3. Victoria's house of review: Ten years after

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ABSTRACT

The provisions of the Constitution (Parliamentary Reform) Act 2003 undoubtedly represented the most significant constitutional reforms in Victoria for almost 150 years. A major, though certainly not sole, motivation for those advocating and implementing these reforms related to a desire for the Legislative Council to function as a more effective house of review. The Act provided the Council with the constitutional foundation for this by reforming the method for electing upper house members. It appears to have been assumed that this would then provide impetus for further changes that would be implemented by the Council itself.

By the end of 2013, just over ten years had passed since the Act's enactment. This is an opportune point at which to assess the extent, effectiveness and methods by which anticipated changes have occurred. To what degree has a transformation commenced that requires further time to evolve? In what ways have obstructions become apparent that have weakened the Council's capacity to be a 'genuine' house of review? Are any such obstructions likely to have ongoing, even permanent consequences?

Introduction

The Constitution (Parliamentary Reform) Bill 2003 was introduced by a second term Bracks Government flushed with the success of an overwhelming majority in the lower house – the Legislative Assembly – and an unexpected majority (25 of 44 Members) in the upper house – the Legislative Council. Other than a short-lived exception in 1985, this was the first time the Australian Labor Party (ALP) had ever enjoyed control of both houses of the Victorian Parliament. The Reform Bill was the product of an ALP that, traditionally, had been distrustful and hostile towards the Legislative Council. In fact, it had attempted unsuccessfully to reform the upper house as recently as 2002.60

The new bill, that introduced wide-ranging constitutional reforms in Victoria, was claimed to represent (and no doubt was) the single most significant package of parliamentary reforms in the State since the establishment of responsible government in 1856. These reforms were not focussed solely on the upper house as they also dealt with the relationship between the houses and 'strengthening' the Constitution via entrenchment provisions. Nevertheless, the alleged need to fix the Legislative Council was at the forefront of the Government's thinking. The upper house was criticised by ALP members for failing to act as a genuine house of review, one which had historically been either a 'rubber stamp' or obstructionist, depending on whether the Government had a majority in both houses (criticisms that were hardly unusual in relation to a bicameral parliament).61

Amongst the strongest proponents of such reforms were not only government members, but the three members of the Constitution Commission, whose recommendations and reports formed the basis for most of the reforms implemented subsequently. The Constitution Commission was composed of two experienced Liberal Party parliamentarians (Hon. Alan Hunt AM, previously a Victorian cabinet minister and President of the Legislative Council, and Hon. Ian Macphee AO, a former federal minister), as well as the Hon. George Hampel QC, former Justice of the Supreme Court of Victoria. The Commissioners received clear directions from the Government's terms of reference to 'research, investigate, consult, report on and make recommendations' on legislative changes that would 'enable the Legislative Council to operate effectively as a genuine House of Review'.62

Some of the reforms that ultimately formed part of the Constitution (Parliamentary Reform) Bill 2003 clearly were not intended to enhance the Council's effectiveness as a house of review. In certain cases, these related to quite separate issues (recognition of local government as an essential tier of government was one example), while in others the reforms were clearly intended to restrict upper house power (complete removal of the Council's capacity to block Supply).

So what were the reforms that would allegedly enhance the Council's ability to review and bring the Executive to account more effectively? Primarily, these related to a single aspect of the Reform Bill: the method by which the Legislative Council would be elected. The bill introduced eight multi-member electorates, consisting of five members each, to be elected via the proportional representation system for four year terms. The consequential quota of 16.66% was expected to enhance the likelihood of small parties and independents being elected and to minimise the possibility of any single party again controlling the upper house. In the words of then shadow minister, David Davis (later to become Leader of the Government in the Council and certainly not a proponent of the reform), 'My strong belief is that it will be about once every fifty years that a party gains control of the house'.63

Other than anticipated changes in the composition and diversity of the Legislative Council's membership due to multi-member electorates and proportional representation, the Reform Bill offered little else to enhance directly the Council's review function. The term 'house of review' was referred to regularly by the Government in publications and debate but, as noted by Costar and Gardiner, 'few members articulated what this might actually mean in practice.'64 There appeared to be an assumption that the Council's altered composition would help engender cultural change and a new, more incisive method of conducting business. This concept of an upper house being both reactive (for example, reviewing bills sent to it by the lower house) and proactive (for example, scrutinising the Executive via committee hearings) had been outlined in an address given by John Uhr to the Constitution Commission of Victoria in August 2001.65

This, then, is the purpose of this article. It will examine the extent to which the Constitution (Parliamentary Reform) Act 2003 established a structure that would enhance the Legislative Council's review function, as well as considering the willingness and effectiveness of the Council to reform itself from within to become a more vigorous and independent house in scrutinising the Executive's actions. Even if ten years (or a little more as the period under review continues until the end of 2013) is considered insufficient for a genuine transformation to have occurred, to what degree has progress appeared to be made and in what ways have longer term obstructions been identified?

