to any questions you have taken on notice and any further that might come from committee members.

(The witnesses withdrew)

(Luncheon adjournment)

LUKE McNAMARA, Professor, Faculty of Law, University of New South Wales, and

JULIA QUILTER, Associate Professor, School of Law, University of Wollongong, affirmed and examined:

CHAIR: Would either of you like to make an opening statement?

Dr McNAMARA: We would like to make a joint opening statement. The work that we want to draw on is collaborative research in particular, so we would like to do that. First of all, we would like to thank the committee for the invitation. It is a pleasure to be here and we are enthusiastic about the opportunity to contribute to the committee's work. I wanted to begin by explaining where our expertise relevant to the committee comes from. We are both scholars of criminal law and criminalisation and are involved in a number of research projects that are concerned to contribute to the business of good criminal lawmaking, which of course is a shared concern of the Parliament and indeed this committee.

In that context we have a particular focus on the process of pre-enactment scrutiny of bills because we regard pre-enactment scrutiny as one of the most effective and powerful forms of quality control, preferable in many respects to post-enactment review by courts or by other mechanisms. Our research is focused on the effectiveness of existing pre-enactment scrutiny regimes. To that end we have completed a recent study published in *Current Issues in Criminal Justice* where we report on the finding of a study of the work of the New South Wales Parliament's Legislation Review Committee. Our primary submission arising out of that work on which we will elaborate in a moment is that the committee has the potential to play an even more effective role in the scrutiny of bills than it currently does. We would like to draw on that research to support that submission. I will hand over to my colleague Dr Quilter to that end.

Dr QUILTER: In case you have not managed to read all of the nuances of that article I thought it might be useful to set out the methodology that we approached for that study. We looked over a three-year period during 2010 to 2012, which of course included both Labor and Liberal governments during that period, at all bills but with a focus on criminal law bills as we defined them. We found 82 criminal law bills out of the 368 in that period. It was about 22 per cent of all bills, which is a fairly significant number of the bills. We then looked at all of the relevant Legislation Review Digests, in particular looking at the potential references and the references to infringements on rights and liberties. We then looked at all of the *Hansard* debates and introductions of the bills in relation to the ones that we had particularly flagged—the 82, that is—for references to do with the committee's work and/or more general references to rights and liberties infringements or otherwise. Then we also undertook a couple of select case studies to broaden our understanding of what was going on.

The specific findings that we found were that for 80 per cent of bills the committee found some kind of trespass on personal rights and liberties, so 80 per cent of those bills. Forty were referred to Parliament but of those 40 only in 45 per cent of occasions—so not in 55 per cent, obviously—was there either reference to the committee's work or a more general reference to rights and liberties trespassing. Finally, only one of those bills led to some sort of amendment on the basis of concerns to do with a trespass on rights and liberties. More generally from those findings we felt that the committee and its staff really do an excellent job in putting together those digests. They do thorough work. It is very detailed in terms of the scrutiny of those bills, but we do feel that it is very much an under-utilised resource. Secondly, the overall findings were the lack of visibility of the committee's work in both Houses and then finally that it has little to no impact on the types of amendments that are being initiated or actually operate in the Parliament.

It was really taking up those key problems about lack of visibility, lack of actually leading to amendments but with the focus on the fact that this digest is a really excellent source, we think. We think it is central for this committee to be looking at the way in which there can be an alignment between the timing of the work of the committee and the type of work they are doing with the introduction and debate on bills. We would suggest a number of recommendations that my colleague will elaborate briefly on. Some of those will be things that could be done today and do not require any particular amendment. They will just be adjustments to the practices. Some of those may require amendments to the standing orders and some of those in the perhaps harder category may require legislative amendment. I will turn back to Professor McNamara to provide a list of those recommendations

Dr McNAMARA: I simply have nine very quick points to make that I will make efficiently and then I will invite members of the committee to ask any questions of either of us that you would like to ask. By way of

a further preface though, it is important to recognise that our research has focused on the work of a particular committee. It has focused particularly on the scrutiny of bills component of the work that committees do in the New South Wales Parliament and we have had a particular focus on criminal law bills. But, with those recognitions, we are confident that there are some wider lessons to be learned about the role that the Legislation Review Committee can play in the process of lawmaking in this Parliament. The first thing is that the pressures of time mean that it is very difficult for committee members to be as fully familiar with the contents of the digests that are produced on a regular basis. It would be desirable if there was sufficient time for members to be both aware of and able to advocate in the party room and in the House on those matters.

The second thing is distribution of the digest, the logistics of distribution and timely distribution. It would be certainly desirable if those digests were distributed to parliamentarians in both Houses in sync with the timetable for the introduction and debate on bills. Third, I would say it would be desirable if the two-page summaries that are contained routinely at the front of the digest are made available when the bill in question is being debated in the relevant House. Fourthly, that there is adequate time to prepare and disseminate those digests in relation to those bills. Fifthly—this is perhaps a significant change in practice but one we believe could yield good results—we recommend that consideration be given to a practice by the Legislation Review Committee of proposing specific amendments to bills under consideration as distinct from merely noting or expressing concern about the contents of a particular bill. Related to that there might be consideration given to the revival of a practice which we did detect in operation in our research in 2010 of the Legislation Review Committee engaging in correspondence with the relevant Minister prior to the completion of their analysis, which seemed to us a good opportunity for dialogue.

The seventh point is that one of the distinctive features of the Legislation Review Committee as compared to other committees in the New South Wales Parliament, including Legislative Council committees, is that there is no specific obligation on Ministers to respond to the observations or recommendations of the committee. We recommend that consideration be given to the introduction of an obligation of ministerial response either during that early point of bill consideration by the committee or at some point during debate on the bill in the House. The last two points are points that we think it is appropriate to raise based on our research. They would involve legislative amendment to the Legislation Review Act but we wanted to note them for the committee's attention. The first is section 8A (2) of the *Legislation Review Act*, which effectively provides currently that a bill can be passed by either House without reference or, rather, without a report having been completed by the Legislation Review Committee. There is kind of a recognition of the realities of timing but the observation we would make is that ideally, of course, both Houses would have benefit of the work of the committee prior to any votes on any bills. To the extent that the provision does not require that, consideration might be given to its amendment.

Finally, we would acknowledge that the mandate of the Legislation Review Committee is necessarily confined to the terms provided by the relevant Act. It is, as many members of the committee will know I am sure, a product of a decision not to enact a bill of rights in New South Wales but to instead establish a Legislation Review Committee which would be alert to the potential rights and liberties implications of bills. If the view of this committee was that there needed to be a more active and widespread role for the Legislation Review Committee and scrutiny of bills then consideration might be given to the addition of additional criteria to that set of statutory provisions.

The Hon. MICK VEITCH: In that research did you only look at legislation or did you at all venture into disallowable instruments?

Dr McNAMARA: We did not. Our focus was on legislation, on bills. We recognise there is a very live issue about disallowable instruments and regulations. That was not a subject of our study.

The Hon. MICK VEITCH: I think you are one of the few people other than MPs who have actually read the *Hansard*. I do not know whether to commiserate with you or congratulate you on that. I note that you reflect upon which members have raised comments or recommendations of the Legislation Review Committee as part of debate on bills in the Chamber. In light of those enhancements that you articulated at the conclusion of your presentation, how do you think we could make it a more effective mechanism for the members of Parliament and also for the community? A lot of community members do not know that the Legislation Review Committee exists or how it operates. It is an important mechanism and it has an important role.

Dr QUILTER: In terms of the way in which the House operates and members operate it is that early dissemination of the actual digest itself together with having it available in the House when a bill is being

introduced or debated. Then also we would suggest or recommend that there needs to be some consideration as to whether the Minister who has responsibility for the initiating bill addresses the concerns that are raised in the digest.

The Hon. MICK VEITCH: Would that address be as part of the second reading speech or the speech in reply?

Dr QUILTER: Ideally it could be addressed as part of the second reading speech. I think it needs to be addressed somewhere, ideally there because obviously that is something that can be used for interpreting the statute later on and it is given the most priority and prominence if one is to actually read part of the *Hansard* record.

Dr McNAMARA: From our point of view any increase in visibility of the committee's recommendations would be desirable, however achieved. At the heart of that point is the observation that some scrutiny committees in some jurisdictions are criticised for the poor quality of the work that they do or for being tardy in their production of reports. Based on our research, no such accusations could be directed at the Legislation Review Committee. It is clear that the staff of the committee do an outstanding job, produce high-quality analysis and have actually very good antennae for the potential rights and liberties implications of bills.

It seems to us then to be a significant lost opportunity if the quality of the analysis is not, at a minimum, more visible in debates that occur in both Houses, which is why we have suggested that one mechanism to guarantee a minimum level of visibility was to require some consideration, some response, whether at the point of the second reading speech or at some other point in debate. But that, at a minimum, would achieve a high degree of visibility for the work of the committee and indeed, the substantive issues raised by the committee.

