Current Issues
Background Paper

The Legislative Council of New South Wales:
Past, Present and Future

by

Barbara Page

Reprint Series

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Foreword

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Suggestions for future topics are welcome.

Rob Brian
Parliamentary Librarian

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THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES

In 1978 the people of New South Wales overwhelmingly supported proposals to transform the Legislative Council of New South Wales from an indirectly elected house to one directly elected by the people. This was the most important change to the composition of the Council in its to then 122 year history - a history that had been marked by repeated attempts to abolish or reform the Council and by criticism and questioning of the Council's role and operations.

HISTORICAL BACKGROUND

The old Legislative Council of New South Wales was created by an Act of the British government in 1823 as an advisory body to the Governor of the colony and was initially composed of five colonial officials nominated by the Crown. By 1851 its membership had increased to 54 - 18 of whom were nominated and 36 elected by colonists with certain property qualifications - and its powers had evolved to include limited legislative authority and financial powers. This Council was given the task of drafting the constitution to provide for responsible government in New South Wales. The draft constitution was passed by the British parliament with certain amendments (Lumb, 1977: 19). The New South Wales Constitution Act 1855 created a bicameral legislature, with an elected lower house and a nominated Legislative Council. The history of the Council since then can be divided into three phases according to the method of appointment of its members: by nomination from responsible government until 1934; by indirect election from 1934 to 1978; and by direct election since 1978.

Responsible government to 1934

The 1855 constitution provided that the Legislative Council would contain at least 21 members who were nominated by the government and who were appointed by the Governor for life, after an initial period of five years. However, while a minimum number of members was specified, a maximum was not, leaving the way open for governments to swamp an uncooperative Council with their supporters. This happened on several occasions, and by 1932 the numbers of Legislative Councillors had reached 126. One notable swamping instance was Premier Lang's attempt in 1925 to implement

Labor Party policy and abolish the Council by appointing an intended suicide squad of 25 Labor members who were pledged to its abolition. The attempt failed when some of these appointees decided that the attractions of life in the Council were greater than their commitment to its demise, but it so alarmed the conservative parties that the succeeding conservative government legislated to provide that the Council could not be abolished or significantly reformed without first obtaining the approval of electors through a referendum. On his return to power in 1930, Lang unsuccessfully attempted both to overturn the referendum requirement and again to abolish the Council. Following the Lang government's dismissal in 1932, the next coalition government held a referendum in 1933 in which electors approved radical changes to the constitution of the Council.

1934-1978

The Legislative Council was reconstituted in 1934 as a house of 60 members elected on a basis of proportional representation by the members of the Legislative Assembly and Legislative Council. Members were elected for twelve year terms, with fifteen members retiring every three years. The Legislative Assembly retained its sole power to initiate '... all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost ...' (so called 'money bills'), but the Legislative Council was given the power to reject all legislation other than bills appropriating revenue or moneys for the ordinary annual services of the government (which bills can be assented to with or without any amendments suggested by the Council). On all other legislation Council rejection or amendment could only be overcome through a long and complicated process to resolve deadlocks. This process, outlined under section 5B of the Constitution Act 1902, provides that where the Legislative Council rejects or fails to pass a bill, or makes amendments to it which are not acceptable to the Legislative Assembly, the Legislative Assembly may after three months pass the bill again in the same or amended form. If the Legislative Council again rejects or fails to pass it, or amends it in a way unacceptable to the Assembly, a free conference may be held between managers appointed by both Houses (see Lumb, 1977: 52-56). If there is still an impasse, the Governor can convene a joint sitting of both houses which may deliberate, but not vote, upon the bill. After the joint sitting the Legislative Assembly can decide to put the bill, either as it last passed it or in

amended form, to a referendum. If the bill is approved by a majority of electors it then becomes law.

While the change to a fixed number of indirectly elected Councillors prevented governments from swamping the Council, any hope that this new method of appointment would lead to a Council of independent members with a variety of experience and expertise was not fulfilled. Although some members, like Sir Henry Manning, did pride themselves on their independence (Turner, 1969: 5), Council membership generally became a source of patronage by which the party faithful could be rewarded (Rydon, 1983: 28). Membership was part-time and the record of attendance at Council meetings for some, though by no means all, members was very poor. The definitive study of the performance of the Legislative Council in its indirectly elected years concluded that 'it has had a useful record of undramatic "tidying up"' and that it had not always been intransigent (Turner, 1969: 123-4). However, governments resented the Council's ability to block their legislation and there were further attempts to reconstitute or abolish it during this period. In 1961 the Labor government held a referendum on a proposal to abolish the Council. It was opposed by the coalition parties and rejected by electors (by 57.6 per cent of valid votes cast), but at the same time there appeared to be a fair degree of bipartisan support for reform of the Council, particularly concerning the method of election.

The Liberal Party had campaigned against the referendum with the slogan 'retain, reform', but in its subsequent years in office it was unable to agree (either amongst itself or with its coalition partner) upon what that reform should be (Turner, 1983: 43). When the Labor Party gained government in 1976, however, Premier Neville Wran moved to implement his election campaign promise to reform the method of election for the Council. A bill to provide for a Council of 45 members, directly elected by the people, was passed by both houses (after lengthy negotiations between the government and the opposition-controlled Council, including recourse to the deadlock provision (see Jeckeln, 1979)), put to referendum in 1978 and approved by 73.21 per cent of voters.

