

The New South Wales Legislative Council: an analysis of its contemporary performance as a house of review

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In 1978 the New South Wales Legislative Council was reformed by introduction of an electoral system based on proportional representation. The Council has been gradually transformed. Politically diverse in terms of party representation, it is now an active house of review with a strong committee system.

It is a truism to say that the Legislative Council of NSW, Australia's first legislature, has undergone very significant changes since its establishment in 1824 as a five-member appointed body. That its powers and composition, as well as its underlying political *raison d'être*, have altered dramatically since that time is as obvious as it is unsurprising. What is less obvious, perhaps, and more surprising is the relatively recent nature of certain changes. Before the reforms of 1978, membership of the Council was part-time and members were indirectly elected; its reputation as an effective house of review was modest, at best;¹ and, completing the portrait of an institution not overly imbued with dynamism and independence, it is said that membership generally was a 'source of patronage by which the party faithful could be rewarded'.² As late as 1983 Ken Turner commented that a 'little

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¹ K. Turner, *House of Review? The New South Wales Legislative Council, 1934–1968*, Sydney University Press 1969, 123–24.

² B. Page, *The Legislative Council of New South Wales: Past, Present and Future*, NSW Parliamentary Library Research Service Background Paper No 1990/1, 3.

improvement in the Council's modest review performance does not seem a fully satisfactory rationale for the Council, but it may be all there is'.³

In some respects the subsequent performance of the upper house in NSW may have exceeded expectations. Since 1978, with the introduction of full-time membership and an electoral system based on proportional representation, there has been a gradual transformation of the Council into a politically diverse, in terms of party representation, and active house of review with a strong committee system. Formally, at least, the Legislative Council of NSW is not as powerful as other Australian upper houses, in that it lacks the constitutional power to block supply. Appropriation Bills apart, however, its formal powers are equal to those of the Legislative Assembly. It is also the case that the Council is itself entrenched and that it cannot be abolished, or its powers or membership altered, without a referendum.

Politically, moreover, the contemporary Council is enormously influential, if for no other reason than, since 1988, no government has controlled the upper house. Indeed, at present no fewer than 13 of the 42 members sit on the cross benches. Predictably enough, these developments have not pleased everyone. Just as the cause of reform, and even abolition, was active before 1978, it remains so today; for parliamentarians, academics, the media and the public alike the Council continues to be the subject of persistent, if not continuous, scrutiny. Like the Senate, the NSW Legislative Council invites partisan debate about the role upper houses can play in the revival of parliament as an institution, on one side, and concerning the whole question of the democratic legitimacy of second chambers, on the other.

At present the Council consists of 42 members elected on an optional preferential proportional representation basis from one electorate, the State of New South Wales. Members serve an 8 year term, one-half (21) being elected every four years to coincide with the term of Parliament. This means that a candidate requires approximately 4.5 per cent of the total vote (after distribution of preferences) in order to secure a seat in the upper house.⁴ A different perspective is gained when one compares the distribution of seats with the percentage of primary votes gained. Viewed from this perspective, the results of the 1999 periodic election for half the Council seats were as follows: 8 Labor Party (37.27 per cent of total vote); 6 Liberal/National Parties (27.39 per cent of total vote); 1 Pauline Hanson's One Nation (6.34 per cent of total vote); 1 Australian Democrats (4.01 per cent of total votes); 1 Christian Democratic Party (3.17 per cent of total vote); 1 The Greens

³ K. Turner, 'Some changes in the New South Wales Legislative Council Since 1978' in *The Role of Upper Houses Today*, edited by G.S. Reid, Proceedings of the Fourth Annual Workshop of the Australasian Study of Parliament Group, 1983, 55. Turner wryly added: 'For that matter, if we examined the actual, rather than the traditional, performance of the Assembly, we might find similar difficulty in justifying that chamber too!'

⁴ Percentage required is determined by dividing 100 per cent by one more than the number of seats to be contested in the electorate, in this case $100 \div 22$.

(2.91 per cent of total vote); 1 Reform the Legal System (1.00 per cent of total vote); 1 Unity (0.98 per cent of total vote); 1 Outdoor Recreation Party (0.20 per cent of total vote).

Another comment to make on this election is that it involved a huge number of candidates, 264 in all in 80 groups, set out on a 'tablecloth' ballot paper approximately one metre across by 70 centimetres down. Concerns that the system permitted manipulation of preference flows, especially by micro and front parties, prompted the Carr Government to introduce significant changes to the above the line method of voting and the registration requirements for parties.⁵ The likely net effect of these reforms is that, while minor parties such as the Australian Democrats and the Greens will continue to flourish in the upper house in NSW, micro parties will find it harder to attract sufficient preferences to achieve the required quota.

The focus of this article is on the Legislative Council's performance as a house of review. Its analysis for this purpose is restricted to two areas: first, an overview of the work of the Legislative Council's committees, and secondly, an account of the Council's record in amending Bills from 1988 to 2000.

Committees

Committees have been appointed throughout the history of the New South Wales Parliament, but it was not until the early 1980s that committees began to emerge as a significant mechanism for parliamentary review of executive activity.⁶ In 1983, the Public Accounts Committee (a Legislative Assembly committee) was reconstituted under new legislation and was given a permanent secretariat and budget. A joint standing committee on Road Safety (Staysafe) was established in 1983 and, four years later, the Council's Subordinate Legislation Committee was reconstituted into the Joint Regulation Review Committee. If anything, this last development suggested a diminution of the Council's role, as the upper house only provided two of the nine members for this new joint committee.