The Hon. Dr PETER PHELPS: I was a member of the committee for four years, but not anymore. I am just not sure how you get your timings because the normal process for a bill to be brought in is, the Minister will move the first read, which is a perfunctory effort and then he goes immediately into his second reading speech at that point. It is then adjourned. So there is no capacity for him—because the bill would never have been referred to the committee within that intervening 30 seconds between the first read and the second read. Unless you are suggesting that the relevant Minister in the subsequent House respond to the concerns raised by the committee that would be, as it currently stands, the only way it could be done practically at this stage, given that the first reading is perfunctory and the second reading happens immediately.

Dr QUILTER: Is it possible for the committee to review it prior to it getting to the first reading?

The Hon. Dr PETER PHELPS: You will have a greater chance of finding hens' teeth than getting a Minister to do a disclosure draft of any bill before it enters the House.

The Hon. TREVOR KHAN: The other difficulty, in a practical sense, is that, if we are talking about the current Government, the matter has been through the Joint Party Room. Perhaps before anyone sees a bill, it is ticked off generally by the Party Room. I am not going through the internal machinations of what may happen there. It will be ticked off by the Party Room. So at least one of the major sides of political debate is essentially hamstrung by what has happened in the Party Room before it has been before the Legislative Review Committee. And often it will have been through the other side's party room as well. And I would have thought, in most cases of criminal bills, probably ticked off there without anyone having had a close look at it either. So that the main two political organs, in a sense, have already made their decision, perhaps not on the basis of a detailed consideration of the bill but on the broad principles that are outlined in a briefing note. So, I struggle with it.

The Hon. MICK VEITCH: Are you asking a question or making a comment?

The Hon. TREVOR KHAN: It is a comment. I am trying to look at how—

Reverend the Hon. FRED NILE: It is probably misleading to call it the Legislation Review Committee because it sticks strictly to that relationship to the Bill of Rights debate and often there are bad things in the bill and they are not mentioned in the review.

The Hon. Dr PETER PHELPS: I disagree with that.

Reverend the Hon. FRED NILE: Bad things in different people's points of view.

The Hon. Dr PETER PHELPS: That is right. Would you agree that the current framework within which the bills are assessed is quite comprehensive, in terms of the rights of individual citizens, which was the original reason as to why this method was chosen?

Dr McNAMARA: I would agree with that and I recognise that the committee, over the years, has taken the view—this is the way I would put it: In some jurisdictions equivalent committees are bound by quite detailed and explicit parameters, in terms of the sorts of rights they are allowed to address. The wording of the Legislation Review Act is not of that nature and so the committee has taken the view that the reference to trespassing on rights and liberties, for example, can be interpreted broadly to allow the committee to touch on a broad range of rights and liberties concerns. Certainly the evidence suggests that that committee does that on a regular basis.

The Hon. Dr PETER PHELPS: Can I put forward a different hypothesis and that is that the committee reports are generally excellent, in fact, universally excellent. I cannot think of a single bad report. They contain clear, impartial assessments of the human rights and liberties implications of various bills but that, in many instances, they are ignored. Then the real question is why they are ignored. The real question is, are they ignored because it is a bad report? No, they are ignored because, in many instances, the decision is already set and, in other instances, because there are members of the Parliament who just do not care what that committee would have to say.

CHAIR: Professor McNamara, I will be taking that as a comment.

The Hon. Dr PETER PHELPS: You mentioned you did an analysis of who actually raised it in the Parliament. I would be very surprised if there were many who raised the assessment because, at that stage, if you were to say, "This is a bad bill" because it introduces a whole range of rights, the Henry VIII clause—a whole range of things—you are essentially going against what your Party Room has determined previously is the preferred course of action in relation to the bill. That is the real problem.

Dr QUILTER: It tended to be independents and members for The Greens who raised real concerns or issues, rather than members of either the Opposition or the Government.

The Hon. MICK VEITCH: Again, that is because of the processes, as the honourable the Deputy President articulated is the way legislation works through the party processes in this place. So I think you will find the crossbenchers and independents will have a process where they could raise it, where once it goes through the party rooms, the majority of the members are locked into a position.

The Hon. TREVOR KHAN: The majority of members in the House are but we are locked.

The Hon. MICK VEITCH: I think it is a timing issue.

The Hon. Dr PETER PHELPS: Not totally locked. Even if we were to have a situation where the bill could not proceed in the second House, without having been examined by the committee and Government responded to the committee, what do you envisage would be the actual material change in the way the legislation progressed?

Dr McNAMARA: My response would be that I would put on my eternal optimist's hat and I would suggest that one could not expect an immediate effect of any particular sort but there might be a longer term benefit. I know academics can be criticised for using vague concepts and pie-in-the-sky stuff but one of the things that is often spoken about in the context of introducing law-making processes that are more respectful of human rights, is the idea of embedding a human rights culture in the way we talk about social policy and about law-making. Certainly, one of the longer term goals that I would imagine might be achieved with greater visibility of the Legislation Review Committee's observations over time is that human rights arguments become part of the more regular conversation.

I would certainly add to the summary that Dr Quilter gave earlier, that one of the things that we were struck by was the absence of discussion of substantive human rights issues in the discussion of bills, whether or not that were to take the form of a specific opposition or proposal for an amendment but the absence of the

language of human rights. So one of the observations that I would add—based on research that has been done on the work of the Joint Committee on Human Rights in the United Kingdom's Parliament—is that at the point that that committee, which is a rough equivalent of the Legislation Review Committee in this Parliament, at a point in time that committee was also suffering from equivalent visibility challenges. And one of the changes that it began to make was that, rather than simply express concerns or make recommendations, it began to articulate specific amendments to be considered in the relevant House.

I am not going to suggest to you that that miraculously changed the outcomes overnight, but what it did do, very quickly, was to increase the visibility of human rights considerations and made it much more likely that human rights considerations would be debated when that bill was up for consideration. So, these are longer-term objectives but if one of the concerns of this particular Select Committee is to put in place processes that, over time, can incrementally improve the quality of the work that Parliament does when it comes to the creation of laws and the production of good policy for this State, then those things might be considered.

The Hon. Dr PETER PHELPS: However, the difference is that the Westminster Parliament has one-, two- and three-line whips. Effectively, under the Australian system, every vote is a three-line whip, bar a small number of what might be called conscience votes on particular moral issues. Even in the United Kingdom, unless it is part of the policy portfolio which they took to the election, the Whip will not call a three-line whip on any vote. So you are stuck with one- and two-line whips, which allows a greater degree of conscience. Now, unless the Labor Party plans on giving up the Pledge, which I do not think they are likely to do in the near future, and we are judged by the same standard in the Coalition, how do you get around that particular situation? Certainly, a human rights committee in the United Kingdom can recommend amending legislation but where you have effectively got a three-line whip on everything which happens in a New South Wales and an Australian Parliament, there is not going to be any material change. I do not disagree with your vision, I am just not seeing a six-lane super highway from our current position to where you suggest.

Dr QUILTER: If that is the case though, is there a point to having this excellent work being done, if it is really destroyed by something that is actually not going to have any effect?

The Hon. MICK VEITCH: Which is going to be a good segue to my second question. In light of the body of work that you have completed, looking at the Legislation Review Committee and understanding or appreciating how that committee came about, do you think a Bill of Rights would have been a better mechanism, as opposed to the Legislative Review Committee?

Dr McNAMARA: That is a very big question, Mr Deputy-Chair. It is one that I could talk for hours about, as it happens, but I will not. I always start conversations about bills of rights with a really important point: We need to know what we are talking about because often, when the phrase is used, many people will assume we are talking about a bill that gives substantial powers to the Judiciary. It is important that we recognise that a bill of rights does not necessarily mean that at all and there are bills of rights models that are really more sophisticated versions of what currently exists in the form of pre-enactment scrutiny, the arrangements that we currently have.

The Hon. TREVOR KHAN: Something like the Canadian model.

Dr McNAMARA: There are a number of options. I certainly think there is scope for giving wider consideration to how the underlying principle, if you like, that informed the establishment of the Legislation Review Committee, how that underlying principle could be better realised. A cynical member of the electorate might look to the reality of what is going on if they were privy to the information and think, why would we have this system where there is enormous, excellent-quality research done by great staffers to a committee meeting regularly to endorse those recommendations? But that process seems to be to a large extent, as members here have explained, at cross-purposes with the mechanics of how laws are made. That is a great dilemma and I think it is one that needs to be confronted. I would not want to argue for the abolition of the Legislation Review Committee because I think it is important that we continue to find ways of improving the quality of law making and that mechanism, however limited, continues to make a contribution.

Reverend the Hon. FRED NILE: As cross-bench members, we get extensive criticism of new Criminal Law bills from the Bar Association, the Law Society and the Legal Aid groups, listing all the negative impacts on human rights. If you took that literally we would not pass any bills in the Parliament. So we have to weigh up the greater good that comes out of the legislation, which is what the Government has done. They know it reduces human rights; it is quite clear it does. In fact, in quite a few recent bills we have had do that exactly

because of the terrorism threat and so on. So we have shifted into an area where we are reducing human rights deliberately, or governments are.

The Hon. TREVOR KHAN: Could I raise this? If what you see as a viable outcome is greater visibility to the reports, then—because these things are generally tabled on a Tuesday—is a way forward for there to be at least the start of a debate on the contents of the Legislation Review Committee Report during the—

The Hon. Dr PETER PHELPS: —Committee Reports Take Note in the afternoon.