Legislative Council prior to 2003

Despite facing the common criticism levelled at upper houses of being simply a 'rubber stamp' or obstructionist, prior to 2003 Victoria's Legislative Council had adopted various procedures under its standing and sessional orders to strengthen its review function. Some of these were longstanding procedures or practices, while a number had been introduced during the 54th Parliament (1999 to 2002), a period in which the new Bracks ALP Government was seriously outnumbered in the chamber.66 The Opposition used its numerical advantage, at least to some extent, to strengthen its position both politically and in terms of holding the Government to account through procedural reforms, some of which have survived or been enhanced.

Several of the procedures and customs with a lengthy history in the Council that, at the very least, provided the Opposition with greater opportunities for scrutiny and debate, included:

- a period of some hours each Wednesday during which general business took precedence over all other business. During the 54th Parliament, the period allocated was three hours.
- the adoption of a procedure in 1993, based on Australian Senate practice, if Ministers failed to provide an answer to a question on notice within thirty days of it having appeared on the Council's Notice Paper.
- the absence of time limits on individual members' speeches when debating bills.
- the virtual absence of a guillotine or closure motion to stifle debate.67

During the 54th Parliament, further procedural innovations included:

- the adoption of a sessional order in 2002 to enable supplementary questions to be asked during Question Time. This procedure was retained and is now part of the standing orders.
- the introduction, also in 2002, of a period for 90 second Members' Statements which initially applied twice per week and now occurs each sitting day.
- precedence being given to debate motions to take note of reports and other papers for up to one hour. A similar procedure still exists in the Council.

Thus, by the conclusion of 2002, the Legislative Council was partly fulfilling its review function through the application of certain long standing as well as emerging practices. Nevertheless, substantially more progress was required before the house could be considered to have genuinely embraced a more assertive, independent role vis-à-vis the Executive.68

Post-2003 and the Constitution (Parliamentary Reform) Act

The Legislative Council's composition

When assessing the Constitution (Parliamentary Reform) Act's impact, it is significant that the legislation did not include the Constitutional Commission's preferred model of six regions electing seven Members each, resulting in a quota of approximately 12.5%. The Commission had placed considerable importance on the need for diversity and minority representation to create a more inclusive and effective upper house which could 'increase the vitality of our democracy'. It believed that this goal would be undermined partially if the quota under proportional representation was

too high. It regarded the 16.66% quota under the eight regions by five Member model, the one ultimately adopted, as being acceptable but higher than ideal.69

Since 2003, there have only been two Victorian State elections using proportional representation for the upper house (November 2006 and 2010). Therefore, the new system's capacity to achieve the Commission's ambitions has not been fully tested. Nevertheless, there have been positive developments in terms of greater diversity of representation. The most prominent example has been the election of three members of the Australian Greens at both elections. In addition, the 2006 election saw a member of the Democratic Labor Party (DLP) win a seat in the Legislative Council, despite attracting only 2.57% of first preferences. His election, along with the Australian Greens, constituted the first representation in the Victorian upper house of any party or individual outside of the Liberals, Country Party/Nationals and ALP since July 1955 when the last DLP member was elected.70

In the 56th Parliament, the Australian Greens (and DLP member to a lesser extent) were able to exert considerable influence over the Council. In a house comprising ALP 19, Liberal 15, The Nationals 2, Australian Greens 3 and DLP 1, the Australian Greens exercised the balance of power when voting with the Government (or non-government parties as a bloc) on contentious issues. The lack of a government majority influenced the passage of legislation (bills rejected, amended, lapsed), establishment of committees and the procedures governing the conduct of proceedings. The 54th Parliament, in which there was a non-government majority consisting of the Liberal/Nationals Coalition only, was of course able to exercise the same sort of power, however in the 56th Parliament a wider range of party interests were involved in the process.