⁵ *Parliamentary Electorates and Elections Amendment Act 1999*; D. Clune, 'Political Chronicles — NSW, July to December 1999' (2000) 46 *Australian Journal of Politics and History* 221 at 222. In future, voters will be able to choose their own preferences above the line by numbering the different groups listed. The first choice indicated will take the voter's preferences through the list of candidates in that group below the line. If a second choice is indicated the application of preferences will then continue through all of the candidates in that group and so on. As the Constitution requires that an elector needs to record a vote for at least 15 candidates, only groups with this number or more will be able to apply to be listed above the line. Note that owing to the changes in the registration laws for political parties, A Better Future for Our Children has been deregistered and Alan Corbett is now an independent MLC — *NSW Government Gazette*, No. 34, 2 February 2001, 552.

⁶ M. Willis, 'Committee Action: New South Wales strengthens the parliamentary process' (1990) 71 *The Parliamentarian* 163.

Before its conversion to a House of full-time members the Legislative Council had been, in Turner's words, 'modestly active' in joint and select committee work.⁷ Page reported that this trend had continued for much of the 1980s.⁸ For the Council, it was the period after 1988 that proved the most important in this respect. The lack of a clear government majority in the upper house since that time has resulted in a marked increase in parliamentary committees, so much so that in a report on the performance of Legislative Council committees for the period July 1999 to December 1999, the Clerk of the Parliaments stated that 'Anecdotal evidence suggests that this has been the most intense period of Committee activity in the history of the Legislative Council'.⁹ A proliferation in committee inquiries can also be noted, rising from 21 in 1998–1999 to 37 in 1999–2000.

An important landmark in this development was the report in November 1986 of the Select Committee on Standing Committees for the Legislative Council, recommending the establishment of a system of standing committees. This resulted, in 1988, in the establishment of two standing committees of the Legislative Council: the Standing Committee on State Development and the Standing Committee on Social Issues.¹⁰ Both were 'firmly under the control of government members', there being initially five government and four non-government members on each committee.¹¹ By 1991 the Standing Committee on State Development had been reduced to a membership of seven; whereas the Standing Committee on Social Issues had been increased to 10, of which five were government members, three Labor and two cross-benchers (one Australian Democrat and one Call to Australia). Since 1999 there are five members on each government-controlled upper house standing committee, the government retaining its majority¹² with three members (including the Chair), plus one Coalition member (the Deputy Chair) and one cross-bench member. A third Standing Committee on Law and Justice was established in 1995. All these committees have produced important reports over the past decade or so, on subjects as diverse as accessing adoption information and juvenile justice (Standing Committee on Social Issues), the management of fisheries in NSW (Standing Committee on State Development), and the motor accidents scheme (Standing Committee on Law and Justice). Reflecting on the early years of these committees, a long-serving Labor MLC and later Chairman of the Standing Committee on Law and Justice commented that they had 'given backbench MLCs a valuable input into policy they would not otherwise have had'. He also referred to MLCs taking on the Government in a bipartisan manner.

⁷ K. Turner, n. 3, 48–55.

⁸ B. Page, n. 2, 10. Table 3 in Page's work sets out the Council's committees and joint committees between 1976 and 1989.

⁹ New South Wales, Legislative Council, *Report on Performance: Legislative Council Committees: 1 July – 31 December 1999*, Number One, February 2000.

¹⁰ The Standing Committee Upon Parliamentary Privilege was also established in 1988. In 1995 it was reconstituted as the Standing Committee on Parliamentary Privilege and Ethics.

¹¹ B. Page, n. 2, 10.

¹² The Standing Committee on Privilege and Ethics has eight members and is now chaired by a cross-bench member.

The Social Issues Committee, for example, as a result of its Adoption reference, proposed that, contrary to existing government policy, access be provided to adoption information on the grounds that every person should have the right to information on their origins. This recommendation was accepted by the Minister and existing policy changed accordingly. When investigating drug abuse, the Social Issues Committee unanimously recommended, again in direct contradiction to existing government policy, elimination of virtually all forms of tobacco advertising. In this case, however, the Government was not so sympathetic and rejected the recommendation out of hand. A further instance of Council committees acting in a bipartisan fashion to scrutinise government policy is the fact that the State Development Committee recently unanimously endorsed a report highly critical of the Government's coastal development policy.¹³

In June 2000 the Deputy President of the Council, Hon Tony Kelly MLC, reported that these standing committees:

. . . have continued their in-depth inquiries into complex matters of public policy, in a co-operative manner. In most of these inquiries it has been possible for a consensus, unanimous report to be produced. Furthermore, these Committees have continued to see positive outcomes result from their inquiries with a good record of implementation of recommendations by Government.¹⁴

A second landmark was establishment in 1991 of joint estimates committees, the direct result of the memorandum of understanding, known as the 'Charter of Reform', signed by leaders of the minority Coalition Government and the three independent members who held the balance of power in the Assembly.¹⁵ Of this period, Rodney Smith commented that '25 joint estimates committees have been established. To date their potential to allow close questioning of government expenditure has been blunted by the inexperience of members at this task, procedural difficulties, the government's opaque accounting methods and the brevity of committee meetings'.¹⁶ These joint estimates committees operated until the 1995 Budget Session, after which time the Houses failed to reach agreement on their mode of operation. The Council's reaction was to set up three estimates committees of its own in October 1995, reflecting the portfolio responsibilities of the Ministers in the upper house. These committees, which were authorised to examine the appropriations of government departments, as well as the expenditure or income of statutory bodies, comprised of four Government, two Opposition and two cross-bench members. Assembly Ministers attended these Estimates Committee

¹³ B. Vaughan, 'The situation in a State Parliament' in *The PRS 25 Years On*, Department of the Parliamentary Library 1995, 43.