The Hon. TREVOR KHAN: The Tuesday Take Note report. That would at least start to ventilate the issue hopefully before the legislation is actually debated in our House. To me that mechanism seems to be the only way that I can think of that we are going to get people thinking about it because at present the report is simply tabled, we get an email with a link some half an hour later, or thereabouts, after tabling and that is just about the end of the set in that sense.

Dr QUILTER: That would seem to be a good change. I wonder if I could go back to a question that the Deputy Chair asked in relation to how the public more generally might be involved in the visibility, for instance, of the committee's work. One thing I was thinking about is the excellent way in which now electronically both the second reading speech and the text of the bill is available; I wonder if there could also be a link on that homepage to the committee's actual digest. I know there are other links and other places where you can find it but in relation to a bill that is—

The Hon. TREVOR KHAN: You need to be a rocket scientist to find it.

Dr QUILTER: Or us, and I was just thinking that you could have another link to the Legislation Review Committee's digest on that page alongside the text of the bill and/or the second reading speech there, which would give greater visibility to a larger body of researchers. The other thing I was thinking about was the use of social media, dare I say it. If there is a function, for instance, of the Legislation Review Committee to have a Twitter account and to tweet when their 20-odd different digests come out to those followers—I would be one of them—that might be another mechanism for at least providing some, albeit limited, more visibility to the work of the committee.

The Hon. MICK VEITCH: I would be happy for you to take that on notice and go away and mull it over a bit further if you want and come back with some suggestions.

Dr QUILTER: I would be happy to do that.

The Hon. Dr PETER PHELPS: Surely the retention of it serves as an angel on the shoulder of members of Parliament that you might be voting for this bill but you should remember that it has significant implications for the restriction of rights and liberties for members of the public. If nothing else that is a reason to retain it.

Dr McNAMARA: I guess my response would be at a minimum I would hope that the committee has that effect, but the image of the angel on the shoulder is a bit too light; I think there needs to be a slightly more obvious presence.

CHAIR: You want a canary in the mine instead.

Dr McNAMARA: For those reasons the committee's existence is important and certainly I think should continue. But I go back to our primary submission: we see enormous quality in the analysis of what is being done in the name of the Legislation Review Committee and notwithstanding all the very real barriers and considerations that members of the committee here today have articulated to us, which we appreciate. None the less, we think there are some modest procedural changes that can happen that would make a contribution towards increasing the visibility and over time perhaps will increase the level of discourse around human rights considerations.

I will just add there that we focus very much on rights and liberties implications because that is the focus of the Legislation Review Committee but, as I mention in one of our earlier submissions, there is the broader question of whether or not scrutiny of bills should have a wider mandate, that it might consider

considerations other than simply rights and liberties infringements. The response might be that we have enough trouble paying serious attention to these issues why introduce more? But if the concern of this particular select committee is what are the various ways in which the committees can make a contribution to the quality of lawmaking and good policy then we might want to consider that there are other valid considerations in addition to the rights and liberties implications of bills.

CHAIR: Professor McNamara, one last quick question: It is right to say you formerly served as an expert adviser to the Legislation Review Committee?

Dr McNAMARA: Correct.

CHAIR: Does that committee still have such a position?

Dr McNAMARA: That is a very good question, Chair. I do not know the answer to that question. My understanding is yes, but I have not served in that capacity for some nine years and so I could not give you an answer. I would certainly encourage the continuation of that practice, not for myself out of self-interest, but certainly I think there was great value as academics in having the opportunity to be involved in that process. Could I just add to that—and I know I speak on behalf of Dr Quilter and myself—that we were very pleased to receive this invitation because the sort of work that we do comes from a desire to contribute to the quality of the work of the Parliament and of government generally and I think many academics, many legal experts, would fall into that category, and so I think consideration should be given to the maintenance of those sorts of practices of having legal advice from outside the committee and outside Parliament.

CHAIR: Thank you very much for your participation today. The committee has resolved that the answers to questions taken on notice be returned within 21 days. The secretariat will contact you in relation to those. I think also there were some questions from Mr Veitch with reference to any suggestions you may have. Thank you very much for your time.

(The witnesses withdrew)

NEIL LAURIE, Clerk of the Parliament, Department of the Queensland Legislative Assembly, before the committee via Skype, sworn and examined:

CHAIR: I now welcome our next witness, Mr Neil Laurie, who is joining us via Skype. Would you like to start by making a short opening statement?

Mr LAURIE: I would like to start by thanking the committee for the indulgence in accepting my late submission. I have outlined in the submission to the best of my abilities what I think would be of use to the committee. It is a little bit like how long is a piece of string; I could talk indefinitely on the subject, but perhaps if I just leave it there and allow the committee to ask whatever questions they may have it would be a better use of the time.

The Hon. Dr PETER PHELPS: How do you get over the problem of executive dictatorship by majoritarianism?

Mr LAURIE: Executive dominance of the Parliament will, of course, vary from Parliament to Parliament based upon the structures of that Parliament, the composition of that Parliament and the cultures of each Parliament as well. If I may say so, I think that in Australia generally, and I hate generalisations, we have an unfortunately long history of a culture of accepting that executive dominance as part of the rules of the game, if you like. I do believe that cultures can be changed by structures and whilst you will never completely obviate the problem or the issue, structures can alter those cultures to some degree.

The Hon. Dr PETER PHELPS: In a unicameral system of a majority situation by the government how can you expect to have an independent committee system acting as a protection from executive dominance when those very members could find that their future careers are dependent upon executive preferment?

Mr LAURIE: A committee structure and committee processes at the very least allow information interflow and the ventilation of issues. If I think back to Queensland prior to 2011 and the introduction of our portfolio committee system, prior to the default position of legislation being referred to the committees, for example, I think back to a situation where the core problem was that members were largely, first, very uninformed about the legislation and the impacts of legislation on stakeholders; secondly, stakeholders had no formal process to put their views, so stakeholders were left with either lobbying the department and/or Minister responsible for the bill or the shadow spokesperson, if you like, to try and get their issues ventilated.

I think that the structures that have been put in place since 2011 at the very least allow a proper period to slow down legislation if it is referred to the committees and some ventilation of those issues and stakeholder input. I cannot suggest that it is a complete panacea to the problems that you pose or the issues but it is a remarkable step forward, I think, than what we had prior to 2011. If you want to make more structural changes to a game-change culture even more you have got to attack the root cause of the issue, which is stuff like your voting systems and the composition of your House, which is precisely what they did in New Zealand where I suppose they are at a different level once again in terms of their committees, fundamentally because of the make-up of their House.

The Hon. Dr PETER PHELPS: In relation to the referral of bills to committees, is it the situation that every bill is automatically referred unless it is exempted by the House?

Mr LAURIE: That is correct.

The Hon. Dr PETER PHELPS: What is the mechanism for the House seeking exemption? The default is that they all go to committee but Ministers can do what?

Mr LAURIE: The standing orders provide when a bill is introduced by a Minister or a private member that they indicate what committee they want the bill to be considered by. Any time after that either the Minister or a member essentially can move an urgency motion that allows the bill to be either considered within a time that is less than the default position of six months in the bill or not considered by the committee at all and dealt with by the House. So one of those two mechanisms is then put in place. Most bills are introduced on the Tuesday of a sitting week, the first day of the sitting week. The Committee of the Legislative Assembly [CLA] as a matter of course considers all bills introduced and can also set a timetable shorter than the six month's

referral to the committee. They do that by resolution of the CLA and that is reported to the House. If the CLA cannot agree on that then it comes back to the House.

The Hon. Dr PETER PHELPS: For the House to give effect to that recommendation?

Mr LAURIE: If the CLA agrees on it the House is simply notified of it; if the CLA cannot agree on it then the House has to resolve the issue.

The Hon. Dr PETER PHELPS: Who makes up the CLA? Are they Whips?

Mr LAURIE: The CLA at the moment is comprised of the Speaker as the Chair, three Executive Government members, three senior non-government members and one crossbencher. So the Government does not have the numbers.

The Hon. GREG DONNELLY: Thank you for your submission, which is very useful and greatly appreciated. I wish to address the issue of the review of expenditure in the Queensland Parliament. In Budget Estimate hearings in the NSW Parliament the forthcoming expenditure for the financial year is examined by committees. What is the equivalent process in Queensland for reviewing government expenditure for the forthcoming year?

Mr LAURIE: Our system, which has been place since 1996, was very much modelled on a system from New South Wales as I understand it. Essentially prior to the creation of portfolio committees each year we used to establish seven Estimates committees to consider the various compartments of the budget. Now the estimates simply go to the portfolio committees to consider the expenditure for the areas within their area of responsibility. It essentially boils down to one day of examination of each portfolio committee's area in the committee hearing. So there is one day of Estimates hearings for each portfolio committee.

The Hon. GREG DONNELLY: If we take, for example, the policy area of Community and Family Services, a day would be allocated for that portfolio responsibility. A day would be how many hours approximately? Would it be six or eight hours?

Mr LAURIE: Essentially, if I recall correctly, they are an eight-hour day. Sorry, I correct that. The committees can meet any time between the hours of 9.00 a.m. and 9.00 p.m. As a matter of practice, with breaks and that, they tend to sit about eight hours in total.