Confidence that proportional representation would rarely produce government majorities in the Legislative Council, thereby strengthening pluralism and scrutiny of the Executive, was shaken by the outcome of the November 2010 State election. In the 57th Parliament, the Liberal/Nationals Coalition Government gained a majority of 21 seats out of 40, with the ALP represented by 16 members and the Australian Greens 3. Aside from electing the Australian Greens, proportional representation had produced a similar result in both houses with the Government holding a very narrow majority in each. As one would expect, this resulted in significant implications for the Legislative Council.

Legislative Council Committees

During the 56th Parliament, a Standing Committee on Finance and Public Administration and several select committees were established. The highest profile of their activities was an inquiry conducted by the standing committee into the planning process for the Windsor Hotel redevelopment and the involvement in this of the office of the Minister for Planning. These committees used their non-government majorities not only to scrutinise government performance and highlight maladministration but, in the view of government members, to gain party-political advantage.71 There was nothing particularly unusual about that, and a similar situation had existed during the 54th Parliament when the Opposition controlled the numbers in the upper house.

The 56th Parliament also saw the establishment of a Legislation Committee, which had originally been trialled in the previous Parliament under sessional orders and was now formally included in the standing orders. Despite the existence of a non-

government majority in the Council, the Legislation Committee ultimately only had four bills referred to it, the last of which was in 2008. It was not entirely clear why the Committee was used so sparingly as it facilitated the review of legislation through the appearance of various witnesses including a Council Minister on two occasions and an Assembly Minister on another.72 The standing orders governing the Legislation Committee of the 56th Parliament may have been seen as too prescriptive in terms of the manner in which it was to conduct reviews and present reports. The Committee's investigations were limited to bills (or parts of bills) that were currently before the Council and had been referred to it by the house after their second reading. The process seems to have been viewed as partly a substitute for the Committee of the whole stage (although that stage could still occur after the Legislation Committee had reported).73

The standing committee system that was established at the commencement of the 57th Parliament was based on recommendations made by the Council's Standing Orders Committee late in the 56th Parliament.74 After studying various jurisdictions in Australia, the Committee (comprising representatives from all of the parties in the Council other than the DLP) settled unanimously on a structure based closely on one that had operated in the Australian Senate, although in a scaled down form. The Legislative Council was to have three pairs of committees, each containing a legislation and references committee, overseeing major government policy areas. Each committee was to consist of eight members, with four nominated by the Leader of the Government, three by the Opposition and one coming from minority parties or independents.

In the case of the new legislation committees, there would be a government appointed chair with both a deliberative and a casting vote. It was noted by the Standing Orders Committee that 'one of the central roles of legislation committees was to review government legislation and it was important for the Government to maintain a reasonable level of control over the legislative process'.75 The legislation committees would be permitted to self-reference, but only in relation to annual reports and departmental/agency performance. The references committees were to have a non-government chair, also with a deliberative and casting vote. Consistent with Australian Senate practice, these committees would not have the power to self-reference.76 It was considered appropriate that the house should determine the nature of such broad, sometimes lengthy, inquiries. In addition, despite not being stated explicitly in the Standing Orders Committee's report or during debate in the Council, there may also have been an assumption future governments were unlikely to control the Council under proportional representation. As a result, it may have been assumed that the Executive was unlikely to determine the work of references committees. This appears to have been the case when Standing Orders Committee member and Leader of the Government, John Lenders, observed:

Reference committees are clearly in the hands of this house, and whoever the non-government parties are at the time can seek to do further investigative work on that basis. I think that is a very good balance.77

The acceptance of this new standing committee system for the 57th Parliament was an acknowledgement by the Council of its enhanced role as a house of review and its recognition of the Constitution (Parliamentary Reform) Act's influence over its culture. It was noted in the Standing Orders Committee's interim report that the adoption of proportional representation had changed the Council's composition, creating a new dynamic in the house and a 'greater inclination on the part of the

Council to establish its own select and standing committees than was the case in previous parliaments'.[78]

There was an unexpected pause in the emergence of this 'new dynamic' in the Council when the 2010 State election produced a narrow government majority in both houses. In terms of the new standing committees, their ability to fulfil the expectations just outlined was weakened considerably by three principal factors. The first two of these may change significantly in the 58th Parliament which will commence at the end of 2014 or early 2015. The other factor could be an ongoing challenge well into the future unless suitable compromises can be reached.