¹⁴ A. Kelly MLC, 'Co-operation and confrontation: committees of the NSW Legislative Council', *Paper Presented to the 31st Presiding Officers and Clerks Conference*, July 2000.

¹⁵ R. Smith, 'Parliament' in M. Laffin and M. Painter (eds), *Reform and Reversal: Lessons from the Coalition Government in New South Wales, 1988-95*, MacMillan, 1995, 26-27.

¹⁶ *Ibid*, 34.

hearings on a voluntary basis. As discussed below, as the two Houses were again unable to agree to a joint resolution, in 1997 the Council's General Purpose Standing Committees took on the role of estimates committees, an arrangement which remains in place today.

A third landmark occurred in 1997 when a major step was taken towards establishing a comprehensive system of parliamentary committees. In that year, the Legislative Council appointed five general purpose standing committees modelled on the Senate committees in the Australian Parliament. These committees were established on an Opposition motion with the support of the cross-bench and independent members who held the balance of power in the upper house. The Government opposed the motion. The committees were re-established in 1999 at the commencement of the current Parliament, again in the face of Government opposition. In the light of these developments the Deputy President of the Council, Hon Tony Kelly MLC, has argued that there are now really 'two parallel committee systems' in the NSW Legislative Council, with a distinction being drawn between the government-controlled Standing Committees and the General Purpose Standing Committees which remain outside government control. He went on to say that these parallel sets of committees handle different types of inquiries.¹⁷ Kelly commented:

. . . in May 1999 there was a strong movement from the Opposition and cross-bench members to discard the government controlled standing committees in favour of the General Purpose Standing Committees. However, an understanding was reached that, at this stage in the development of the Legislative Council's committee system, such a move would not be appropriate. A key concern was the risk that such a move could result in the Government no longer including the upper house committees in their policy development and policy review processes.¹⁸

As set out in the Council's resolution of 13 May 1999, under which the General Purpose Standing Committees are presently constituted, each committee is responsible for a set of government portfolios. Further, each committee consists of seven members: three government members, two opposition members and two cross bench or independent members. The committees may inquire into and report on: any matters referred to them by the House; the expenditure, performance or effectiveness of any department of government, statutory body or corporation; any matter in the annual report of a department of government, statutory body or corporation. Very importantly, the inquiries undertaken by these committees do not depend on a reference from the Council, but can be generated from within the committee itself, subject to the requirement that the inquiry can be accommodated under one of the committee's portfolios.¹⁹ In this way, inquiries can be tailored to

¹⁷ A. Kelly MLC, 'Co-operation and confrontation: committees of the NSW Legislative Council', *Paper Presented to the 31st Presiding Officers and Clerks Conference*, July 2000.

¹⁸ *Ibid.*

¹⁹ A Committee meeting may be convened at the request of three members. At such a meeting, an inquiry can be proposed and the proposal voted upon. Usually, given the make-up of these

suit the interests and expertise of their members. The committees have been granted express power to:

- a) send for and examine persons, papers, records and things;
- b) adjourn from place to place;
- c) make visits of inspection within the State;
- d) request the attendance of and examine members of the House;
- e) publish, before presentation to the House, submissions received and evidence taken in public; and
- f) report from time to time its proceedings, evidence taken in public and recommendations.

Taken together, the fact that these General Purpose Standing Committees are not controlled by the Government, plus the broad nature of their powers and their capacity for self-referencing, make them flexible and, potentially, formidable instruments for the scrutiny of the Executive. In a relatively short space of time they have reported on an impressive range of subjects of more immediate and long-term political interest, including: Olympic budgeting and ticketing (General Purpose Standing Committee No. 1); rural and regional health services in NSW (General Purpose Standing Committee No. 2); the police commissioner's contract of employment (General Purpose Standing Committee No. 3); the privatisation of FreightCorp (General Purpose Standing Committee No 4); as well as the NSW rural fire service and the M5 East ventilation stack (General Purpose Standing Committee No. 5). The very political nature of their inquiries has tended to make this reporting process more confrontational than is usually the case for the Council's Standing Committees. For example, five of the eight reports of inquiries (apart from the examination of budget estimates) by the General Purpose Standing Committees from May 1999 to June 2000 included dissenting reports.²⁰

It is fair to say that establishment of these General Purpose Standing Committees is among the most important developments in the Council's role as a house of review. They are, however, subject to limitations of various kinds. For example, a weakness of a practical sort is that, when acting as estimates committees, ministers often take questions on notice, but the time taken typically to respond to these may limit their value when the questions at issue are of immediate political concern. To date no

committees, the outcome will depend on the casting vote of the Chair. In fact, other Council Standing Committees can initiate inquiries into matters arising in annual reports, but in practice this power is rarely, if ever, used.

²⁰ A. Kelly MLC, 'Co-operation and confrontation: committees of the NSW Legislative Council', *Paper Presented to the 31st Presiding Officers and Clerks Conference*, July 2000. Various factors are considered, including the tight timeframes for several of these reports, the personalities involved, as well as the inherently controversial nature of the subjects under inquiry. The paper was responding to the argument presented by Anne Lynch at the 1999 Conference on the theme of 'the fragmentation of the Senate committee system'.

minister based in the lower house has refused to appear before a General Purpose Standing Committee, yet it remains the case that such committees do not have the power to summon ministers from the Assembly,²¹ or for that matter to require lower house ministers to answer questions when they do appear. Also, in the case of the General Purpose Committees there is no formal requirement for the Government to respond to a report in any set time frame. This contrasts with the Standing Committees of the upper house, in relation to which the Government is required to respond to a committee report within six months. However, the General Purpose Committees are in a position to require attendance by public servants; and, further, if a General Purpose Committee is dissatisfied with a Government's response, or by its failure to respond, then it can use its self-referencing powers to reconvene and continue the scrutiny process by establishing a new inquiry.