The Hon. GREG DONNELLY: Could you explain the composition of the attendees at those committee hearings in terms of representation from the Government and the bureaucracy?

Mr LAURIE: The Minister responsible is always in attendance, as are all the chief executive officers [CEOs] and directors generals [DGs] of the various entities. The committee is allowed to direct question the Minister and the CEOs and DGs, and the Minister and the DG can refer questions to other officers. As a general rule of thumb essentially the senior executive level of all the departments for each portfolio turn-up at those hearings.

The Hon. GREG DONNELLY: Is that by invitation? For example, does the chair of the committee send a letter inviting the Minister and specifying individuals or is that determined by the Minister?

Mr LAURIE: It is essentially by default everyone of a senior nature comes from each area. The committees do have the ability to specify particular officers and that has occurred from time to time, but generally speaking it is just accepted that the senior officers will be in attendance. There have been few issues around that. I can recall a couple of years ago there was an independent statutory officer who was on leave during the Estimates hearing and the committee of the day was quite upset that leave had been allowed during the Estimates process.

The Hon. GREG DONNELLY: Do government members on the committee participate in asking questions or are questions left to the non-government members and government members essentially vacate the time to perhaps reduce the length of the hearing?

Mr LAURIE: When the system was first introduced in 1996 and right up until 2011, from memory, there was a very strict time allocation. Essentially time used to be strictly split between government and non-

government. Questions used to be timed, answers used to be timed; it was a real stopwatch sort of situation. From 2011 that strict allocation of time has been done away with, so it is more like a normal committee hearing if you like. So we do not have the stopwatches going per se. However, that being said, there is a bit of an informal agreement usually in committees as to the allocation of time. The chair and the non-government members sort of discuss it beforehand and work out how it is going to go. Some committees will be pretty well close to 50-50 questioning time; in other committees the questioning time will be 80 per cent non-government or 20 per cent non-government, it just depends upon the membership. I can forward you a couple of reports that show in more detail the breakup because we have examined each committee's process since 2011 in order to see how it has been operating. I am happy to send down to your secretariat Committee of the Legislative Assembly reports which go into greater detail as to the time breakup that has actually occurred in the last few years.

The Hon. GREG DONNELLY: That would be very helpful. Thank you very much.

Reverend the Hon. FRED NILE: In your excellent submission you make reference to the issue of government responses. In our current system they have six months; you have referred to the three month recommendation—that is what happens in Queensland?

Mr LAURIE: We have a situation where in statute it is three months and if the Minister is unable to comply within three months they give an interim response giving the reasons as to why they cannot reply. I would say the majority of responses are definitely done within three months. In relation to bills inquiries by committees, the practice of the Ministers now is to actually table a formal response to each and every committee recommendation at the time that the bill is brought back on for debate. In relation to reference or other inquiries, they would just come in usually on or around the due date.

Reverend the Hon. FRED NILE: When you have the Estimate hearings do the Ministers normally attend?

Mr LAURIE: Always. They are always in attendance. They must be in attendance at the estimates hearings.

Reverend the Hon. FRED NILE: You say "must"?

Mr LAURIE: The standing orders basically provide that they will be in attendance.

Reverend the Hon. FRED NILE: Is there a standing order that requires them to attend?

Mr LAURIE: That is correct.

Reverend the Hon. FRED NILE: Our system is voluntary. We have to negotiate with the Ministers.

Mr LAURIE: I should also mention that from about 1996 until 2011 questions could only be put to the Minister and then it was up to the Minister whether or not they would refer those to other officers. Since 2011 the committees have been able to directly question the DGs and the CEOs if you like. So it has really been accepted in our system from 1996 when it was introduced that Ministers are always in attendance and the Standing Orders reflect that.

Reverend the Hon. FRED NILE: We have to get the Minister's cooperation because our committees are of the upper House and most of the Ministers are from the lower House. You cannot push Ministers around from the other House in this process.

Mr LAURIE: That is one problem we do not have with unicameralism.

The Hon. Dr PETER PHELPS: Do the referrals to committees happen after the first or second reading stage of a bill?

Mr LAURIE: The bill is introduced, read a first time and then referred. It actually occurs before the second reading, which was part of the design of the system because we wanted members to be actually more informed about the bill before the second reading commenced.

The Hon. MICK VEITCH: I am interested in how your committees access regional participation. When you conduct an inquiry do you take committees into the regions? If so, what sort of support mechanisms do you provide for the members when they are on away committees? Do you have a committee secretariat? If so, what are their roles? For example, do you take Hansard? What are the processes?

Mr LAURIE: Ironically just before this hearing I was indicating internally that we have probably had more travel this year than I can ever recall in terms of committee travel. It is pretty well all for intrastate, if you know what I mean. Our committees are regularly—every week almost, or every second week at the moment—out in the regions on hearings on bills and references. They are going to remote communities and small regional centres. At the moment there is a lot of travel. In terms of support for members, we send one or two members of the secretariat, depending upon the nature of the inquiry and the workload, and we will send Hansard support as well. In effect what we do with Hansard these days is that it is recorded remotely and then transcribed in Brisbane. We are just introducing new technologies at the moment to make that a more seamless process whereby the reporters in Brisbane will be actually transcribing it as it is occurring.

The Hon. MICK VEITCH: You would have the technology available for them to stay in situ in Brisbane?

Mr LAURIE: Yes.

The Hon. MICK VEITCH: Are you looking at things like closed captioning as well? Do you publically broadcast or webstream your committees?

Mr LAURIE: We do broadcast all the hearings that are held in Brisbane—we have got the infrastructure for that. It is on my forward list to look at broadcasting from the regional centres when we do that but we are not at that point at the moment. We are very close to the point of being able to essentially do the transcription in Brisbane as it is occurring in the regions.

The Hon. MICK VEITCH: And closed captioning or tele-texting?

Mr LAURIE: We do not do closed captioning, no.

The Hon. Dr PETER PHELPS: I understand the Queensland Parliament's privileges are statutorily enacted rather than relying on 1689 common law?

Mr LAURIE: Yes.

The Hon. Dr PETER PHELPS: Was that done as a conscious decision to move in that direction or in response to some sort of court intervention or some sort of external privilege matter which prompted a clarification of parliamentary privilege?

Mr LAURIE: It first started in 1992. We had a Privileges Committee inquiry and the introduction of what was called our Parliamentary Papers Act, which was essentially the recodification of the 1688 bill, and provisions along the lines of the Commonwealth's Privileges Act. I think that that bill was provoked by probably the same reasons as the Senate legislation was provoked. However, in the 1990s, we had a much more extensive review of our constitutional arrangements. We had a consolidation of our constitution and a number of inquiries into the adequacy of privileges and things of that nature. Our current legislation is the result of the very long process of review, and it is actually probably one of the more comprehensive systems of statutory enactment of privilege in Australia, if not the most comprehensive enactment. Our legislation also specifically deals with matters like electronic communications to make sure, for example, that our broadcasts and everything are absolutely protected by privilege.

I would urge your committee to really look hard at the issue of the statutory enactment because I personally have been in many situations in the last decade or the last two decades in relation to the Queensland Parliament and the various challenges and issues that have arisen. I have been very glad of the fact that we have a statutory regime and we do not have to rely so much on the doctrine of necessity and therefore interpretations by the court. The legal profession is not known in Queensland for its knowledge of constitutional history, if you like, and so having things in statute is a lot easier when issues arise.

The Hon. MICK VEITCH: You talk about the constitutional statute. I note in your submission that you say that the constitutional amendment would provide a general power to initiate inquiries on your own motion.

Mr LAURIE: Yes.

The Hon. MICK VEITCH: What created that situation and what are you trying to achieve?

Mr LAURIE: That was something that arose out of an issue last year. When the upper House was disposed of in 1922, about 10 years later the then Labor Party introduced entrenched provisions into the Queensland Constitution that would make sure that an upper House could not be re-established without a referendum. At the same time, they introduced three-year maximum terms for the Queensland Parliament. Last year a bill was introduced to go to fixed four-year terms. During the process of consultation over that, there was a lot of concern about a number of aspects of what four-year terms meant in a unicameral Parliament and the absence of various safeguards. That then spilled into the fact of trying to give more, if you like, moral authority to the continuation of a committee system and ancillary matters. The genesis of that legislation was really the movement towards fixed four-year terms, which is now law, or will be law shortly; it has been passed by people at a referendum. These things in this current bill are really ancillary to the fixed four-year term issue.

The Hon. MICK VEITCH: Thank you.

Reverend the Hon. FRED NILE: I note you said a moment ago there would be a referendum to restore the upper House, but the upper House was only abolished by a vote of the members, I understand.

Mr LAURIE: That is correct.

Reverend the Hon. FRED NILE: Not by the people.

Mr LAURIE: No. In fact, in 1917 there had been a referendum on the abolition of the upper House, which failed. Despite that, they then appointed more members to the upper House, known colloquially as the suicide squad, in order to achieve that end.

The Hon. Dr PETER PHELPS: Was it not Ted Theodore's argument that they voted for us in an election so that was the referendum they needed?

Mr LAURIE: Yes, something like that. The Governor of the then colonial Government happened to be in the United Kingdom at the time.