8. By the end of 2013, the Coalition Government had used its majority in the Council consistently to prevent government bills being referred to the legislation committees of the standing committees. Amongst the 38 motions moved seeking such a referral, only seven were successful, and of those just three referrals related to proposed legislation. Those three bills consisted of two private members' bills and just a single government bill, which was minor non-contentious legislation.[79]

Given that the Government had control of each legislation committee via its power to appoint the chair who could exercise a casting vote, non-government members expressed considerable frustration that the Council did not make more use of these committees, even allowing for the common reluctance of governments to expose themselves to additional scrutiny.[80]

9. Unsurprisingly, given that the three references committees of the Council standing committees had a non-government majority and chair, the Coalition also maintained firm control of these committees. By the end of 2013, only 12 attempts had been made to refer matters to one of these committees, with just four being successful (all four emanating from the Government). Significantly, three of the four referrals were made by April 2011, with the only other one occurring in February 2012.

10. A key development that may have dissuaded the Government from making more use of the references committees was the desire of the Legal and Social Issues References Committee to recall a witness to provide further evidence related to its inquiry into organ donation. The Committee had resolved to do this following the tabling of its final report the previous sitting week due to perceived inconsistencies in the witness' evidence. Its deputy chair, who was a government member, strongly objected to this approach, arguing that the Committee lacked the authority to continue gathering evidence after submitting a final report as, in effect, it would be self-referencing, a power the Committee lacked. When asked to rule on the matter, the President concluded that it was a grey area that should, ideally, be considered by the Council's Procedure Committee.[81]

In the following sitting week, the Leader of the Government responded by moving a motion: (a) for the Procedure Committee to examine the capacity of standing committees to continue their investigations beyond the date they are required to table their final report; and (b) to prevent such investigations occurring after the tabling date until the Procedure Committee had presented its report on the matter.[82] The Government's motion was agreed to after a division and the Procedure Committee had not reported on the issue by the end of 2013.

The Opposition alleged that the Government feared that the witness, if recalled, might have provided evidence that could embarrass or damage it in

some way, and was escaping scrutiny as a result. According to the Leader of the Opposition, John Lenders:

> We have the Leader of the Government seeking to use the legislature to, in effect, shut down a committee investigating his portfolio…It is a critical issue in relation to our Constitution and the separation of powers that we have a proposition before the house in which a member, the Leader of the Government…is seeking to close down the legislature's ability to scrutinise the executive.[83]

If the Opposition was correct, the Government has not been prepared to take such risks again, with no inquiries having been assigned to a references committee since then.

11. The third means by which the standing committees were limited in their scrutiny role may prove the most intractable problem for the Council going into future parliaments: the issue relates to money.

At the beginning, it needs to be stated that restrictions on Council committees accessing the funds required for staffing, administration and the general conduct of investigations is nothing new nor peculiar to a single side of politics. Part of the problem has been structural and systematic, as despite the Victorian Parliament being financed by a separate appropriation bill since the early 1990s, the bill has provided little genuine financial independence. As noted by the current President, Bruce Atkinson, the presiding officers and clerks over the years have had little input into the funding process, broad government financial policy has determined the Parliament's budget and the institution has been unable to access any of its own, unspent funds without first gaining the Treasurer's approval. Even if such approval is granted, these funds are only supposed to be spent on non-recurrent, one-off expenses.[84]

In the 56th Parliament, a period in which several politically contentious, non-government controlled committees were active, an attempt was made to gain additional funding for Council committees by accessing unspent departmental funds. The (ALP) Government did not agree to these requests and, as a result, Council committees were serviced by a limited support staff and operated on a very restricted administrative budget using funds from the department's operating budget.[85]

Unfortunately, funding difficulties continued in the first three years of the 57th Parliament, despite the change of government. These difficulties related partly to a lack of additional funding in the department's budget to service the Council's new standing committees to a standard similar to the Victorian Parliament's joint investigatory committees (which all had a government majority and chair).[86] In addition, restrictions were once again placed on the amount that could be accessed from the department's unspent operating funds. Although the department was eventually granted some additional funds in 2011 and 2012, there were considerable delays in the process which created additional uncertainty, particularly with hiring research staff.

The department did receive advice from the Department of Treasury and Finance that the Council's 2013–14 operating budget included a modest additional sum intended for the standing committees. There was also an

indication that the Treasurer was likely to provide a slightly larger amount in the following financial year. Although this was certainly a positive step in terms of recognising the special needs of the Council's standing committees, such provision of funds continue to be provided on a yearly basis rather than as a continuing commitment.