Opinion may differ about the actual impact the reports of the General Purpose Committees have had on Government policy to date. As was the case in relation to the inquiry into Olympic ticketing, these committees tend to deal with the most highly politicised issues and it may be that governments will be unlikely to accept any recommendation which does not accord very firmly with its own policy and agenda. In spite of this, the committees can still sometimes perform a valuable role in publicly discussing contentious issues at hearings. Further, Olympic ticketing is a good example of an inquiry where, during its course, the Government addressed many of the problems that had acted as a catalyst for the inquiry.

More generally, it can be argued that the possibility that governments will ignore reports is a perennial dilemma facing parliamentary committees. This suggests, in turn, that the committee system should not be looked upon as a panacea for all the real and imagined faults of parliamentary government. Conversely, it might also be said that considerations of this kind should not lead us to underestimate the potential significance of the committee system which is now in place in the NSW upper house. Of particular note is the unique self-referencing power of the General Purpose Standing Committees which, on one view, permits members to pursue with new vigour the Council's constitutional scrutiny or accountability function, defined by the High Court in terms of the 'superintendence of the executive government'. Just how effectively and responsibly this power is exercised may prove an important indicator of the performance of these committees. It can be noted in this regard that the Legislative Council now produces an annual report on performance in which the work of all its committees is analysed against such criteria as the number of hearings conducted, the number of reports and recommendations produced, and the outcomes in relation to these.²²

²¹ Legislative Council, Parliament of NSW, *General Purpose Standing Committees: Manual for Budget Estimates Hearings*, June 2000. This limitation is not peculiar to these committees. Rather, it is a reflection of the customary arrangements that apply between the two houses of parliament in the Westminster system.

²² The first of these reports is dated February 2000.

At present there is one upper house select committee — on the increase in prisoner population. In addition, excluding the various domestic committees, there are a total of nine joint committees. Two of these are joint select committees;²³ five are joint statutory committees;²⁴ and two are joint standing committees.²⁵ An upper house threat in April 2000 to refer rail safety to General Purpose Standing Committee No 4 was only averted by the Government's agreement to broaden the terms of reference of the inquiry into the Glenbrook rail disaster chaired by Acting Justice McInerney.

Writing in 1990, Barbara Page thought it 'questionable' whether the Council as constituted at that time could 'support an effective committee system along the lines of the Australian Senate'. She added, '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 . . . If the number of Councillors was to be further reduced, then this would be even more unlikely'.²⁶ This is precisely what occurred in 1991 when the Council was reduced to its present size of 42 members. Clearly, the 'system' of parliamentary committees which has developed since Page wrote over a decade ago can only operate if members are prepared to serve on several committees at a time; and, echoing Page's views, it is hard to see how it could operate efficiently if the Council's size were reduced still further.

Amendment of Bills

For the decade from 1978, when a directly elected Legislative Council was established, to 1988, a period in which the upper house remained under the control of the Labor Government, the performance of the Council as a house of review can be characterised as significant but limited.²⁷ Reviewing this period and looking towards possible future developments, Barbara Page concluded:

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. 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,

²³ Into safe injecting rooms and victims compensation.

²⁴ Committee on Children and Young People; Committee on the Health Care Complaints Commission; Committee on the ICAC; Committee on the Office of the Ombudsman and Police Integrity Commission; and the Regulation Review Committee.

²⁵ The Small Business and the Staysafe Joint Standing Committees.

²⁶ B. Page, n 2, 16.

²⁷ A thorough analysis of the Council's performance for the period from 1976 to 1990 is contained in the NSW Parliamentary Library Background Paper by Barbara Page: see n. 2.

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.²⁸

There will be different perspectives on the performance of the Council as a house of review since 1988. Throughout this period, sections of the press have campaigned for the reform or abolition of the upper house, one paper describing it as ‘a waste of taxpayers’ money’. Alternatively, that paper suggested reform proposals to reduce the number of MLCs from 42 to 34 should be ‘re-activated’.²⁹ The Treasurer, Michael Egan, has also been a concerted critic of his own legislative chamber, calling for its abolition, refusing in the long-running saga of litigation to accept the legitimacy of its review functions, and claiming that its new committee system was a sign that ‘crossbenchers and the Opposition are prepared to behave in a wacky and reckless way for the next four years’.³⁰ But that is only one perspective. Another would emphasise the contribution the upper house has made to reinvigorating the parliamentary process in NSW, especially in securing the accountability of government activity. In any event, an analysis of the Council’s performance since 1988 is needed if the questions posed by Page about the Council’s future development are to be answered.

1988 to 1995 (49th to 50th Parliaments)

As noted, after the 1988 general election, when the Liberal/National Coalition gained office, minority parties held the balance of power in the upper house. Call to Australia now had three seats in the Council, the Australian Democrats two. Following the 1991 general election, when the Coalition Government could achieve a majority with the support of the two Call to Australia members, its position in the Council was less problematic; certainly less so than in the Assembly where it was now in a minority. All the same, the successful passage of its legislative program through the Council required delicate handling throughout these years. Indeed, Premiers Greiner and Fahey had to devise strategies to keep Parliament itself functioning.³¹

In the Council, this involved attempting to form *ad hoc* coalitions of support during the period 1988 to 1991 by formally briefing independent MLCs on contentious legislation, as well as making pre-emptive amendments to legislation in anticipation of objections.³² In the Assembly, the developments were even more significant. Through the ‘Charter of Reform’, signed in 1991 and forming the cornerstone of the

²⁸ B. Page, n 2, 19.