The Hon. Dr PETER PHELPS: That is right, Deputy Governor, Trades and Labor Council guy.

Mr LAURIE: The Lieutenant Governor appointed a whole heap of new members, including himself as the president of the Council.

CHAIR: Thank you very much, Mr Laurie. The committee has resolved that answers to questions taken on notice be returned within 21 days. The secretariat will contact you in relation to the questions you have taken on notice, and particularly in respect of the report that you mentioned earlier in terms of the performance of the committees since their introduction.

Mr LAURIE: I will send those documents through.

(The witness withdrew)

LAURA GRENFELL, Associate Professor of Law, University of Adelaide Law School, appeared before the committee via Skype, sworn and examined:

CHAIR: My name is Scott Farlow. I am the Chair of the Select Committee on the Legislative Council Committee System. I will set the scene for you. We are in the Macquarie Room at the New South Wales Parliament. I have with me other members of the committee. On my left is the Deputy Chair, the Hon. Mick Veitch; the Hon. Greg Donnelly; Reverend the Hon. Fred Nile; the Hon. Dr Peter Phelps; and to my right is the Hon. Trevor Khan. Members of the public are also present and the proceeding is being recorded by Hansard. Would you like to make an opening statement?

Dr GRENFELL: Yes, if that is okay. I would like to begin by saying that I am a big supporter of the role that parliamentary committees can play in building a stronger scrutiny culture in Parliament. I would also like to outline that my expertise lies narrowly in the area of studying rights scrutiny committees in Australian State Parliaments. In 2015 I published my initial research in public law review and I have recently completed a survey of how anti-bikie bills were debated in four different State Parliaments, including New South Wales. In regards to my research published in the Public Law Review, I acknowledge that there were two factual errors regarding the size of the membership of the Legislation Review Committee [LRC]. I understand that this committee includes the Council's role in scrutinising bills.

In my time today I would like to advocate for the Council to conduct greater scrutiny of bills, both substantive and technical. I particularly encourage the Council to broaden its scrutiny of bills so as to strengthen the rights scrutiny role of Parliament and to complement this with a constitutional scrutiny role. The Council's discussion paper mentioned that the number of bills for which it had received references for substantive scrutiny since 1997 sits at 11, which equates to one referral every two to three years. This low number speaks for itself. I would like to focus on the technical scrutiny of bills by the Legislation Review Committee.

In my view, there are some indications that this committee has been struggling to effectively perform the role it was originally given in 2002, which is to assist Parliament in the balancing of rights considerations through systemically providing it with timely and relevant information and analysis. In my view, there are five main ways to strengthen the technical scrutiny provided by New South Wales parliamentary committees. These recommendations are interrelated and focus predominantly on the LRC. They are: first, strengthening the mandate of the scrutiny committee; improving the timing of scrutiny reports; increasing public engagement by giving the LRC the power to invite public submissions and to hold public hearings; the need for the LRC to directly engage Government Ministers; and the need for external advisers.

In this opening statement I will outline my views in regard to one of these, but I am happy to elaborate on the rest of them in the question session. As you know, the mandate of the LRC is modelled very closely on the Senate Standard Committee for the Scrutiny of Bills, which is a well-respected committee. The mandate is often referred to as the traditional common law scrutiny mandate or the cornerstone principles. The source of these principles is not overtly connected with rights protection. The mandate is understood to refer to Commonwealth rights, which a Parliament can abrogate if it shows a clear intention to do so. Most commentators agree that this mandate is vague, but the advantage of it is that it allows a committee to interpret the principles broadly if it chooses to do so.

My research indicated that between 2006 and 2011 it was the practice of the committee to interpret the principles very broadly in light of both Australian constitutional law and international human rights law. In my view, this interpretation of a mandate beyond common law rights can become a very stretched one, which can reduce its legitimacy. This broad mandate also makes the scrutiny role of the LRC very onerous and time-consuming, which may slow down the tabling of its reports. After 2011, the practice changed and the mandate was interpreted narrowly only to cover common law rights. Of course this is legitimate, but it does make the committee's reports less useful for both members of Parliaments seeking broader rights guidance from the committee. In particular, non-Government members and backbenchers do not have access to the advice of the Solicitor-General on matters of constitutionality. While State Parliaments have plenary power, members have a responsibility to be mindful and properly informed of constitutional constraints, particularly those flowing from chapter 3 of the Constitution.

I note that the Council is interested in how the Council's scrutiny function could be better aligned with values of the Australian Senate. I want to point out three things and you are aware of most of these. First, a separate Senate committee scrutinises regulations; second, another separate Senate committee scrutinises

referred bills from their constitutionality, amongst other things. This is known as a Senate Standing Committee on Legal and Constitutional Affairs. Thirdly, in 2011 the Australian Parliament established another committee to scrutinise all bills in light of Australia's international human rights obligations. It was recognised while there is some overlap between common law rights and international human rights, the mandate of the Senate Standing Committee for the Scrutiny of Bills could not legitimately be stretched to cover all international human rights.

In light of this, I think the LRC mandate and committee system in New South Wales Parliament could be strengthened by the following three changes. The first change would be to separate the scrutiny of bills from the scrutiny of regulations. I am sure many people have talked about that. The second change would be to add to the LRC's mandate so that on the referral of both houses it has the ability to scrutinise the constitutionality of a bill in addition to its rights scrutiny function. I advocate this option because in reading *Hansard* I see that many debates become dominated by constitutional anxieties, which can cloud the way of all the relevant considerations. Members are sometimes understandably anxious about the constitutionality of bills, in particular, the implications of chapter 3 of the Constitution. I think the ability to refer the question of constitutionality to a committee could help address this and allow members to see the bigger picture.

On the question of constitutionality, the committee members could be informed by an adviser, who is an expert in public law and constitutional law as well as public submissions made by academic experts and practitioners. The third change would be to establish a separate committee—whether it be a joint committee or an upper house committee—to undertake scrutiny of all bills for their compliance with our international human rights obligations along the lines of the Federal Parliamentary Joint Committee on Human Rights. It is worth remembering that under international law all entities within a federal nation state are bound by these international obligations. These three changes would in my view better align the scrutiny mechanisms of the New South Wales Parliament to those of the Australian Senate, and would also strengthen the scrutiny role of the Parliament.

CHAIR: Can you make that opening statement available in an electronic format that can be shared?

Dr GRENFELL: Yes, and I am happy to send it to the committee.

The Hon. Dr PETER PHELPS: Given that the existing committee looks at both constitutional and what might be called broader human rights, if not necessarily international human rights and obligations, what advantage would attach to separating constitutionality when it is already being investigated?

Dr GRENFELL: I may not have communicated clearly. I believe that it needs to have an explicit mandate to do so. It has been doing so, and particularly between 2006 and 2011. However, it has been doing it less frequently since 2011. The legitimacy of what it is doing is reduced if it is not explicitly in its mandate. Secondly, the LRC does not now have the power to invite public submissions and to hold public hearings. It would benefit the Parliament in many ways if it were given that power. I know that part of the inquiry is about encouraging community engagement with the Parliament, and I think this is one of the ways of doing that.

The Hon. Dr PETER PHELPS: The problem with that would be how then do you have a timely report from the committee that meets the legislative deadline? For example, I presume under your system where a bill is introduced it would go to a committee and it would then be open for public comment. The bill might come back six months later and then be subject to a further referral to a joint standing committee, which could delay it for another period of time. Why would you have the public intervene at the first instance rather than at a subsequent hearing when matters that go beyond the mere rights implications of a bill are supposed to be addressed?

Dr GRENFELL: I am afraid an aircraft just flew over the building.

The Hon. Dr PETER PHELPS: I will shorten the question. Would it not be better if you want public consultation on legislation for it to be dealt by one of our general purpose standing committees so that it can cover every aspect—human rights, international rights obligations, political assessments and economic assessments—rather than having public submissions and comment when you are simply looking at the rights aspects of a bill?

Dr GRENFELL: As I said, my research narrowly looks at the scrutiny committees, and I am obviously doing a comparative study. I note that Victoria's Scrutiny of Acts and Regulations Committee has the power to invite public submissions and to hold public hearings. It does not do the latter very often, and for all of

the reasons you mentioned. Timeliness is incredibly important, but sometimes public submissions directed to rights issues can also be very important. I have some ideas about the timeliness issue because it is imperative that reports are timely. I therefore do not think a six-month delay is feasible for most bills.

I have been studying anti-bikie bills, which are generally categorised as urgent. As we all know, the Newman Government passed three anti-bikie bills in a very short time. What is interesting about that story from 2013 is the committee was granted 48 hours in which to write up a report. During that 48 hours, 13 public submissions were lodged. That is incredible. Such a short period is not feasible. The desire to interact with the parliamentary committee on this issue, and particularly in regard to rights, was very strong, and I suspect that it would be in other States.

The Hon. Dr PETER PHELPS: Given that the LRC's reports are essentially prepared by officials and are in the overwhelming majority of cases simply approved by the committee, what further benefit could public consultation provide that is not already provided as a result of the consideration of officials who have prepared the draft report?