Ongoing, adequate funding for the Legislative Council's standing committees will be essential if the upper house is to perform its scrutiny function adequately. Without it, even if a non-government majority ensures that there are sufficient references to keep the standing committees busy, the department will lack the capacity to adequately resource them.

The Legislative Process

The transition from a non-government to a government majority in the Legislative Council at the commencement of the 57th Parliament has, predictably, impacted the house's review function in terms of the frequency with which legislation has been amended or rejected. In the 56th Parliament, the Council amended 49 of the 340 bills that were passed, with another 11 bills being rejected. In the first three years of the 57th Parliament, only 8 bills of 251 passed have been amended, all by the Government, with no bills rejected. These figures come as no great surprise.

What has been somewhat more notable, although certainly nothing unique in the Legislative Council's history, has been the Government's approach in managing its legislative program through the house. There have been few sittings after dinner on a Thursday evening (only three times by the end of 2013), and the absence of any Friday sittings, despite these being an option under the standing orders. Instead, there has been a tendency towards lengthy sittings on Tuesday evenings (the Council's first sitting day of the week) in which these have extended past 10.00 pm (the normal time for the Adjournment debate) if certain contentious legislation (or certainly legislation of high priority to the Government) has not been passed. In the first three years of the 57th Parliament, the Council extended past midnight on 11 occasions on a Tuesday, with the vast majority of these continuing past 2.00 am. In the 56th Parliament from 2006–10, there were only two occasions when the house sat beyond midnight (one related to the very high profile and contentious Abortion Law Reform Bill 2008) on any evening, although there were sixteen Thursday evening sittings and six Friday sittings.[87]

It could be argued that the approach adopted in the 57th Parliament has increased the difficulties for the house – particularly the non-government parties – to effectively scrutinise legislation, as in many cases it has been the least straight forward of the bills that have been reviewed in the early hours of the morning. Certainly, the Government would argue that this approach is their prerogative and they have argued repeatedly that they have allowed the house to continue its scrutiny of bills for as long as it has desired.[88] Nevertheless, the effectiveness of this scrutiny may have been blunted at times by continuing to sit for extended periods at the tail end of very long days. Certainly the non-government parties have consistently voted against motions to extend sittings past the usual adjournment hour.

Another factor related to the legislative process that impacted on the Legislative Council's effectiveness as a house of review during the 56th Parliament, and could certainly do so in future parliaments, concerns the Dispute Resolution Committee

(DRC). This was a body created under the Constitution (Parliamentary Reform) Act 2003. The Committee's role was based loosely on the Conference of Managers system which had provided for negotiations over disputed bills to be conducted by members appointed by both houses. This system had been used intermittently in the Victorian Parliament in the first half of the twentieth century, but had not been used since 1945.89

When the Constitution Commission recommended the creation of a DRC, it envisaged that the Committee would help to resolve legislative deadlocks which were considered more likely when the Council was elected via proportional representation.90 Its recommendation was reflected in s.65B of the Constitution which provided for a committee of twelve members, with seven appointed by the Assembly and five by the Council, with each house required to take into account its political composition in determining appointments to the DRC. Under s.65C, the DRC is expected to reach a resolution concerning a bill that is the subject of a dispute within 30 days of it being referred to the Committee by the Legislative Assembly. S.65D states that if the Committee fails to do so within the 30 days (or ten sitting days, whichever is the longer), the Disputed Bill becomes a deadlocked bill. This can result in certain constitutional processes, one of which could be the dissolution of both houses and a general election (s.65E).

There are a number of fundamental problems, from the perspective of the Council's scrutiny function, with the manner in which the dispute resolution process has been structured under the Constitution and with the interpretation of what constitutes a disputed bill. In the estimation of Philip Davis, a former Liberal Party Leader of the Opposition in the Council, the new method of dealing with disputes 'has led to questions arising about the relevance of the upper house in its capacity to properly hold the Executive to account'.91

The first weakness in terms of the Council's scrutiny role concerns the requirement under s.65(1) of the Constitution for all bills referred to the DRC to come via a resolution of the Legislative Assembly. Clearly, the equality and independent powers of the Council have been further weakened when only the Assembly has the right to access this deadlock mechanism, one which can relate to any bill at all.