²⁹ Editorial, ‘The ideal replacement is no one’, *The Daily Telegraph*, 25 July 2000.

³⁰ G. Jacobsen, ‘Inquisitors keeping up the pressure’, *Sydney Morning Herald*, 17 January 2000.

³¹ R. Smith, n. 15, 25.

³² See R. Smith, n. 15, 25; B. Page, n. 2, 6–7.

Coalition Government's fragile hold on office until March 1995, the three independent MPs made a major impact on policy initiatives and parliamentary reform.³³

The impact of the Council on the Government's legislative program can be gauged from the statistics for Bills during each of the parliamentary sessions during this period.³⁴ As Smith noted, after the 1988 election the Council 'went from being a chamber in which amendments were rare, and successful Opposition amendments almost unknown, to one in which both government and non-government amendments were commonly passed'. To a very large extent this is an effect of the cross-bench balance of power. There are, however, variations in this effect depending on the nature and extent of the cross-bench support the Government needed.

During the first period from 1988 to 1991, when the Government required support from three of the five cross-bench members, passage of legislation through the Council was difficult. Of the 556 Bills introduced in the Council, 116 (20.9 per cent) had amendments proposed to them and 80 (14.4 per cent) were actually amended. A particularly difficult area for the Government was industrial relations reform. More than 300 amendments were made to the Industrial Relations Bill 1990 in the Council, which was subsequently withdrawn by the Government.³⁵ In contrast, during the period after the 1991 election through to the end of the 1993 session, when, due to the support of the two Call to Australia members, the Coalition had the numbers in the Council, the passage of legislation through the upper house appears to have been somewhat easier. Of the 325 Bills introduced in the Council during this period, 42 (12.9 per cent) had amendments proposed to them and 24 (7.4 per cent) of these Bills were amended. During the same period, of the 227 separate amendments carried in the Council, 187 (82.4 per cent) were amendments which were moved by the Government. While many of these amendments are likely to have been technical in nature, it may also be that negotiations with the CTA Party were partly responsible.

The situation appeared to change in the 1994 session, the last of the Coalition Government: of 123 Bills introduced, 32 (26 per cent) had amendments proposed to them and 15 (12.2 per cent) were amended. But note that 10 of the 15 Bills were

³³ See R. Smith, n. 15, 25–7.

³⁴ Such information has been compiled from the Journal of the Legislative Council of New South Wales, Minutes of Proceedings. It must be noted that statistics on amendments to Bills can only provide a crude indication of trends. Without differentiating between technical amendments and policy amendments (and, perhaps, amendments indicating preferences as to wording as opposed to substance), no conclusive positions can be taken. Nevertheless, the statistics on amendments do provide useful points of departure for analysis.

³⁵ After the 1991 election, when the Industrial Relations Bill 1991 was proposed by the Greiner Government, the then Minister for Industrial Relations actually appeared in the Council to pilot the legislation through the debate. The relevant section of the Constitution Act 1902 permitting this action is section 38A which allows a Minister who is a member of the Legislative Assembly to sit in the Council to explain the provisions of a Bill. This can only be done with the consent of the Council itself.

amended either entirely or partially by amendments moved by the Government in the Council. The Coalition Government still only required the support of the two Call to Australia members in the Council. However, in comparison to the previous sessions since the 1991 election up until 1993, both the Australian Democrats and the Call to Australia Party were somewhat more active and successful in proposing and securing carriage of their amendments. From 1991 to 1993, the Australian Democrats proposed 44 amendments but none were carried. During the 1994 session, they proposed 64 amendments and eight were carried. Similarly, from 1991 to 1993, the Call to Australia Party proposed 31 amendments and eight were carried. During the 1994 session, they proposed 26 and 18 were carried. This may have been due to the increasing pressure and scrutiny which the Coalition Government came under towards the end of its term of office. Call to Australia may have sought, perhaps belatedly, to capitalise on its bargaining power. It should be noted, however, that the eight successful amendments moved by Call to Australia related to two Bills, the Farm Debt Mediation Bill 1994 and the Independent Commission Against Corruption (Amendment) Bill 1994. These amendments were passed without a division and with the support of the Government.³⁶ The Australian Democrats, for their part, were successful in amending three Bills, all of which concerned the criminal law — the Crimes (Dangerous Driving Offences) Amendment Bill 1994, the Sentencing Legislation (Amendment) Bill 1994 and the Victims Compensation (Amendment) Bill 1994. Again, these amendments were passed without a division and with the support of the Government.³⁷

1995 to 1999 (the 51st Parliament)

The general election of 1995 saw Labor returning to office under Premier Carr, with a slim majority in the Assembly.³⁸ It also saw a change in the composition of the Council. Politically, the upper house was now more complex. The 21 seats were distributed as follows: 8 Liberal/National; 8 Labor; 1 Australian Democrats; 1 Greens; 1 Call to Australia; 1 A Better Future For Our Children; 1 Shooters Party. The Coalition Parties won 38.49 per cent of the primary vote; Labor 35.25 per cent; minor parties and independents 26.26 per cent in total, with successful minor party and independents winning 14.09 per cent of the primary vote.³⁹ Immediately after the 1995 election the composition of the upper house was as follows: 18 Coalition; 17 Labor; 2 Australian Democrats; 2 Call to Australia; 3 other. However, during the course of the 51st Parliament matters became more complex still. One defection each from the Coalition,⁴⁰ Labor⁴¹ and the Australian Democrats⁴² created 3 Independent members, so that now there were: 17 Coalition; 16 Labor; and 9 others.