Dr GRENFELL: Having read the *Hansard* report of debates held in the New South Wales Parliament it has struck me how few times the LRC's reports are mentioned. I have contrasted this with debates in other States. When public submissions are made in Queensland, committee members and the Opposition show a greater interest in the reports and they refer to what various bodies were talking about. I was struck when I read the 2009 anti-bikie bill debates in New South Wales that the Law Society of New South Wales did not make a submission. When it did make one in 2012, it was a very minimal effort. I wonder whether that is because there is no formal avenue through which it can have its submissions received. I think that what the Law Society produced in 2012 constituted very poor guidance for members of Parliament. It was full of very aspirational statements about international human rights that are not useful in guiding members. That could be improved by the LRC system.

The Hon. Dr PETER PHELPS: What you are saying—and I do not disagree—is that the reports themselves are quite good, but parliamentarians should perhaps pay greater attention to them in their debates.

Dr GRENFELL: The quality has changed at different times. I do think that these sorts of reports would be enriched by public submissions. Of course, committees receive a range of public submissions, and many centres are prepared to do a great deal of research to enrich their reports. I also think that the status and influence of the committee would be boosted if it were to engage with the public in that way.

The Hon. MICK VEITCH: In your opening statement you mentioned having a separate committee to look at regulations as opposed to having one committee to review legislation and regulations. What is the rationale behind having disallowance instruments examined separately? Are there any jurisdictions that do that?

Dr GRENFELL: I am not an expert on the scrutiny of regulations; my research looks only at bills. The example I gave obviously related to the Senate. In Victoria those roles are combined in the Scrutiny of Acts and Regulations Committee. As is evident from its title, it reviews both. However, from my reading of the work done by people who have researched in this area it appears that regulations do not receive as much attention in the reports as bills, and often regulations are critical and they need scrutiny.

The Hon. MICK VEITCH: I asked that question because our Legislation Review Committee was also charged with looking at regulations. A number of members of the upper House are concerned that perhaps we are not applying as much diligence to our scrutiny of the impact of regulations on our human rights. How can we look at the regulations as well as legislation?

Dr GRENFELL: I agree that regulations definitely need more attention. It seems a strange place to cut corners and to lump everything together. That is particularly true if the practice is as it was from 2006 until 2011 when scrutiny was undertaken in light of constitutional law, common law and international human rights law. Obviously that involves a great deal of work. If that were done for all bills and regulations, timing would suffer. Splitting things up will also improve the timing.

The Hon. Dr PETER PHELPS: How does South Australia's upper House do it?

Dr GRENFELL: That is a good question. I do not think ours is a wonderful example. We have one of the smaller upper houses in Australia.

The Hon. Dr PETER PHELPS: Is there a Government majority in the upper House?

Dr GRENFELL: No.

The Hon. Dr PETER PHELPS: Why has it not exercised its power to hold the Executive to account? I apologise, that is not a question for you; it was a rhetorical question.

Dr GRENFELL: South Australia, like Western Australia, Tasmania and the Northern Territory, has no bills scrutiny committee. We do have a regulations scrutiny committee, but very few regulations are ever knocked back. That committee has been criticised in respect of whether it is doing do a particularly rigorous job.

Reverend the Hon. FRED NILE: The New South Wales Chief Justice Tom Bathurst is very critical of what he regards as the undermining of key common law rights. Would you acknowledge that the current climate in our society—15-year-old and 16-year-old boys have been engaged in murderous attacks on government officials and so on—has increased the pressure on our traditional human rights from a legal point of view with regard to the courts and the police?

Dr GRENFELL: I think that Parliaments are not generally very worried about abrogating common law rights, and there are not many consequences from doing so. I think that is why having a mandate that focuses on common law rights is not enough protection for individual rights amenities.

Reverend the Hon. FRED NILE: My question relates to whether in the current climate in Australia and throughout the world there is a need to review the application of those human rights?

Dr GRENFELL: I do not understand.

Reverend the Hon. FRED NILE: Governments are being forced to introduce legislation that reduces our traditional human rights to deal with Islamic terrorism and to provide for longer jail terms.

Dr GRENFELL: Governments have said that every century. I cannot see anything particularly new here.

Reverend the Hon. FRED NILE: I am not talking about South Australia; it is an island. I am talking about New South Wales, and Sydney particularly.

Dr GRENFELL: We do feel isolated at times.

The Hon. Dr PETER PHELPS: Would you agree that necessity is the plea for every infringement of human freedom? It is the argument of tyrants and the creed of slaves.

Reverend the Hon. FRED NILE: It is the desire of true democrats to protect our rights.

The Hon. GREG DONNELLY: In regard to looking at international models of best practice for legislative scrutiny—obviously you have got some experience in this area—are there any jurisdictions overseas that have come to your attention that in your judgement do it reasonably well and we should look at?

Dr GRENFELL: I have only looked really at the United Kingdom system and its scrutiny committee there is known as a Joint Human Rights Committee and that is increasingly having some impact on legislation in the United Kingdom but really you have to remember that there are many other dynamics happening in the United Kingdom, such as the Human Rights Act.

The Hon. GREG DONNELLY: Yes.

Dr GRENFELL: I do want to say, of course, that one thing that interests me is that it seems to be United Kingdom practice that the chair of scrutiny committees is never given to a government member. I think this is something important about scrutiny committees that the Council could consider. Currently the LRC is chaired by a government member and the Senate committee, its counterpart, is never chaired by a government member. So just small things like this I think are very important. They also feed into the public perception of these parliamentary committees. I note that in Victoria they have had parliamentary secretaries sitting on their

scrutiny committee and this, I do not think, looks particularly good in terms of committees trying to hold Executive accountable.

I think there are some things that we can learn from the United Kingdom but as I said it also exists at the Senate level. I know that New South Wales is very interested in how it can align itself with the Senate level. I also just want to mention that the Senate does work with what is called statements of compatibility, as does Victoria. Queensland has its own system of explanatory notes. Now this is something that actually assists these committees with the timing of their reports because these documents are actually produced by the Executive which is quite well resourced, and in these documents the Executive has to set out how its bill is compatible, let us say, with the traditional common laws principles, or something like that.

So it is first shifting the burden from Parliament which is relatively under-resourced to the Executive. The Executive has to set out the initial sort of statement, and then this speeds up the process of when the Parliamentary committee first starts looking at it, it has already got this set out. Whereas a second reading speech, as we all know, does not necessarily do that and in New South Wales when the LRC begins its scrutiny it is only relying on the second reading speech and I think it is at a disadvantage, unlike its counterparts in the Senate and in Victoria and in Queensland.

The Hon. TREVOR KHAN: I notice that you made the observation of essentially describing, I suppose, as a parallel between the Senate committee and our Legislative Review Committee [LRC]. There is a bit of a problem in that, is there not, in the context that our Legislative Review Committee is a joint standing committee of both the upper House and the lower House and in a constitutional sense they are quite different in their very nature. As a body, that is the Legislative Council, does not have control over the procedures of the LRC.

Dr GRENFELL: Yes, I very much agree with you. So that is why I was surprised in your discussion paper that you did cover the LRC and that there was quite a bit written on it in the submissions that you received. Why I have been talking about that Senate committee is because I have read all the *Hansard* reports from 2002 when the LRC was established. Throughout these reports it is quite clear that the LRC was modelled on that Senate committee. Obviously New South Wales generally probably sees itself as a Parliament comparable to the Federal Parliament in many respects. I am sure you do not compare self with self in the Australian Parliament. So this is why I have been mentioning the Senate committee because the LRC is the only scrutiny committee in a State Parliament to almost exactly have the same words as that Senate committee.

Now you have just mentioned, of course, that the LRC has five members from the lower House, three members from the upper House and this very much changes its dynamics. Now this is why I have been talking about the fact that a non-government chair could be quite a useful mechanism to, at least, address some public perceptions about the domination of the Executive of parliamentary scrutiny committees.

The Hon. TREVOR KHAN: I might accept that in theory but I think the problem is if it is a joint standing committee it is always going to be dominated by the Government.

Dr GRENFELL: Yes, that is so and that is obviously in the interests of the Government and it is very hard to change.

The Hon. TREVOR KHAN: It is problematic.

Dr GRENFELL: So that is why I was interested that your inquiry does include the LRC.

CHAIR: Thank you for appearing via Skype. If there are any questions on notice that you have taken in this committee hearing, the committee has resolved that answers to questions on notice be returned within 21 days and the secretariat will contact you in relation to the questions you have taken on notice.

(The witness withdrew)

Professor RODNEY SMITH, Professor of Australian Politics at the University of Sydney, affirmed and examined:

CHAIR: Do you want to make an opening statement?

Professor SMITH: Yes, I might make a brief statement. In my view this is a very welcome committee but also a very challenging one because it is difficult to get around all of the details and all of the ways in which committees impact the system. So responding to the terms of reference was quite challenging and I attempted to do that by looking at the issues of holding the Government to account, improving public policy and improving participation and so that is how I structured the submission. I think there is no ideal or perfect committee system out there waiting to be found. I think all committee systems are a matter of historical development and variation and they respond to factors such as the size of the overall Parliament, the size of the House, the resources available, local traditions, cultures and so on.