Secondly, the Legislative Assembly controls the numbers on the DRC as s.65B prescribes that seven of the Committee's twelve members are from the lower house. Given a Government majority in the Assembly, one can assume that this will translate into Executive control of the DRC via the Committee's composition.92

Thirdly, the lack of transparency over negotiations in the DRC partially undermines the Parliament's role of scrutinising bills in a public forum. S.65B(9) of the Constitution requires the DRC to meet privately and permits it to determine its own rules rather than being governed by any form of joint standing orders or rules of practice. As noted by Philip Davis, the DRC's tabled resolutions offer 'no insight whatsoever into the proceedings of the Committee'. He argued:

For vital legislation to be decided…behind closed doors contradicts our history of accountable process and is offensive to our democratic principles.93

A fourth concern that has been identified relates to the interpretation of what constitutes a disputed bill. S.65A(1) of the Constitution states that such a bill is one:

Which has passed the Assembly and having been transmitted to and received by the Council not less than 2 months before the end of the session has not been passed by the Council within 2 months…either without amendment or with such amendments only as may be agreed to by both the Assembly and the Council.

As noted by Legislative Council President Bruce Atkinson, this does not explicitly exclude a defeated bill from being treated as a disputed bill,94 and that was certainly the approach adopted by the Assembly. In the case of each of the three bills subject to DRC negotiations, the bill was first defeated in the Legislative Council.95 The Speaker of the Legislative Assembly at that time, Speaker Lindell, determined that, despite a bill having been defeated in the upper house, this did not preclude it from remaining under the Parliament's consideration.96 As observed by President Atkinson:

The DRC…has expanded the power of the Legislative Assembly at the expense of the Legislative Council, and has undermined the ability of the Legislative Council to defeat legislation.97

Thus, the establishment of the DRC has restricted the Council's role of examining, scrutinising and, ultimately, rejecting bills, due to the Executive's capacity to then refer the matter to the Committee for further negotiations. Under the Constitution (Parliamentary Reform) Act 2003, the Assembly's rejection of a bill is final, but not the Council's, which weakens the Council's role as a check on Executive power.

'Green shoots'

Although the focus, to this point, has predominantly related to hindrances to the Legislative Council enhancing its review and scrutiny role, some positive changes have occurred. In broad terms, these can be categorised as being both procedural and cultural in nature. In this regard, the Constitutional Commission's apparent faith in the capacity of a restructured Council to reform itself from within, has had some substance.

The first of these developments relates to the steady decline in the time allocated to government business in a sitting week, and the consequent increase in the time for general or non-government business. This commenced in 2003 and continued for the remainder of the period under review. It occurred despite there being government majorities in both the 55th and 57th Parliaments and Wednesday evenings in the latter Parliament being devoted to standing committee business with the Council not sitting. The attached table indicates the progressive changes that have occurred:

1. Legislative Council business by percentage

As one can see from the graph, government business has declined from approximately 2/3 of the Council's time to less than half during the period 2003 to 2013. As is also evident, much of the proportion of time no longer spent on government business has been taken up with additional general business. It is notable that the most significant changes here occurred in the 56th Parliament (end of 2006 to late 2010) when there was a non-government majority following the first proportional representation election. Sessional Orders were introduced in February 2007 which abolished most of

the time limits which had applied in the 55th Parliament, including the three hour overall time limit for general business.98 What is probably more significant is that, in the 57th Parliament, despite a government majority, time limits have not been reintroduced for individual speakers during general business and the Council still allocates most of Wednesdays to such business. This may indicate an acceptance by the Government that a greater allocation of time to general business will be an ongoing feature of the way in which the Council transacts its business. Clearly, additional time does not automatically translate into more effective scrutiny, but it does nevertheless give the non-government parties greater opportunities to put their case.

The current Government has also not reintroduced the use of a Government Business Program, with the associated application of a type of 'guillotine', which existed in the 55th Parliament when the ALP Government had a majority in the Council. This is despite the Government Business Program remaining part of the standing orders and nothing preventing the Government from using it to push its legislative program through the house (as occurs most weeks in the Legislative Assembly). Again, this may partly have reflected a cultural change and an acceptance that the use of a Government Business Program is inconsistent with the Council's role of scrutinising the Executive. It was also argued by Minister and Leader of The Nationals in the Council, Peter Hall, that the Government had not used such a procedure as it was unnecessary and that 'a sense of goodwill and cooperation between all of the parties' would get the Government's business done.99

Other procedures have had their genesis in the 56th Parliament, or at least gained considerable impetus during those years, and have survived the transition back to a government controlled house. Possibly the most significant one concerns the production of documents; others relate to written responses to matters raised on the Adjournment and the introduction of non-government bills.