THE 1978 REFORMS

The Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978 provided for periodic elections for the Legislative Council to be held at the same time as elections for the Legislative Assembly, with Councillors holding office for the equivalent of three Legislative Assembly terms. (As the term of the Legislative Assembly was then three years, this implied a reduction in Councillors' terms from twelve to nine years. However, in 1981 the term of the Legislative Assembly was extended to four years by referendum, thus returning Councillors' terms to a possible twelve years.) Fifteen of the 45 Councillors were to retire and be replaced by fifteen newly elected Councillors at each general election. To provide continuity in the changeover period, the Act provided for the Legislative Council to be reconstituted in three steps. Twenty-eight of the incumbent Councillors (those whose terms were not due to expire until 1985 or 1988) were to remain as members in the reconstituted Council, to be joined by fifteen members elected at the first periodic Council election (held in October 1978). At the next general election (held in 1981) the fourteen Councillors whose terms would have expired in 1985 were retired and replaced by a further fifteen directly elected members. It was not until the general election of 1984, when the remaining fourteen continuing members retired, that the Council was fully reconstituted as a directly elected body.

The method of election of Legislative Councillors that was eventually agreed upon in the negotiations leading up to the 1978 referendum was an optional preference form of proportional representation with the state as a single electorate. The government had initially proposed a system of nonpreferential proportional voting, using the 'list' system, whereby candidates were listed in groups and electors voted for one group only. This proposal was strenuously opposed by opposition members in the Legislative Council who wanted a preferential system where voters were required to nominate their preferences for at least fifteen candidates. The government acceded to this, except that the number of preferences a voter was required to indicate was reduced to ten.

This method of election remained in force for the three elections needed to bring the Council to its fully directly elected status. In 1987, however, the government legislated under the Parliamentary Electorates and Elections (Further Amendment) Act 1987 to

'provide for group or ticket voting in elections for the Legislative Council as an alternative to electors voting individually for candidates' (NSW Legislative Assembly, Parliamentary Debates, 11 November 1987: 15829). The subsequent 1988 Legislative Council election was, therefore, held under a proportional representation electoral system which combined both a list system and optional preferential voting - a system which the government considered would reduce informal votes, but which was criticised by others as a mechanism designed to provide major parties with control over the preferences of their supporters who voted a group ticket (NSW Legislative Council, Parliamentary Debates, 19 November 1987: 16437-16440).

The 1978 reforms to the Legislative Council were directed at its composition. Its powers, however, remained unchanged. The Council retained the power to reject all bills other than those appropriating revenue or money for the ordinary annual services of the government (including, therefore, its power to reject or amend new taxation measures), subject to the lengthy and complicated provisions for the resolution of deadlocks.

DEVELOPMENTS IN THE COUNCIL SINCE 1978

Party composition

The introduction of a directly elected Council brought short-term political gains to the incumbent Labor government. It won nine of the fifteen Council seats contested at the 1978 election, giving it a clear majority of 23 of the then 43 seats. In the next two elections (1981 and 1984) it won eight and seven out of fifteen seats respectively, giving it in 1984 a majority of 24 of the 45 seats. As a portent of things to come, however, two minor party candidates were elected to the Council in 1981 - the Reverend Fred Nile of the Call to Australia Group and Elisabeth Kirkby of the Australian Democrats. A second Call to Australia candidate was elected in 1984, and the March 1988 election saw minor party representation increased to five - three Call to Australia members and two Australian Democrats - who between them now hold the balance of power in the Council. (After the 1988 election the combined Liberal/National Party representation was nineteen, with the ALP holding the remaining 21 seats.)

In this situation, while major party members consistently vote in party blocs[1], their respective numbers are insufficient to guarantee the Liberal/National Party government passage of its bills through the Council, or to provide the ALP opposition with the means of preventing them. Both sides have had to negotiate with the minor parties to obtain passage of legislation, amendments and motions, a task not made easier by the propensity of minor party members to vote independently of each other.

This is especially true of the three members of the Call to Australia Group which has been split by internal dissension between Fred and Elaine Nile on the one side and Marie Bignold on the other. For example, in 70 divisions in 1988, while the Reverend and Mrs Nile always voted together, there were 29 occasions on which Mrs Bignold supported the opposing side. (On 24 of these occasions the Niles supported the government and Mrs Bignold the opposition; in the remaining five divisions the positions were reversed.) On the 32 occasions when the three Call to Australia members voted together, they supported the government on 29 divisions and the opposition on three.[2] The two members of the Australian Democrats were more cohesive, voting differently on only six occasions (when Elisabeth Kirkby supported the government and Richard Jones the opposition), but when they voted together their support was split almost evenly between the government and opposition (26 to 28).[3]

The net effect of this pattern of minor party voting is that the major parties have to try to persuade each minor party MLC of their case independently. With only nineteen of the 45 seats in the Council, the government needs to obtain support from four of the five minor party members in order to ensure that controversial legislation which is opposed by the ALP gets through the Council. In Committee of the whole, the government requires the support of all five minor party members, or four with the casting vote of the Chairman of Committees. This it has generally been able to achieve eventually, although not always without difficulty or compromise. In the parliamentary sessions from 27 April 1988 to 10 August 1989, 235 bills were passed by the Council (see Table 1), while six were not passed, two were later withdrawn in the Assembly, and a further two remain on the Council notice paper but are not expected to go any further unless agreement can be

reached on them.[4]

The analysis of Legislative Council performance between 1976 and August 1989 provided in Table 1 also illustrates the extent of compromise required when a government does not control the Council. Over this period there were three parliamentary sessions in which not only was the opposition able successfully to move amendments of its own, but the number of government amendments to legislation also stands out. These sessions - 1976-77-78 (before reconstruction) and 1988 and 1988-10/8/89- are the three where the government of the day lacked control of the Council. In the intervening sessions, when the government controlled the Council, the opposition was unsuccessful in securing its proposed amendments (with one exception) and the Council was much less able to persuade the government of the need for amendments of its own to bills received from the Assembly.