That became very evident the more I thought about this and the more research that I did. In my view there is no clear blueprint for an ideal or perfect committee system that can be found in other jurisdictions or, indeed, by sewing together in some kind of Frankenstein way some of the things that exist in other jurisdictions. I would say I think that the key dynamic though is the dynamic between the Executive and the Parliament as we just heard. In systems with strong party loyalty or strong party discipline, and that is the Australian parliamentary system—

The Hon. Dr PETER PHELPS: It sure is.

Professor SMITH: That means that in contrast to some other parliamentary systems, for example, the United Kingdom the dynamic is often expressed in government members of the Parliament who are not Ministers effectively acting as extensions of the Executive to some degree. I think that was actually acknowledged in the discussion paper around things like in estimates committees government members basically saying "we are not going to ask any questions". You might ask yourself, why is that?

The Hon. TREVOR KHAN: Because we are told not to.

Professor SMITH: Thank you.

The Hon. TREVOR KHAN: It is very simple.

Professor SMITH: Very simple, that is right. Then a strong party discipline leading from the basic tension between the goals of the Executive and goals of Parliament in terms of scrutiny, improving public policy and community involvement lead to some principles which I outlined on the second page of my submission. It is that committees should have, preferably, non-government majorities. The chairs of committees should preferably be drawn from non-government committee members. Committees ought to be able to initiate their own inquiries or not have them subject to veto by the Government or its representatives on the committee. Committees should have sufficient resources to balance those as needed. So time and expertise staffing of the Executive and that government should be required to respond formally and in a timely way to findings and recommendations.

If we think in terms of accountability then the six now General Purpose Standing Committees more or less meet those criteria compared with committees in other jurisdictions. One of a couple of things I highlight is the production of State papers. But the more important thing, I think, is the committees as they operate at estimates committees—while I think the estimates committees do good work—could be improved. One path for improvement would be to try to mimic the Senate in terms of expanded time, resources, having hearings twice a year and so on but another approach might be to go down the path the Victorian Parliament has which is to have a specific one committee which acts as an estimates committee. Why would that be a good thing, I hear you ask.

The Hon. Dr PETER PHELPS: Why would that be a good thing?

Professor SMITH: I think it would be a good thing perhaps, arguably, because it would involve members of the Legislative Council with a particular interest in budgetary government finance, government accountability, fiscal accountability issues. It would allow for comparison across different departments and different portfolios so to more of a whole-of-government picture than I think emerges from the current estimates

process. It might allow, as it does in the Victorian case, for the committee to make recommendations to improve the process of government expenditure and so on. So that is a suggestion that I make in the submission. In terms of developing sound policy I am very conscious of the limited resources in some sense of a Legislative Council of 42 members. One response to that, and I did make it at the C25 afternoon after some prompting, was that you could always expand the number of legislative councillors—

The Hon. TREVOR KHAN: That is not going to happen.

Professor SMITH: But that would be one response to the fact that you have 42 MLCs as opposed to 76 Senators. So comparing the Legislative Council with the Senate in some ways strikes me as a bit unrealistic simply because of capacity. If it comes to developing sound policy I guess the theme that I have tried to run through that is the sense in which the existing committees might be purposed to do legislative scrutiny. So the General Purpose Standing Committees could, it seems to me, double up as legislation committees. I have suggested that a selection of bills committee might be a useful thing. I am sure this is handled informally and I must say it is handled perfectly well informally. That may be the case. If so, you do not have such a committee but it may formalise things in a way that allows clear identification of the sorts of important, contentious bills that you do want to send the GPSCs acting as legislation committees. So that is the suggestion there.

In terms of promoting community engagement, I think the direction that the committees have moved in in recent years has been very good. I do not think there is any issue with organised interests, experts and so on providing evidence, providing submissions, having the capacity and the resources to have an influence on the committees but where I think things become more difficult is for people who are less organised. So ordinary community members who, nonetheless are important stakeholders, in certain policy and legislative areas, operation of the Executive and do not have those kinds of resources. I think the ways in which the committees in recent years have tried to engage with different sections of the community is a welcomed development. I just encourage that kind of continued experimentation with new forms of community meetings, not having a lot of meetings in this room, lovely as it is. Then I conclude with some arguments or observations about costs and benefits. I am very aware that while compared with other States this Parliament is relatively well resourced and has relatively large numbers of members, there are still limitations. It would be foolish to design a committee system or demand a committee system that does not take note of that.

Just in conclusion for an opening statement, I think it is difficult also to assess the benefits or the impact of committees. Some of you will know the work of Meg Russell from the Constitution Unit at University College London. She has done a lot of work on the impact of committees and trying to assess the impact of committees in the Westminster context in particular. It is a very difficult task. Other than saying that it is a difficult task and perhaps more needs to be done, I think that is a task for folk like me rather than folk like you. But in terms of making the case for the current level of committee work and any changes, any improvements or any reforms, that body of work might have to be done. That is an opening statement.

The Hon. Dr PETER PHELPS: In relation to the suggestion that there just be one estimates committee, I understand Victoria has that in existence but it is a joint committee, is it not?

Professor SMITH: Correct.

The Hon. Dr PETER PHELPS: It still suffers from the same problem that you get in all joint committees—that is, the dominance of the government members and hence the dominance of the Executive expressed through the government members.

Professor SMITH: That is true in the case of the Victorian Public Accounts and Estimates Committee but I do not think those issues would need to be repeated in an estimates committee in the Legislative Council of New South Wales.

The Hon. Dr PETER PHELPS: Is not an alternative method that has been demonstrated to provide effective scrutiny of the Executive the Senate system whereby you have the separation of estimates committees into policy areas and people who have a policy interest in a particular area can apply through that committee to ask whether it is being done efficiently and effectively? Surely that is the preferred model rather than a single committee where people are only there to assess the administrative function and the accounting veracity of what is happening in a department.

Professor SMITH: I think that would be the preferred model. The two difficulties I see there are looking at the way the estimates committees operate at the moment in New South Wales—

The Hon. Dr PETER PHELPS: That is my next question.

Professor SMITH: I just cannot see how you get from how they operate now to the Senate system. That is one issue. These are twin issues. Then I think I would need to be convinced that there are sufficient members of the Legislative Council who were prepared to enter into the spirit of the Senate style estimates committee. As I look at our estimates committees in New South Wales, they do good work, do not get me wrong, but the end of the day there is a lot of fairly partisan questioning and answering and a lot of running interference from some members.

The Hon. Dr PETER PHELPS: They are essentially dreadful. Let's not mince words. Not enough time is allocated. The proportion of time which is given to the government is squared out as one-third and which in most instances is not used so then becomes dead time. You may well face a situation of the opposition and the crossbenchers effectively being limited to maybe 120 minutes in a year in which they can ask questions of the Minister of which maybe the first 20 minutes are taken up with a long exposition on how wonderful his or her department is and how his or her ministerial ability has shone through. The real thing is if the opposition and the crossbenchers were to decide that in fact they were not going to allow only three hours for a Minister but were going to require the Minister to appear for eight or 10 hours or however long was required until the questioning is completed, that would go a long way to ameliorating the problems that we face under the current system, would it not?

Professor SMITH: It would in terms of a longer period for scrutiny as long as that time was used effectively. To some extent the difficulty is that that does require the cooperation of the government members on the committee.

The Hon. TREVOR KHAN: With respect, having been in both opposition and government I have to say your expectation of what opposition members are trying to get out of budget estimates is perhaps a little rose coloured.

Professor SMITH: No, it is not. No, I have read a lot of the transcripts or *Hansard* of estimates committees and the dot point reports that are produced as a result of that. I think there is a partisan dynamic. That is what I am saying.

The Hon. TREVOR KHAN: My only point is that the partisan dynamic is not on one side.

Professor SMITH: It has two sides or three sides.

The Hon. TREVOR KHAN: It is a two-sided exercise. I have to say whether we are talking about the performance of koala bears in the Environment portfolio or I can think of a couple where I was the bomb chucker, it was the first 10 or 15 minutes that you were seeking to achieve your outcome at budget estimates because that was the length of time you had the attention of various of the news media in the room before they rushed off to file their reports. There was an extraordinary political dynamic in getting a king sized hit on the Minister in the first round. The problem when we were in opposition was not the interference run by the Government; it was a question about whether you could construct a sufficiently catchy headline for the *Daily Telegraph* or the *Sydney Morning Herald*. I am a bit of a cynic in terms of simply blaming one side for it. We were all in the game.

Professor SMITH: I was not trying to blame one side but I think opposition members and crossbenchers probably have a different set of interests regardless of who is sitting in the chair.

The Hon. Dr PETER PHELPS: But it is not merely oppositions. Individual members have individual interests. I, for example, do not care about health. It is just not on my radar; I am not interested in it. There are people who love health. There are people who love local government, which again is something I really do not care about. Surely it is better for those people to be appointed to the committee which deals with local government or the committee which deals with health or whatever their interest might be rather than trying to construct a single committee which will have the breadth of interest to be able to dig down into the policy being created in that department. The estimates process is not merely a review of the department's interaction; it is also an opportunity to question the Minister over the basic policy. In fact, you cannot or you should not ask officials

about policy other than its implementation. In that instance surely it is better to have four, five or six variegated committees on particular policy interests and then members can say, "I am interested in that committee, I want to ask the Minister about those things," rather than construct a committee which is supposed to have a universal view over all departments.