In relation to the first of these, the Council agreed to a sessional order early in the 56th Parliament which stated that the house could order documents to be provided by the Executive and that the order must specify the date by which the documents were required. Once received, these documents were to be tabled in the Council by the Clerk. If executive privilege was claimed in respect to any document(s), the sessional order outlined a very clear process to be followed, which could include the claim of privilege being assessed by an independent legal arbiter.100

As it transpired, the involvement of a legal arbiter, a practice based on New South Wales Legislative Council practice, did not come to fruition. This was principally due to the ALP Government's refusal to provide any documents over which executive privilege was claimed and, consequently, independent assessment being prevented. Nevertheless, the practice of seeking government documents via Council orders for their production occurred regularly between 2007 and 2010.

2. Orders for the Production of Documents agreed to by the Legislative Council

	Motions agreed to	Documents provided (at least some)	Documents not provided
56th Parliament	39	27	12
(2006–10)	32		

	Motions agreed to	Documents provided (at least some)	Documents not provided
	Liberals/Nationals 7 Greens		
57th Parliament	36	26	7*
(2010–13)	5 ALP 31 Greens		

3. * Three Orders awaiting final response
4. (Statistics current to end of 2013)
5. As can be seen in Table 2, during the 56th Parliament the Government complied at least partly with 27 of 39 (69%) motions for the production of documents. There were actually 20 occasions when executive privilege was claimed over some or all of the documents. Significantly, there were three occasions when the Leader of the Government in the Upper House and State Treasurer, John Lenders, was suspended from the house's service for the remainder of the day's sitting due to the Government's failure to provide documents which had been sought.101 These suspensions bore a number of similarities with those of New South Wales Treasurer and Government Leader in the Legislative Council, Michael Egan, who was suspended in 1996 and 1998 for his repeated refusal to provide documents for which privilege was claimed.102
6. The responsiveness of the Liberal-National Coalition Government to orders for documents during the 57th Parliament has been similar to the previous Government. As shown in Table 2, in the first three years of the Parliament the Government provided at least some documents 74% of the time, with only seven cases in which no material was forthcoming. The principal difference between the two parliaments has been the preponderance of Australian Greens' initiated orders for documents rather than orders from the Opposition. The ALP Opposition has adopted a somewhat different approach to its Coalition predecessor based on its own experiences while in government. The Opposition's attitude was outlined by Matt Viney on the first occasion an order for documents was moved in the 57th Parliament when he stated:
7. Members on the other side are wanting to suggest that I am…taking a different position to the one I took in the past, but I am not. My position is exactly the same: the house may make a first request for documents and the government of the day should consider that request in accordance with the principles of executive privilege, commercial-in-confidence and cabinet confidentiality matters, as it would in the normal process of an FOI request or any other request for documents.103
8. This attitude has been expressed repeatedly by Opposition Members since then and applied on a fairly consistent basis.
9. It is a little difficult to gauge the effectiveness of the order for documents procedure in reinforcing the Council's scrutiny function, not just because of the occasions when documents have not been provided, but in terms of the usefulness of the material that has been made available. Nevertheless, it has been a means for the non-government parties to obtain documents which were otherwise inaccessible with the possible exception of Freedom of Information requests. In this way, the process has done something positive to enhance the often cited but rarely employed promise of governments to be 'open and accountable'.
10. Another practice of some significance that has survived in the 57th Parliament despite a government majority is the Council's requirement that the relevant minister responds to a matter raised on the Adjournment104 either before the debate has concluded, if the minister is present, or in writing within 30 days. This procedure was

introduced via sessional orders in 2007 and was subsequently incorporated into the standing orders for the 57th Parliament. If a minister does not meet his/her obligations, the member who raised the matter may follow a similar process to one applicable to unanswered questions on notice, in which the member can seek an explanation for the failure to provide an answer and may then move a motion to take note of this failure.[105]