Procedures

The presence and tactics - notably the use of existing but long forgotten or ignored procedures - of minor party members have been a catalyst for some interesting changes which have taken place in Council procedures in the 49th parliament. Because the government does not have the numbers to ensure the passage of a bill, ministers have had to work harder at consulting and negotiating with members. For example, the government now holds formal briefing sessions for members about proposed legislation at which the government's advisers are available for consultation, and the parliamentary counsel is available to give some help to members in drafting amendments. More time has been made available for members to discuss and debate other than government business (for example, General Business now takes precedence on Thursday sitting days where previously it had taken precedence only after Questions, and motions to disallow regulations take precedence over all other business) and to respond to government initiated legislation. For example, there is now a requirement that debate on Council initiated bills be adjourned for five days after the mover's second reading speech.

Other significant changes are set out in the <u>Reports of the Department of the Legislative Council</u> which provide annual reviews of the Council's operations and procedures. (The first <u>Report</u> covered the period 1 January 1986 to 30 June 1987.) Other examples from the 49th parliament include provisions that give the leader of the opposition and leaders of other recognised parties or groups the right to speak to a ministerial statement for the same length of time as that taken by the minister, that permit ministers to reply at a later sitting to matters raised on the adjournment debate, and that petitions presented to the Council be referred by the Clerk to the appropriate ministers.

Full-time politicians

One change which became apparent very quickly after the 1978 reconstruction was a willingness on the part of Councillors to see their Council role as a full-time, rather than a part-time job. One rationale for this was that Councillors could now play a greater role as representatives of the electorate; another, more forceful, argument centred on the role the Council could play as a house of review through the development of a standing committee system along the lines of that operating in the Australian Senate. The final catalyst, however, appears to have been a search for compromise between factions of the Labor Party which resulted in an agreement that Labor Councillors would be admitted to the Assembly caucus once they were all popularly elected and on condition that they were full-time politicians prepared to take on electorate responsibilities equal to those of members of the Legislative Assembly (Turner, 1983: 45-48). In 1985 the base salary of Legislative Councillors was aligned with that of members of the Legislative Assembly, in recognition of their full-time status.

Legislative Councillors on both sides of the major party political spectrum now have electorate responsibilities to represent their party in seats or regions where their party is not represented in the Legislative Assembly -a role that was also played to some extent before 1978.[5] Councillors representing minor parties provide the only parliamentary access for their members' interests (as they are not represented in the lower house) and other Councillors may provide a focus for electorate representations from special interests, such as ethnic groups.

Comparisons of various indicators of Council activity (see Table 2) show that the Council and its members have been more active in their parliamentary duties in the chamber itself since reconstitution. Comparing the calendar years 1977 and 1986, for example, the number of sitting hours per year has doubled (and in 1988 exceeded that of the Legislative Assembly) and the number of questions asked without notice has almost quadrupled. Average attendance of members rose from 91.9 per cent in the 1976-77-78 session to 96.4 per cent in the 1988-89 session, when 22 of the 45 MLCs attended every sitting and a further four missed only one. This compares with a perfect attendance record for only seven of the 55 MLCs who were members for the entire 1976-77-78 session, with a further 10 members absent only once.

While these figures alone show that the full-time, directly elected MLCs of 1988 are more conscientious in their attendance at Council meetings, perhaps more significant is the substantial improvement in the spread of participation by members in the Council's proceedings in the chamber. For example, in 1977 three MLCs accounted for 40 per cent of all questions asked without notice and five MLCs, or one-twelfth of the Councillors, between them asked 50 per cent of the questions. Twenty-four of the then 60 Councillors asked no questions at all and a further seven asked only one. By comparison, in 1988, the three most active questioners accounted for only 28 per cent of the questions, seven MLCs (or just under one-sixth of Councillors) between them asked 50 per cent of the questions, and all but one Councillor asked at least two questions.

A similar picture emerges from participation in debates. In 1988 all Councillors contributed at least once, whereas in 1977 eight Councillors did not participate at all. In both periods, as one would expect, the leaders and deputy leaders of both the government and opposition were among the most active participants. Of other Councillors, opposition members were, in general, more active in both periods than their government counterparts, and in 1988 representatives of minor parties, particularly (but not only) Elisabeth Kirkby and Fred Nile, featured prominently. Using as a measure simply the number of times Councillors participated in debates in 1988, the seven most active Councillors (excluding ministers and the leader and deputy leader of the opposition) - who

amongst them accounted for well over half the number of contributions to debates - included four minor party representatives, the remaining three being ALP members.[7]

While these quantifiable indicators of a more active Council are supported by the impression of close observers that Council proceedings have become more lively and that debate is more informed, it is still the case that participation is uneven and that proceedings are, for the most part, less heated than those in the lower house. This latter point is not surprising, given the nature of upper and lower houses (see pp. 19-20 below), and the small number of ministers in the Council (although that number has risen from two to three under the present government). The forcefulness of questions without notice, for example, is automatically diminished if the minister in charge of the relevant portfolio resides in the other house and is, therefore, not present to answer them.