Professor SMITH: I guess there are advantages and disadvantages in both. I am not opposed to a Senate style estimates system. I see the advantage is exactly what you are saying: that people who are interested in particular policy areas can nominate for that committee and so on. I do think there are advantages in being able to take a whole-of-government approach and seeing where some types of policy shortcomings, administrative shortcomings and inefficiencies are occurring across departments. I think there is also an argument for having on an estimates committee people who have a particular interest in that kind of forensic, detailed examination of what departments do and how they spend taxpayers' money. In my view neither system knocks out the other in terms of advantages and disadvantages. If you were to persist with the current system or a beefed-up version of the current system I think it does need to be beefed up quite considerably. You do need a lot more time so that we get the 15 minutes of the nightly news out of the way and then we get down to the serious business of really interrogating Ministers, with the aid of officials, about what is going on in their department. If we look at the Senate, Senate estimates committees are also used for 15 seconds of television news as well.

The Hon. Dr PETER PHELPS: But it is then followed by seven hours and 45 minutes of forensic interrogation.

Professor SMITH: Exactly.

Reverend the Hon. FRED NILE: In our committee system members in fact indicate what committees they want to serve on. They advise their party and the party nominates the people. People who have a particular interest in the environment make sure they go on the estimates committee that deals with the environment.

The Hon. MICK VEITCH: In our party if you flag an interest in a particular policy area you will never get there.

The Hon. Dr PETER PHELPS: Exactly.

Reverend the Hon. FRED NILE: I am talking about how the genuine minor parties work. The Christian Democratic Party and the Shooters and Fishers Party try to meet the interests of members.

Professor SMITH: I am sure it is a mix.

The Hon. Dr PETER PHELPS: If a selection of bills committee were to be introduced, what would be your preferred model? Would it be that bills go to committee for referral as a default unless they are excluded by a selection of bills committee, or should it be that the selection of bills committee examines bills and then refers bills on that they believe have sufficient gravity in the public policy sphere? Is it a default system or is it a selection system, in your view?

Professor SMITH: It is a selection system.

Reverend the Hon. FRED NILE: But in the way the upper House works as a democratic House, the members can vote to refer a bill to a committee.

The Hon. Dr PETER PHELPS: Which never happens.

Reverend the Hon. FRED NILE: It does happen.

The Hon. Dr PETER PHELPS: It has happened very rarely.

CHAIR: But there is a mechanism for it to occur.

The Hon. MICK VEITCH: At page 3 of your submission you say:

> 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.

That is in regards to budget estimates. That is an interesting initiative, because if we were to go to that extent the government of the day does not have to respond to budget estimates reports as per the normal process of other committees where there would be a government response within 26 weeks. If we were to go down that line as per your suggestion I would suggest the government would like to have an opportunity to respond to the recommendations. Can I ask why you would suggest that we head down that path?

Professor SMITH: Because I think it is helpful in framing debate around public administration in the State. If you look at the Victorian reports, they make a lot of recommendations. It does not mean the government has to take them up or even take them seriously but in a sense it puts them on the public agenda. Okay, not in a broader sense but on the specialist public agenda, the policymakers. It focuses the committee's attention on not just being critical of where public management or public administration is falling down or showing faults but saying, "What might we be able to do to rectify this? What more things might we want to know in order to rectify this?" Some of the recommendations are about the way the information is provided and the sorts of information that is provided.

I think having to make recommendations sharpens the focus of the committee. Different cultures would emerge in different places. The Victorian one is quite detailed and they make a lot of recommendations but it may be that in the case of New South Wales if you went down this track the committee would develop its own norms and it might say, "We do not want to have 150 recommendations. We want to have 10 that we really want to become part of the public debate and the government to respond to."

The Hon. MICK VEITCH: I put to you that our current budget estimates process would not allow us to move to those sorts of recommendations. We just do not have the time.

The Hon. Dr PETER PHELPS: That is why we have the joint Public Accounts Committee at the moment to make those sorts of recommendations.

The Hon. MICK VEITCH: But for us to do that we would need to go more to the Senate process.

CHAIR: No you would actually need to go more to the Victorian model I would suspect.

The Hon. Dr PETER PHELPS: You would basically be subsuming our current Joint Public Accounts Committee and the work it does in the role of the Estimates Committees.

The Hon. MICK VEITCH: So is that what you would envisage, Dr Smith?

Professor SMITH: Not necessarily. I think the Public Accounts Committee does an effective job often in New South Wales. I know the Victorian one does both of those things, so you would need to separate them out and there is obviously going to be overlap. But I think there would be a sufficiently differentiated area for a specialist Estimates Committee to still make recommendations. It is a suggestion for something to be considered, rather than something that I am saying has to be done. I would be happy to see the Estimates process strengthened in either of those ways, either by moving more towards a Senate system or longer hearings, moving away from engaging everybody on the committee in the process. I would also, I think, see merit obviously in the single Estimates Committee.

CHAIR: There has been some discussion earlier today about the subject matter of standing committees and you, in your paper, refer to them of course not covering the whole scope but said you did not see any reason for their expansion. Would you see perhaps merit in their abolition?

Professor SMITH: I guess, for me, they are not the most important element of the committee system in the upper House. With the option of establishing select committees to look into particular matters available plus the General Purpose Standing Committees, I think that standing subject committees do useful work but, if they disappeared, would that work not be done? I am not convinced that it would disappear. I think it would emerge in other elements of the committee system.

The Hon. Dr PETER PHELPS: That is right.

Reverend the Hon. FRED NILE: As thoroughly as those committees do work—and I have been on three of them, so I know how hard they work compared to our Estimates committees.

Professor SMITH: I am not comparing them with Estimates but I am comparing them, for example, with the General Purpose Standing Committees and with Select Committees.

Reverend the Hon. FRED NILE: When I say "Estimates", I meant General Purpose Standing Committees.

Professor SMITH: Okay.

The Hon. GREG DONNELLY: Thank you for coming this afternoon, Dr Smith. My question goes to the issue of accessibility, if I can use that word, of committee members to expert advice and expert opinion about matters, to help inform them to carry out their roles more competently and more effectively in the committee process. Increasingly we are dealing with more and more complicated matters. In all three dimensions really it is very difficult, in some instances, to fully comprehend and understand all aspects of what is being examined, particularly big initiatives of the government of the day. And no matter how one endeavours to try and get on top of the issues, so to speak, there are people outside the committee who have very high levels of understanding and insight into the issue that is being scrutinised by the committee. It could be in the context of Estimates or another policy area.

I am just wondering what your thoughts are about that issue of support to committees and how that can be done, perhaps in modelling we have seen elsewhere, which enables the committee to function with the members—who obviously have their responsibility as elected representatives on the Parliamentary committee—but being able to draw on serious expert advice to help them deal with the issue at hand and how that might be best brought about.

Professor SMITH: So there are different levels, I think. One is obviously engagement with experts on the basis of hearings and so on.

The Hon. TREVOR KHAN: Yes, called expert witnesses, such as yourself.

Professor SMITH: So that is one. So the expert witnesses, in that case, I guess, are acting pro bono. It seems to me that committees do mobilise that level of expertise where they need to. Where I am thinking about staff is this question that is raised in the discussion paper about having generalist staff versus more specialist staff support, Secretariat support, for the committees. I think there are advantages to myself having generalist Secretariat support in some ways, for the same reason that parts of me favour a single Estimates Committee so that people get across the whole of the connections between different policy areas. I think where you need that very specific technical advice on particular questions, of whatever kind, is it not open to committees to specifically draw in experts?

The Hon. Dr PETER PHELPS: It is. We have and we did.

The Hon. GREG DONNELLY: I am just trying to press you further on your thoughts and reflections on the efficacy of that. It obviously raises questions of the funding required to do that.

Professor SMITH: The funding required to do that would vary considerably. So some people will have expertise that is already available that can easily be provided. And I think there is an onus on a lot of public institutions, including universities I would say these days, for us to show something called impact of our research. So one way that people can show impact, for example, is by engaging with these sorts of Council committees. I do not think academics and others would be resistant to that.

It does not seem to me that you need a kind of general rule for saying we need this approach to engage in expertise. Because it seems to me that some of your committee inquiries will generate that, without you having to do anything more than put out the terms of reference. On other occasions, you are going to need to be a little more proactive. But I would not see there is one model that fits all of that. And as I said before, I think in terms of committee Secretariats there are advantages in people not becoming too attached to a particular range of areas of expertise. I guess the question, in terms of if you were to move towards, in a sense, retaining some external experts, is would you be closing off the range of opinion that you might otherwise gain because, if these are controversial areas, then presumably the committees want to hear from a range of experts. So, having one particular expert advising a committee or even a group of experts who are like minded, shall we say, is probably not appropriate.

CHAIR: Professor Smith, thank you very much for your time today, for attending the hearing and for your very thoughtful submission. If there are any questions you have taken on notice the committee has resolved that answers to questions taken on notice be returned within 21 days and the Secretariat will contact you in relation to questions you have taken on notice. There may be some additional questions from committee members as well.

Mr SMITH: Thank you very much.

(The Committee adjourned at 4.07 p.m.)