³⁶ *NSWPD*, 30 November 1994, 5967; *NSWPD* 1 December 1994, 6084.

³⁷ *NSWPD*, 23 November 1994, 5618 and 5260; *NSWPD*, 22 November 1994, 5478; and *NSWPD*, 3 May 1994, 1719, 1725 and 1728

³⁸ Labor won 50 seats; the Coalition 46; Independents 3.

³⁹ A Green, *NSW Legislative Council Elections 1995*, NSW Parliamentary Library Background Paper No 2/1996.

⁴⁰ Helen Sham-Ho resigned from the Liberal Party on 29 June 1998 to be an independent.

As one might expect, the result was a steady upsurge in legislative amendment by the Council in the 51st Parliament. The first session of the Parliament ran from 2 May 1995 to 27 January 1996. In this period a total of 21 Bills (of 124) were amended by the Council. Of the total of 199 amendments which were carried, 48.2 per cent were proposed by the Government and 23.1 per cent by the Opposition; no fewer than 28.7 per cent were therefore proposed by the minor parties and independents. Of these, the Australian Democrats carried 19.6 per cent of the total number of successful amendments (39 of 54 proposed); the Greens carried 4 per cent of the total of amendments carried (8 of 45 proposed); the Shooters Party carried 3.5 per cent (7 of 7 proposed); Call to Australia 1 per cent (2 of 27 proposed); and Better Future For Our Children 0.5 per cent (1 of 1 proposed). This last amendment related, appropriately enough, to the Children (Care and Protection) Amendment Bill 1995. Six of the amendments carried by the Shooters Party concerned the Conveyancers Licensing Bill 1995. The amendments carried by the Greens concentrated on environmental issues, but also included Bills relating to electricity supply (3 amendments); all 16 of the amendments the Greens proposed to the Olympic Co-ordination Authority Bill were negatived. Call to Australia carried 2 amendments to the Bill dealing with the regulation of disorderly houses. The Australian Democrats (still with 2 members in the upper house) successfully proposed 21 amendments to the State Owned Corporation Amendment Bill 1995, plus 18 other amendments to Bills on subjects ranging from witness protection to waste management.

The second session of the 51st Parliament ran from 16 April 1996 to 30 July 1997 by which time a very clear picture of legislation by negotiation had emerged. In this period a total of 66 Bills (of 261) were amended by the Council. Of the total of 482 amendments which were carried, 28.6 per cent were proposed by the Government, 24.3 per cent by the Opposition and 47.1 per cent by minor parties and independents. Of the minor parties and independents, Better Future For Our Children was responsible for 15.6 per cent of the amendments which were carried (75 of 97 proposed). No fewer than 35 of these were to the Children (Protection and Parental Responsibility) Bill 1997; another 15 concerned a Bill amending apprehended violence orders; and 14 related to a young offenders Bill. In a similar pattern of concentrated legislative amendments, the 26 amendments carried by the Shooters Party related to two Bills, one dealing with home invasion, the other concerning victims rights. All 40 amendments proposed by the Shooters Party to the firearms legislation were negatived. The profile for the Greens where successful amendments are concerned is somewhat broader, with the record showing that amendments were carried in the fields of criminal and administrative law, transport legislation, the supply of gas, as well as the core areas of environmental regulation. Richard Jones, formerly an Australian Democrat but now an independent, has a similar profile, including successful amendments to local government legislation and the prevention of cruelty to animals. In crude terms, the dramatic change is to

⁴¹ Franca Arena resigned from the ALP on 7 November 1997 to be an independent.

⁴² Richard Jones resigned from the Australian Democrats on 12 March 1996 to be an independent.

the number of successful amendments — a drop from 39 to 14 (2.9 per cent of the total of amendments carried) — proposed by the Australian Democrats, now reduced to one member in the upper house. As with Call to Australia, which carried three amendments, the Democrats no longer held such a pivotal position in the Council's ever changing balance of power.

Overall, the picture to emerge from these figures is that the minor parties and independents had successfully carried amendments in the key areas of interest to their own constituencies, be it children's rights, law and order, the environment, the rights of animals, or whatever. Whether in some cases this was the result of a deal with the Government, for example, in return for support for a key piece of legislation, cannot be said definitely. Statistics of the kind presented here can only reveal so much, and only hint at the subtleties involved in the complex behind the scenes arrangements now at work in the NSW Legislative Council.

The last session of the 51st Parliament ran from 16 September 1997 to 3 February 1999 in which period a total of 98 Bills (of 277) were amended by the Council. Of the total of 826 amendments which were carried, 38.4 per cent were proposed by the Government, 18.8 per cent by the Opposition and 42.8 per cent by minor parties and independents. The last figure is slightly down on the previous session, but it does not reveal the compromises the Government may have had to make in order to secure passage of its legislative program. Perhaps the outstanding figures to note from this second session are the 134 and 132 amendments successfully proposed by Richard Jones and the Greens member, Ian Cohen, respectively. Better Future for Our Children successfully moved 38 amendments, Call to Australia (now titled the Christian Democratic Party) 29, Australian Democrats 16, and the former Labor MLC, Franca Arena, 5. As ever, great care needs to be taken when analysing statistical data of this sort, but these figures clearly reveal a trend towards increasing minor party and independent involvement in the legislative process. Among the proposed legislation which was most heavily amended by the minor parties and independents were Bills relating to: the Commission for Children and Young People; companion animals; police and public safety; forestry and national parks; native vegetation conservation; privacy and personal information; and the management of Sydney water.