Committees

The Legislative Council had been 'modestly active' in joint and select committee work before its conversion to a house of full-time members (Turner, 1983: 48-55), a trend that has continued (see Table 3 for details of Council and joint committees). The major change in the Council's committee structure since then has been the emergence of a fledgling system' of standing committees, after a long gestation period. Liberal MLC, W.L. Lange, had called for a select committee to investigate this in 1979, and one was finally appointed in February 1985. It reported in November 1986, recommending the establishment of a system of standing committees, but it was not until June 1988 that two standing committees were appointed - one on Social Issues and the other on State Development.

These committees are firmly under the control of government members. Each has nine members, five government and four non-government (which in practice has meant three Labor and one minor party member). The chairperson is nominated by the leader of the government in the Council (the deputy chair by the leader of the opposition) and the person in the chair has a deliberative as well as a casting vote. The appointing resolution also provides that the quorum of a standing committee is three members, two of whom

must be government members. The committees are each supported by a secretary, a senior project officer and a stenographer, and may have staff seconded to them from departments (as has happened with the State Development Committee).

Both committees have very wide-ranging functions.[8] They may act on a reference from the Council or a minister, or of their own accord on matters arising from annual reports and petitions presented to the Council, all of which are to be referred to them (with the President deciding which committee is appropriate). To date, they have been engaged on references from ministers in their inquiries into adoption and drugs (Social Issues) and tendering and contracting (State Development) and a reference from the Council on coastal development (State Development). The Social Issues Committee has issued a report on the adoption reference; the State Development Committee has produced a discussion paper and two reports on tendering and contracting and a discussion paper on coastal development.9

Profile of members

The profiles of Council members have also changed. Compared with the 1977 Council members, Legislative Councillors in 1988 are on average younger, better educated and less predominantly male. This last characteristic is quite striking. Thirteen of the 45 Councillors - or 29 per cent - are women, a figure that compares favourably with the proportion of women in the 1977 Council (11.7 per cent), the 1988 Legislative Assembly (7.3 per cent) and the 1987 Australian Senate (22.4 per cent). (In fact, given that a quorum for the Council is twelve, there is a woman minister, two women hold temporary chair positions and two of the four table officers are women, it would be possible to hold an all female session of the Council!).

The average age of members in the 1977 Council was 57, with only 23.3 per cent of Councillors being under 50, while 35 per cent were over 60. In 1988 the average age was 52, with 42.2 per cent under 50 and 26.7 per cent over 60 (compared, however, with 71.6 per cent of members under 50 and only 7.3 percent over 60 in the Legislative Assembly). In terms of educational qualifications, the 1988 MLCs compare favourably with their 1977

counterparts and on equal terms with 1988 MLAs (see Table 4A). There appear to be less striking changes in occupational backgrounds.[10] Farmers and graziers, lawyers, and trade union officials are predominant categories in both cases, accounting amongst them for 50 per cent of members in 1977 and 53.3 per cent in 1988 (although in the latter period the proportion of lawyers is higher and that of trade union officials lower than in 1977). The one significant change appears to be the drop in MLCs from 'business' backgrounds in 1988 compared with 1977.

Support services

While the support provided to Councillors has improved since the early 1980s, when four typists were shared among all MLCs except for the (then) two ministers, and inadequate support facilities for committees were seen as a limitation upon the efficacy of Council committee work (Turner, 1983: 49), the increased activity in the Council that has come with the transition to full-time membership, the change in party mix of members, their interest in procedural tactics, and their expanded electoral role have all placed additional demands on the staff of the Council.

Unlike members of the Legislative Assembly, MLCs do not have electorate offices staffed by electorate and research assistants. The President, the three government ministers and the leader and deputy leader of the opposition are provided with their own secretarial staff and the chairmen of the two standing committees are each entitled to a research assistant or stenographer (in addition to the committees' own support staff). The remaining 37 Councillors share seven Council secretaries (as at 30 June 1988). In addition, the Council provides funding for research assistants who are employed by the parties, who then decide how their services are allocated between members. (The funding provides for six research assistants for the ALP, three for the Liberal Party, two for the National Party, and one each for the minor parties.) The Parliamentary Library provides a further source of assistance to Councillors (and lower house members) through its reference and information services. Its records of usage give a further indication of an increasingly active Legislative Council with full-time membership. In 1980-81 the Library did 257 jobs for upper house members. By 1988-89 this figure had risen threefold to 781. (Figures for

lower house members increased from 1107 to 1496 over the same period).

Members are also assisted by the chamber staff of the Legislative Council, the Clerk of the Parliaments, Deputy Clerk, Clerk Assistant and Usher of the Black Rod - who in turn are supported by five parliamentary officers. Chamber staff provide advice on procedural and other matters, advice for which there has been a greatly increased demand since the March 1988 election.[11]

ASSESSMENT OF DEVELOPMENTS SINCE 1978

The principle of having a directly elected Legislative Council had been supported by both the Liberal and Labor parties for some time before it actually happened, both because it was felt that the electorate no longer supported indirect election and on the grounds that it would increase the legitimacy of the Council (Turner, 1969: 127). As one commentator put it,

> If the [Legislative Council] was popularly elected perhaps it would be taken more seriously by the Assembly, the people and its own members. Such a change could be manifested in more conscientious attendance, higher salaries and better [electoral and parliamentary] facilities. In that case, it may develop into a house of review ... (Hausfeld, 1977: 99)

The developments in the Legislative Council since 1978, as outlined above, indicate that at least some of these hopes have been fulfilled, although some more securely than others. Overall, Legislative Councillors do appear to be taking their roles more seriously. They are now paid as full-time politicians and have some electorate responsibilities (although not of the same degree as MLAs); they have a better overall record of attendance in the house, and more of them are more actively involved in its proceedings. Their support facilities, while less than those of members of the Legislative Assembly, have nevertheless improved, especially with the advent of the two standing committees. (Not only are these two committees adequately resourced themselves, but the provision of secretarial/research staff for the two chairmen - and the appointment of a third minister (with outside sources of support) from amongst the ranks of government MLCs - means that there are fewer

Councillors vying for access to the facilities which are available.) These improvements could be expected to continue.