11. In practice, the overwhelming majority of Adjournment matters requiring a written answer have not been provided within the 30 day limit. A big part of the reason for this is the difficulty the Council has in pursuing Legislative Assembly ministers, who represent the bulk of the Cabinet, for answers. In large part, the Council is dependent on the persuasive powers of Council ministers to prevail on their lower house colleagues. Nevertheless, approximately 80–85% of Adjournment matters raised between 2008 and 2013 were eventually responded to in writing and, if anything, these responses have become a little more timely in the 57th Parliament.
12. The number and timeliness of written answers tells us nothing about their usefulness or how comprehensively matters are addressed by ministers. Nevertheless, the expectation that a response will be provided has placed an additional obligation on the Executive, and the procedure's retention by the current Government, despite having the numbers to change it, suggests the procedure has a good chance of being preserved in the future.
13. The other notable change in the Council's operations since the 2003 Reform Act, and more particularly since the election of members from minor parties who are not directly part of the Government vs Opposition contest, has been the gradual increase in the number of private members' or non-government bills being introduced. As reflected in Table 3, which covers a 25 year period in the Council, the frequency of these bills tended in the past to be shaped by whether the Government had an upper house majority. For instance, only one Opposition bill was initiated in the Council through the seven years of the Kennett Liberal/National Party Government when the Executive controlled the numbers in both houses.
14. Private Members' Bills introduced in the Legislative Council

Parliament	Non-Government Bills introduced
51st (1988–92)	9*
52nd (1992–96)	0
53rd (1996–99)	1
54th (1999–2002)	9*
55th (2003–06)	6
56th (2006–10)	13*
57th (2010–13)	13
TOTAL	51

15. * Non-Government majority held in the Council
16. Notably, however, the increased number of non-government bills in the 56th Parliament, when the Government lacked a majority, has not only continued but been built on in the 57th Parliament. By the end of 2013, with the Parliament having almost a year to run, the number of private members' bills had already equalled the total for the entire 56th Parliament.
17. There is no question that the continued presence in the Council of three Australian Greens' members has been a major factor in this development. Amongst the 13 Bills initiated in the 57th Parliament's first three years, 11 were sponsored by the

Australian Greens. There also appears to have been an increasing awareness since 2003 of the opportunity such bills afford non-government parties to raise issues of concern and highlight the need for policy and legislative change. This may represent some cultural change in the house which has enhanced the Council's review function.

18. Once again, it is worth noting that raising matters is one thing, actually achieving legislative reform is another. Even with a non-government majority in the 56th Parliament, only five bills attracted sufficient support to pass the Council and be referred to the Legislative Assembly where none were successful. By the end of 2013, none of the 13 private members' bills introduced into the Council in the 57th Parliament had passed.

19. Conclusion

20. The Legislative Council was partially effective as a house of review prior to 2003, with rules and practices differing quite markedly from the lower house in terms of the absence of many time limits and the provision of opportunities for non-government members to express opposing views. The Constitution (Parliamentary Reform) Act 2003 provided impetus to this scrutiny function by introducing a key structural reform through a new method of electing the Council. The proponents of this reform appeared to believe this would provide the Council with the foundation for further structural and cultural changes from within.
21. It is somewhat difficult to measure the extent to which the Council has lived up to the Constitutional Commission's expectations, or even those of the Government which established that body and introduced the Reform Bill in 2003. Certainly, the Commission did provide a broad outline of what an effective house of review should do, but did not fully enunciate the means of achieving this (outside of a strengthened parliamentary committee system). The Commission placed considerable faith in the capacity of proportional representation, with multi-member electorates, to promote more diverse representation, new ideas and a greater likelihood that the political complexion of the Council would differ from the lower house. In this regard, the 56th Parliament can be seen as considerably more successful than its successor, as it had a larger number of parties represented and, more importantly, the Government did not possess a majority. Nevertheless, a significant problem for the Council emanating from the Reform Act was exposed during the 56th Parliament: this was the Dispute Resolution Committee. The provisions of the Constitution related to this Committee do not treat the Council equally with the Assembly and bring into question its right to defeat a bill.
22. In terms of the Council's scrutiny function, probably the greatest weakness of the 57th Parliament has been the lack of opportunities for the newly created standing committee system to break free of government influence over references and resourcing. A non-government majority in the 58th Parliament will undoubtedly result in far more references and work for the standing committees, but the issue of adequate resourcing to meet the needs of such a committee system remains less certain.
23. Despite these difficulties, and although only a little over a decade has passed since the Reform Act's enactment, it seems reasonable to argue that the Council has started evolving into a more effective house of review. A very positive sign has been the number of relevant procedural reforms which have been retained, even in a government controlled house. It therefore seems likely that the Council will continue to develop into a more diverse, assertive and independent body.