1999 to 2000 (the 52nd Parliament)

Labor retained office in the 1999 election with an increased majority in the Assembly. In the Council, on the other hand, there were now 13 cross-bench members in a House of 42 seats. As noted, the periodic election for 21 upper house seats produced the following outcome: 8 Labor Party; 6 Liberal/National Parties; 1 Pauline Hanson's One Nation; 1 Australian Democrats; 1 Christian Democratic Party; 1 The Greens; 1 Reform the Legal System; 1 Unity; 1 Outdoor Recreation Party. The Labor Party won 37.27 per cent of the primary vote; the Coalition 27.39 per cent; minor parties and independents a total of 35.34 per cent, with the

successful minor parties and independents winning 18.61 per cent of the primary vote. At present the Council comprises: 16 Labor; 13 Coalition; and 13 other (1 Australian Democrat; 2 Christian Democratic Party; 2 Greens; 1 One Nation; 1 Better Future for Our Children; 1 Shooters; 1 Reform the Legal System; 1 Outdoor Recreation Party; 1 Unity; plus 2 Independents⁴³).

To date, there has only been one completed session of the 52nd Parliament, the short Budget session from May to August 1999. The second session, which is still ongoing, started in September 1999 and figures for the amendment of Bills are available up until December 2000. The picture to emerge from the first session is, predictably, one of mounting complexity, in which the Government adopted a tentative approach to its legislative program. In total, 7 Bills (of 81) were amended in this period. Of the total of 127 amendments which were carried: 80 were moved by the Government; 6 by the Opposition; 23 by the Australian Democrats; 9 by the Christian Democrats; 4 by Richard Jones; 2 by Better Future For Our Children; and one each by the Greens, Reform the Legal System, Unity and Helen Sham-Ho. Most amended was a Bill dealing with motor accidents compensation.

The statistics for the ongoing second session of the 52nd Parliament show that 50 Bills (of 255) were amended, with a total of 428 amendments being carried. Of these, 137 were moved by the Government, 68 by the Opposition and the other 223 (52.1 per cent) by the minor parties and independents. Again Richard Jones and the Greens were particularly active in this regard, moving 107 and 55 successful amendments respectively. In percentage terms, Richard Jones moved 25 per cent of successful amendments, and the Greens 12.9 per cent. Other successful amendments were moved by: Better Future For Our Children 23 (5.4 per cent); Reform the Legal System 12 (2.8 per cent); Australian Democrats 10 (2.3 per cent); Christian Democrats 8 (1.9 per cent); Outdoor Recreation Party 2 (0.5 per cent); and one each (0.2 per cent) for One Nation, Unity and Helen Sham-Ho, all relating to the Community Relations Commission and Principles of Multiculturalism Bill 2000. Most of the Government's major pieces of legislation were amended to some extent or other, including Bills dealing with adoption, sentencing, the regulation of gambling, water management and various other environmental measures. Again, this tells us nothing of the process of legislative negotiation which must now occur on a regular basis if the Government wants to secure passage of its legislation through the upper house. In fact, a feature of the present upper house is the fact that the minor parties and independents caucus on a weekly basis, mostly it can be assumed for the purpose of deciding upon such arrangements as committee membership and procedural and resource matters generally.⁴⁴ It seems that, in addition to any dealings the Government may have with individual members, it also briefs members on policy-related issues at these caucus meetings. The point can also be made that, at times, the minor parties and independents may seek to act in concert over a certain policy matter, as in the case of upper house electoral reform.

⁴³ Richard Jones and Helen Sham-Ho.

⁴⁴ Each minor party and independent member has two full-time staffers.

On other occasions, of which gambling regulation and liquor licensing are two outstanding examples, they have found themselves largely working together to achieve similar policy goals, operating more or less as a bloc against both the Government and the Opposition. Of course, where the Government and Opposition do agree, and where the required political will is in place, they have the numbers to carry legislation through the Council.

Whatever amendments have been proposed and carried to Government Bills in this period, the fact remains that the kind of ‘mandate wars’ which have affected the Australian Senate have not been replicated in the NSW upper house. Disagreements, sometimes trenchant in nature, have arisen, but usually a way has been found through these. One instance is the Dairy Industry Bill 2000, which saw both the Opposition and certain independent members pressing for amendments to provide for a State-funded top up compensation package to farmers. The amendments providing for this package were defeated in the Assembly but passed in the Council. The Assembly disagreed with the amendments with reasons and the Council in turn insisted on its amendments. In the Assembly, again, the Government suspended Standing Orders to permit a motion to be moved in Committee of the Whole ‘That the Assembly insists on its disagreement to the Legislative Council amendments a second time’. In Committee, the Leader of the National Party moved an amendment to this motion to refer the amendments to a conference of managers of both Houses. The amendment was negatived and the original motion agreed to. In the Council, the amendments were not insisted upon but only after the Government gave an undertaking to look at other avenues of assistance.