It is also the case that in this 49th parliament the Legislative Assembly has to take the Council seriously, because the government does not have control of the upper house. This has resulted in changes in procedures which allow more scope for briefings, discussion and consideration of legislation by Council members, government and non-government alike. The permanence of these changes, however, may depend upon having a Council where the majority of members does not automatically support the government of the day. A government in control of the upper house, whether the members have the added legitimacy of being popularly elected or not, may be impatient of such procedures and unwilling to consider suggestions for amendments to its legislation, as Table 1 suggests.

As long as the existing electoral system of statewide proportional representation with optional preferential voting continues, it is likely that minor parties will continue to be represented in the Council and that neither major party will have the numbers to control it. There are opposing points of view about the desirability of this, which reflect the ambivalent role of all upper houses in Westminster-style parliaments (see Sharman, 1987a).

The prescriptions of responsible cabinet government which underlie such parliaments depend on the notion of a structurally powerful executive responsible to the popularly elected lower house. Upper houses in such a system are, therefore, in an equivocal position. The stronger the upper house (in terms of the extent of its formal powers and/or the legitimacy afforded by its method of election), the greater the threat to executive dominance and, possibly, to strong stable government. On the other hand, a weak upper house may serve very little useful purpose at all.

In the nineteenth century when Australian state upper houses were established they were intended to act as a conservative brake or check on what was feared would be the excesses of the masses representatives in lower houses (Jaensch, 1986: 366; Parker, 1978: 197).

By the latter half of the twentieth century, however, these fears had either subsided or it was no longer considered politic to express them. Those who value upper houses now tend to praise them as places where ill-considered or hasty legislation can be reviewed in a forum removed from the hurly-burly of everyday political point-scoring which typifies lower houses, and as places where emerging issues, on which policy has not yet been formulated, can be aired. In Bagehot's phrase, 'a revising and leisured legislature is extremely useful, if not quite necessary' (Hamer, 1982: 62). Not all, of course, see any value in them: 'if the Upper House agrees with the Lower it is superfluous; if it disagrees it ought to be abolished' (Hamer, 1982: 60 (quoting Abbe Sieyes)).

Opponents of upper houses per se argue that the reviewing and checking functions can be performed just as well by lower houses if appropriate mechanisms are set up there (see, for example, Coghill, 1984). While this is hard to refute in principle, in practice governments have been notoriously, if understandably, loth to encourage such moves (see, for example, Indyk, 1980). The success of upper houses in performing a useful reviewing (as opposed to obstructing) function is also, however, partly at the mercy of governments - for example, in the provision of resources to support committees, or in the willingness of governments to take notice of and act upon recommendations made by the reviewing body.

Moreover, the point where upper house 'review' becomes 'obstruction' is often in the eye of the beholder, and for participants in the political process may depend upon whether that eye belongs to the government or the opposition. Commentators on the political scene, however, also hold differing views in this regard. For example, the response in The Australian to the New South Wales Legislative Council's promise to reject government legislation on teachers' work practices in September 1988 was that it was 'acting like a proper house of review for the first time in years' (10 September 1988), while the Sydney Morning Herald's critical editorial reminded Legislative Councillors 'that the Government must be allowed to govern' (6 September 1988).

A government's legitimacy under the Westminster system comes from its ability to

command the confidence of the majority of members in the lower house of parliament and it is this which ensures the primacy of lower houses. For upper houses to perform an effective review function without undermining this primacy, they need to operate with a mixture of independence and restraint. ('Independence', in this context, means giving a higher priority in certain circumstances (for example, in committee work) to their role as upper house scrutineers and reviewers than to the partisan dimension of government versus opposition that characterises lower houses.) Upper houses can then provide a useful reviewing function by enabling a second look - by both the government and other parties - to be taken at legislation emanating from the lower house. They can provide a separate public forum for independent scrutiny of the executive, and undertake inquiries into particular issues of public concern. The renaissance of the Australian Senate in the 1970s and 1980s, for example, has been at least partly due to its performance of these roles through the committee system established there in the early 1970s.

It is rather too early to assess how effective the two existing standing committees of the New South Wales Legislative Council will be in this regard, especially given the areas of responsibility which have been allocated to them. While these are very wide, and lend themselves to the consideration of issues on which the government has not yet formed a policy, it is arguable that, if the Council is to act as a house of review, other responsibilities might have been more appropriate - such as scrutiny of legislation or of estimates. The continuing exclusion of Legislative Councillors from the Public Accounts Committee and the demise of the Council's Subordinate Legislation Committee in 1987 upon the establishment of a joint Regulation Review Committee (on which the Council provides only two of the nine members) do not augur well in this regard.

It is also questionable whether the Council can support an effective committee system along the lines of the Australian Senate. Two committees are hardly enough to constitute a 'system', but it is hard to see that many more could be staffed by a Council of 45 members, not all of whom are available for committee work. (The President, Chairman of Committees, ministers, leaders of the opposition and the whips all hold positions which would presumably exclude them). If the number of Councillors was to be further

reduced, then this would be even more unlikely.

One final point that needs to be considered in this assessment is the role of ministers in the Legislative Council. It has been argued, most notably in Australia by Senator David Hamer (Hamer, 1982), that if an upper house is to be effective as a house of review of executive policies, then the executive should not be represented there at all. The presence of ministers (and aspiring ministers), intent upon seeing the government's legislation passed with the minimum of delay and fuss, is seen as not conducive to - and, indeed, in conflict with - the independence required for effective review.

On the other hand, if there is to be any real point in having ministers in the Council, they need to be there in sufficient numbers for them to be able to operate effectively and for the Council to be able to subject the government, through them, to proper scrutiny in parliamentary procedures such as question time and debates. While the number of ministers in the New South Wales Legislative Council has increased from two to three under the present government, this is still only three out of a ministry of 20. It is clearly impossible for these three ministers to be sufficiently informed about the other seventeen portfolios to be able to answer questions about them - either without notice or on details of proposed legislation. While there is a provision under section 38A of the Constitution Act and standing order 214A for the Council to request a lower house minister to attend to explain the provisions of a bill during the second reading or committee stages, this provision has not, so far, been used. A pre-election coalition proposal for Legislative Assembly ministers to attend Council question time on a roster system[12] would also have overcome part of this problem, had it eventuated. As it is, the Council appears to have the worst all worlds and, if it is to be taken seriously, the role of ministers there needs to be clarified.

FURTHER REFORM PROPOSALS

Reform of the upper house has been on the agenda of both major political parties over the last few years. In May 1987 the Unsworth Labor government floated a plan for reform which included allowing double dissolutions of the State parliament, reducing the number

of MLCs from 45 to 35, cutting the maximum term from twelve to eight years, and giving the party with the highest first-preference vote five extra places in the Council to ensure that the government of the day had control of both houses. The last proposal especially proved controversial and early in 1988 another version of Labor's reform plan appeared in which the 'winner's bonus' of five extra MLCs was dropped. Instead it was proposed that deadlocks on legislation be resolved through a joint sitting of both houses at which, it was assumed, the government's lower house majority would make up for any deficiencies in its upper house numbers, thus allowing the Council to delay, but not defeat, government legislation.

These proposals, stimulated by the expectation that no party would have a majority in the upper house after the approaching election (Unsworth, Sydney Morning Herald, 5 January 1988), went no further than the talking stage. Mr Greiner, then leader of the opposition, pointed out that 'Independents could obstruct or amend legislation only with the support of the opposition, together representing more than 50 per cent of the electorate' (Sydney Mornina Herald, 5 January 1988).

In government, following the March 1988 election, the Greiner-Murray coalition found itself in the minority in the upper house. It was defeated in its early attempt to unseat the Labor President, J. R. Johnson, and conflict further intensified when the government's proposed educational reforms were blocked in the upper house. Premier Greiner accused 23 of the 45 members of 'totally irresponsible behaviour', describing the twelve year term of members as an 'obscenity' (Australian, 5 September 1988). In the same month, in response to such defeats, the Liberal Party's state conference debated a motion to abolish the Council. The motion was defeated.

In April 1989 new reform proposals were drawn up by Liberal Party minister, J. Schipp, which advocated reducing the Council to 39 members with a maximum term of eight years. He is reported to have put forward several options, the favoured one being to divide New South Wales into three provinces of 33 electorates with each province electing thirteen Councillors. (Proposed changes to the constitution of the Legislative Council

must be passed at a referendum.) Nothing further emerged until early 1990 when Premier Greiner foreshadowed an electoral reform package to reduce the size of both houses (the Legislative Assembly would lose five MP's and the number of MLC's would drop to 40).

CONCLUSION

At their best, independent upper houses, with diversified party representation, can not only prove effective means of reviewing legislative programs, but in the process can reinvigorate the entire parliamentary process (Sharman, 1987b: 48). Developments in the New South Wales Legislative Council since 1978 have gone some way towards this goal. Where the Council goes from here will depend upon many factors, including the calibre of members, the party mix of members, the resources afforded to members and the way the committee system develops. Two crucial determinants, however, will be the extent to which parliamentarians and governments appreciate the work that can be done by a house of review, and the success with which members of that house can maintain a balance between the independence that effective review requires and the restraint needed to allow a government to govern.

ENDNOTES

I thank the staff of the New South Wales Parliamentary Library (especially Dr David Clune), Mr John Evans (Clerk of the Parliaments) and Mr Mark Swinson (Deputy Clerk of the Legislative Assembly), and Ms Lyn Fisher for their assistance in the preparation of this paper.

1. An exception to the norm of party voting solidarity occurred during debate on a Summary Offences Bill on 15 June 1988, when one National Party member crossed the floor to vote with the Call to Australia Group against the combined vote of the government and opposition.

2. In the remaining nine division they voted together against everybody else on four occasions; there were four divisions in which they did not all vote; and the remaining division was a conscience vote on an abortion bill in which they all

voted Aye.

3. In the remaining ten divisions there were six occasions on which one did not vote, three when they, the government and opposition all voted together, and the abortion conscience vote when both voted No. (These figures, and those in note 2, have been obtained from a record of voting patterns of minor parties supplied by officers of the Legislative Council.)

4. The six bills not passed were the Independent Commission Against Corruption Bill, the Forestry (Environmental Protection) Amendment Bill, the Children (Care and Protection) (School Attendance) Amendment Bill, the Property Services Corporation Bill, the Ombudsman (Amendment) Bill and the Police Regulation (Allegations of Misconduct) (Amendment) Bill. The two withdrawn by the Assembly were the Police Regulation (Reinstatement) Bill and the Children (Criminal Proceedings) Amendment Bill. The two still on the notice paper are the Industrial Arbitration (Further Amendment) Bill and the Teaching Services (Amendment) Bill.