It remains the case that some Bills have not proceeded owing to the impossibility of their being passed in the Council. For example, a foreshadowed Bill to combine the positions of the ICAC and Ombudsman Commissioners was not introduced owing to lack of Legislative Council support. Also, attempts by the Government to bring independent contractors under the jurisdiction of the Industrial Relations Commission by declaring them to be employees were thwarted by the Council.⁴⁵

Inevitably, many questions remain. Statistical analysis can say nothing about the legislation that the Government may have introduced in other circumstances, or about any changes that may have been made by negotiation before or after a Bill was introduced. Nor, for that matter, can it say anything about the likelihood of minor parties and independents sometimes serving the ends of Government, for example, by championing amendments which the Government might support but which it could not have introduced itself for political reasons. It is probable that the present situation in the NSW Legislative Council makes for a Government that is

⁴⁵ D. Murphy and L. Doherty, ‘Labor backdown on industrial bill’, *The Sydney Morning Herald* 24 June 2000. The Industrial Relations Amendment Bill 2000 was in fact divided into two Bills, the Industrial Relations Amendment Bill and the Industrial Relations Amendment (Independent Contractors) Bill. The first was returned to the Assembly as the original Bill, while the second, dealing with the independent contractor provisions, remains on the Council’s business paper.

accustomed to negotiation and amendment as the price it must pay to get its program through. The present situation could also make for cautious government, at least as far as legislative initiatives are concerned. It could be, too, that an upper house is itself cautious in this situation, determined to amend and scrutinise up to a point, but aware also of the dangers involved in a house of review exerting its powers to the limits of its constitutional functions.

Conclusions and future perspectives

At the level of principle, in terms of the contested debate concerning the democratic legitimacy of upper houses, the arguments for and against bicameralism can often be black and white in nature. From this perspective, an upper house is either right, in theory, or it is not. At a more pragmatic level, however, any assessment of the performance of a Legislative Council is likely to be less certain. There will be instances when some particular achievement, such as a committee report or an amendment to a controversial piece of legislation, is considered positively by many people and will be pointed to as an instance of the value of a powerful house of review. Indeed, an effective upper house committee structure may itself be seen as an important indicator of parliamentary vitality. Conversely, other instances or indicators of performance may be viewed more negatively. Critics can point to such things as the potential for committees to replicate party political divisions, or the instinct of governments to ignore wherever they can any unwelcome recommendations made by upper house committees. Doubts can also be expressed about the whole process of legislative amendment when minor parties hold the balance of power, both as an issue of principle as to whether this is an undermining of the democratic system, and as a more pragmatic question concerning the effective formulation of statutory law.

From one standpoint, the performance of the contemporary Council in NSW can be seen as a question of balance – of the balance of political power, certainly, but also of the balancing of constitutional powers and proprieties, public expectations and political realities. Page called it a balance between the independence that effective review requires and the restraint needed to allow a government to govern. The indications are that the present NSW Legislative Council has achieved much of what Page had in mind when writing of an upper house reinvigorating the parliamentary process. Views will always differ about its underlying legitimacy, as well as concerning the performance of its members in a more pragmatic sense. However, that the Council is now a house of review in every sense is not in doubt.

With the introduction of electoral reforms in 1999, it is unlikely that its present mix of membership, with single representatives of several micro parties, will continue into the future. On the other hand, there is every likelihood that minor parties of different political persuasions will continue to be represented in the Council. If, as seems likely, minor parties still hold the balance of power, there is also every likelihood that the developments in the committee system will continue, as will the

pattern of legislative amendment discussed above. But nothing is certain. Much could depend on the political make-up of the minor parties: whether they are more 'left-leaning' or 'conservative' in disposition may affect their determination to scrutinise the government of the day. Quite different patterns of legislative amendment, both in terms of volume and direction, could apply when, for example, the balance of power lies with more 'right-leaning' minor parties and the government itself is conservative in nature, as against a situation when an ideologically conservative government must deal with more 'left-leaning' or 'progressive' minor parties. It is interesting in this regard to note how ideological perspectives on upper houses have changed. For the first three-quarters of the 20th century they were damned by the Left as obstructing the will of the people, most dramatically at the federal level in 1975; now some elements of the Left champion the role of upper houses in enhancing democracy. Attitudes towards upper houses can also be influenced by the political climate of the day: for example, when a government with a big program is in office, the possibilities for conflict increase; whereas in times like the 1950s when there is little call for governmental activism a hostile upper house may not be such a problem. All of which suggests that, while any analysis of a bicameral legislature must be based on theoretical considerations and issues of principle, the influence of contingency is never far away. What is perceived to be review, in one context, is looked upon as obstruction in another. The line between independent upper house review and the independent pursuit of policies by minor parties in areas where their mandate is questionable can be very fine.

In relation to the NSW Legislative Council, there is always the prospect of the major parties combining to abolish the Council. In his valedictory speech upon resigning, long-serving Liberal MLC, John Hannaford, warned that '[u]nless existing members made a concerted decision to enhance the role and relevance of this House, I believe during my lifetime this House will be abolished'.⁴⁶ On a more positive note, he added:

The use by members of the effectively designed committee structure, together with the clearly established power of this Chamber to secure executive accountability through the production of papers to the House, is the way to satisfy the public that this House is a proper bulwark of democracy. . . . During the next decade all members of this House should focus on the quality of public administration and make certain the Executive is accountable for the quality of that administration.⁴⁷

That may be a counsel of perfection, or possibly of imperfection depending on one's point of view. Still, it suggests the challenges ahead for the NSW upper house. Nothing is certain; but all things considered it seems that the Legislative Council will continue to be a vigorous and powerful component of the NSW Parliament for the foreseeable future. ▲

⁴⁶ *NSWPD*, 7 September 2000, 8772.

⁴⁷ *Ibid*, 8773.