5. For example, New South Wales Labor Party MLCs (and Senators) are assigned to non-Labor electorates where they are expected to raise the profile of the party. They are also assigned duties to party branches. (See report in The Australian, 28 March 1989.) Similarly, Liberal Party MLC, John Hannaford, was assigned Labor held seats in the western suburbs after the 1984 election with the task of establishing a Liberal presence there (Sydney Morning Herald, 12 September 1989).

6. The years 1977 and 1988 have been chosen for comparison because 1977 was the last full year before reconstitution, 1988 is the last full year for which figures are available, and they are both years in which the government of the day did not have control of the Council.

7.   The sources for this analysis of the spread of members' participation are the index to Hansard for 1977 and the NSW Parliamentary Library records for 1988.

8.   For details, see NSW Legislative Council, Resolutions Relating to Committees and Other Bodies, extracts from the Minutes of Proceedings, Second Session of the Forty-ninth Parliament, revised issue, 29 May 1989.

9.   I am grateful to the Secretary of the Standing Committee on State Development, Dr Brian Jinks, and the Senior Project Officer of the Social Issues Committee, Mr Tony Pooley, for their information and advice.

10.   This comparison has been made by taking what appears to be the main occupation at the time of 1977 Councillors, and for 1988 Councillors the main or last occupation of a member before becoming a Councillor, according to Who's Who and biographical files in the NSW Parliamentary Library.

11.   The information in this section has been obtained from the Department of the Legislative Council Reports for the period 1 January 1986 to 30 June 1987 and for the year ended 30 June 1988 and from staff of the Legislative Council.

12.   Reported in the Sydney Morning Herald, 19 June 1989.

TABLE 1: ANALYSIS OF LEGISLATIVE COUNCIL PERFORMANCE, 1976-89

SESSION	First & Last Sitting Days	BILLS		NO. OF AMENDMENTS								Private Members notices of motions
		Assented to	Amended by Council	Govt Carried	Govt Negatived	Oppn Carried			Oppn Negatived			
1976	25/5/76	-	-	-	-	-			-			
1976-77-78	24/8/76-77 16/3/78	277	25	188	4	74			1			7
1978	15/3/78-7/9/78	16	-	-	-	-			-			4
1978-79	7/11/78-24/4/79	199	16	42	-	-			72			4
1979-80	14/8/79-2/4/80	206	7	18	-	-			42			6
1980-81	12/8/80-14/5/81	185	6	13	-	-			35			4
1981	12/8/81-27/8/81	5	1	1	-	-			-			-
1981-2	28/10/81 -3/12/81 16/2/82 -7/4/82	120	5	31	-	-			LIB/NP 24	AD 4	CTA -	6
1982	30/6/82 -1/7/82	2	-	-	-	-			-	-	-	3
1982-83	17/8/82 -2/12/82 15/2/83 -30/3/83	161	6	12	-	-			36	3	1	11
1983-84	16/8/83 -1/12/83 28/2/84 -1/3/84	139	3	8	-	-			45	-	1	13
1984	1/5/84 -13/6/84	101	3	12	-	1			22	-	4	4
1984-85 -86	14/8/84 -2/11/84 26/2/85 -23/4/85 24/9/85 -29/11/85	296	4	4	-	-			94	3	11	17
1986-87 -88	19/2/86 -30/4/86 23/9/86 -4/12/86 11/2/87 -3/6/87 22/9/87- 25/11/87	420	3	10	-	-			164	-	18 (N-16) (B-2)	18
1988	27/4/88- 3/8/88	46	7	4	-	ALP 14	AD 9	CTA 4	ALP 20	AD 13	CTA 6	9
1988-89	17/8/88 -14/12/88 21/2/89 -24/5/89 1/8/89- 10/8/89	189	24	100		60	76	-	48	43	-	14

TABLE 2: ANALYSIS OF LEGISLATIVE COUNCIL PERFORMANCE, 1976-89

SESSION	FIRST & LAST SITTING DAYS	SITTINGS				QUESTIONS		
		DAYS	HOURS	AFTER 10.30 pm	BEFORE 2.30 pm	WITHOUT NOTICE	ON NOTICE	NO. WITHOUT NOTICE PER SITTING DAY
1976	25/5/76	1	1.13	---	1			
1976-77-78	24/8/76-77-16/3/78	101	385.09	19	8	296	35	2.9
1978	15/8/78-7/9/78	9	37.08	2	2	37	5	4.1
1978-79	7/11/78-24/4/79	36	182.12	12	7	142	20	3.9
1979-80	14/8/79-2/4/80	47	218.03	10	8	299	48	6.4
1980-81	12/8/80-14/5/81	48	230.41	8	9	323	57	6.7
1981	12/8/81-27/8/81	9	30.25	1	2	92	32	10.2
1981-2	28/10/81-3/12/81 16/2/82-7/4/82	19	121.40	8	7	230	115	12.1
1982	30/6/82-1/7/82	2	9.52	1	2	31	52	15.5
1982-83	17/8/82-2/12/82 15/2/83-30/3/83	37	171.21	7	10	369	142	10.0
1983-84	16/8/83-1/12/83 28/2/84-1/3/84	31	165.37	6	11	251	110	8.1
1984	1/5/84-13/6/84	14	104.41	8	8	145	9	10.4
1984-85-86	14/8/84-2/11/84 26/2/85-23/4/85 24/9/85-29/11/85	67	467.15	29	16	755	107	11.3
1986-87-88	19/2/86-30/4/86 23/9/86-4/12/86 11/2/87-3/6/87 22/9/87-25/11/87	96	716.35	42	35	1512	251	15.8
1988	27/4/88-3/8/88	18	138.27	12	11	270	52	15.0
1988-89	17/5/88-14/12/88 21/2/89-24/5/89 1/8/89-10/8/89	58	500.58	25	32		388	

Table 3 - NSW Legislative Council: Committees and Joint Committees, 1976-89

SESSION APPOINTED	COMMITTEE
1976-77-78	Pecuniary interests (Joint) Drugs (Joint) Parks for Mobile Homes and Caravans (Joint) Constitution and Parliamentary Electorates and Elections (Amendment) Bill (Council Select Committee) Public Accounts and Financial Accounts of Statutory Authorities (Council Select Committee)
1978	Public Accounts and Financial Accounts of Statutory Authorities (Joint)
1978-79	Public Accounts and Financial Accounts of Statutory Authorities (Joint) - reappointed Parks for Mobile Homes and Caravans (Joint)- reappointed
1979-80	Baulkham Hills Shire Council (Norfolk Place Public Reserve) Bill (Private Bill) Public Funding of Campaigns for Elections (Joint) Registration of Pecuniary Interests of Members of Parliament (Council Select Committee)
1980-81	The Bank of Adelaide (Merger) Bill (Private Bill) Hornsby War Memorial Committee (Land Sale) Bill (Private Bill)
1981	NIL
1981-82	Western Division of NSW (Joint) Road Safety (Joint Standing)
1982	NIL
1982-83	Committee of Legislative Council on Disclosures by Members Parliamentary Privilege (Joint)
1983-84	Workers' Compensation Insurance (Joint Select)
1984	NIL
1984-85-86	Select Committee on Standing Committees for Legislative Council
1986-87-88	Regulation Review (Joint)
1988	Standing Committee on Social Issues Standing Committee on State Development Select Committee on Police Regulation (Allegations of Misconduct) Amendment Bill
1988-89	Select Committee on Resources of Legislative Council Independent Commission Against Corruption (Joint) Standing Committee upon Parliamentary Privilege

TABLE 4A

Distribution by Education/Party/Gender

	MALE						FEMALE						TOTAL					
	ALP	Lib	C/NP	Other	Total n	Total %	ALP	Lib	C/NP	Other	Total n	Total %	ALP	Lib	C/NP	Other	Total n	Total %
1977 MLCs																		
Degree	4	8	3		15	28.3		1			1	14.3	4	9	3		16	26.7
Tertiary non-degree	4	5	3		12	22.6		1			1	14.3	4	6	3		13	21.7
Other	11	7	8		26	49.1	4	1			5	71.4	15	8	8		31	51.7
	19	20	14		53	100.0	4	3			7	100.0	23	23	14		60	100.1
1988 MLCs																		
Degree	3	8	1	-	12	37.5	-	4	-	1	5	38.5	3	12	1	1	17	37.8
Tertiary non-degree	5	-	-	1	6	18.8	1	-	1	-	2	15.4	6	-	1	1	8	17.8
Other	8	-	5	1	14	43.8	4	-	-	2	6	46.1	12	-	5	3	20	44.4
	16	8	6	2	32	100.1	5	4	1	3	13	100.0	21	12	7	5	45	100.0
1988 MLAs																		
Degree	13	18	2	-	33	32.7	2	-	1	2	5	62.5	15	18	3	2	38	34.9
Tertiary non-degree	14	14	5	1	34	33.7	-	-	-	-	-	-	14	14	5	1	34	31.2
Other	13	6	12	3	34	33.7	1	1	-	1	3	37.5	14	7	12	4	37	33.9
	40	38	19	4	101	100.1	3	1	1	3	8	100.0	43	39	20	7	109	100.0

TABLE 4B

Age Distribution of MPs

	MLCs 1977 No.	1977 %	MLCs 1988 No.	1988 %	MLAs 1988 No.	1988 %
Under 30	1	1.7	1	2.2	1	0.9
30-39	5	8.3	4	8.9	27	24.8
40-49	8	13.3	14·	31.1	50	45.9
50-59	25	41.7	14	31.1	23	21.1
60+over	21	35.0	12	26.7	8	7.3
TOTAL	60	100.0	45	100.0	109	100.0

TABLE 4C

Occupational Backgrounds of MPs

	MLCs 1977	MLCs 1988	MLAs 1988
Accountant	1	-	2
Barrister/Solicitor	7	9	11
Business exec./Co.director	8	1	14·
Small business/self-employed	6	2	14
Chemist	2	2	1
Clergy	-	1	1
Dentist	1	-	-
Engineer	2	-	1
Farmer/grazier	13	9	17
Industrial advocate	1	-	2
Journalist/editor/b'caster	1	4	2
Medical practitioner	··	1	1
Military	-	-	2
Ministerial/party staff	-	3	9
Police	-	-	2
Public servant nei	1	1	9
Teacher/lecturer	1	3	9
Tradesperson	3	2	5
Trade union official	10	6	5
Other	3	1	2
	60	45	109

NOTE: Tables 4A,4B & 4C have been compiled from information provided in Who's Who, the NSW Parliamentary Library files on biographical details of MPs and Legislative Council records. See also endnote 10 for Table 4C.

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