

BACKGROUND PAPER

PREPARED BY THE PARLIAMENTARY RESEARCH SERVICE

INFORMATION TO ASSIST IN THE PREPARATION OF SUBMISSIONS

On Principles 6 to 11 agreed to by the Legislative Council on 3 and 4 September 1997

The Legislative Council Select Committee on the Operation of the Legislative Council produced an Interim report on 3 September 1997. In this interim report the committee recommended the adoption by the Legislative Council of 11 principles.

The Legislative Council agreed, after some debate, to the statement of principles.

The Joint Select Committee on the Working Arrangements of the Parliament will shortly be examining principles 6 to 11 as part of its Terms of Reference and this background paper prepared by the Parliamentary Research Service is designed to assist in the preparation of submissions.

Some of the information in this paper is taken from information, sometimes updated or slightly modified, from Parliamentary Research Service, 1997, *Baseline Report in Operation of the Legislative Council, Discussion Brief*¹.

6. To facilitate the good working of the House of Government the Legislative Council accepts the need to limit its powers to that of a suspensory veto on all Bills based on the principles enunciated by the Beaumont Royal Commission of 1982.

See Attachment 1 for the Beaumont Royal Commission Recommendations.

The current arrangements for passage of bills in the Legislative Council are :

PASSAGE OF A BILL

A **bill** may be introduced to the Legislative Council after it has passed through the House of Assembly (the usual procedure); by a member

or the Leader on behalf of the Government, or by a member of the Council as a private member's bill.

When it is introduced it has its **First Reading**, the stage at which its long title - outlining what the bill is intended to achieve - is read out by the Clerk. It is then said to 'lie on the Table of the House', meaning it is available for consideration by members and the public, until called on for debate.

The next stage, the **Second Reading**, is when the mover gives detail of the reasoning behind the bill is made clear in the Second Reading speech. This is the official explanation of its purpose.

After the Second Reading speech, other members may debate the principle of the bill in the context of what they have just heard. If they agree in principle they will vote for the motion: 'That the bill be now read the second time', at which stage the Clerk again reads the long title of the bill and the motion is agreed to.

The Council then moves into the **Committee** stage, when the President leaves the Chair and hands proceedings over to the Chairman of Committees. The bill is then considered clause by clause, and it is at this point that members may propose amendments if there are provisions of the bill they are unhappy with. It is certainly not unusual for members to agree *in principle*, and so vote for the second reading, but want one or two individual changes made to the detail.

At the conclusion of the Committee stage the President resumes the Chair and the Chairman of Committees reports what conclusion has been reached or what progress has been made. If amendments have been made they will be read out by the Clerk and voted on again to confirm their accuracy.

At the next stage, the **Third Reading**, members have their final opportunity to speak to the bill, although it is unusual for a bill to reach this stage and be defeated. The bill is then returned to the Assembly, either with the message that it has been agreed to or that amendments have been made and the Assembly is asked to agree to those amendments. When the agreement of both Houses to the total bill has been reached, the bill is sent to the Governor for the **Royal Assent**, after which the bill becomes an **act** and is enforceable by law ¹.

The following is a summary of bills in the Legislative Council from 1947 to 1995.

YEAR	No. of BILLS	BILLS AMENDED		BILLS REJECTED		BILLS LAPSED	ROYAL ASSENT
TOTAL	4738	1252	26.4%	114	2.4%	206	4220

- Percentage of bills introduced by the government - 89.97%
- Jurisdictions which have suspensory veto - New South Wales.
- Jurisdiction where the upper house has the power to defeat bills but not budgets - South Australia, New South Wales and Victoria
- Similar powers to current Tasmania Legislative Council - Western Australia.

7. Both Houses of Parliament should retain their existing rights to disallow subordinate legislation.

A considerable quantity of subordinate legislation is produced each year. During 1998 there were :

152 pieces produced by Government Departments;

80 by-laws under the Local Government Act;

20 Port Authority By-laws.

- It is often stated that disallowance is necessary to provide a method to provide a check and balance on a party with a majority in the House of Assembly. Many commentators feel that without this power the government would potentially be able to construct legislation that would allow widespread use of subordinate legislation to implement programs without Parliamentary approval.
- In addition the ability of the Houses to disallow subordinate legislation may make the departments and minister more careful in framing, as it leads to difficulties if subordinate legislation was disallowed because of technical inadequacies.
- All other states of Australia that have bicameral Parliaments allow disallowance of subordinate legislation by their upper house, subject to a

range of conditions and provisions. They also have joint committees examining subordinate legislation.

8. That the system of the Free Conference of Managers as a tool to resolve disputation between the Houses of Parliament be re-established.

Background:

FREE CONFERENCE (or CONFERENCE OF MANAGERS)

According to section 45 of the Constitution Act 1934 'the Council and the Assembly shall, in all respects, except as provided, have equal powers'. This however does not apply to money bills which must originate in the Assembly and to which the Council may only 'request' the Assembly to make changes or amendments, rather than having the right to initiate them. From the time of the first bicameral Tasmanian Parliament in 1856, the relationship between the two Houses, particularly over the issue of Supply (money bills) has been fragile. The Free Conference was created as an attempt to resolve such problems, and is the only formal deadlock-breaking procedure that has existed, although it presently exists only in the Standing Orders of the Legislative Council, not in the Constitution Act. The first time it was put to use to overcome such a deadlock was in 1856; it failed.

Until 1996, when either House refused ultimately to accept amendments made or requested by the other, a Free Conference of managers was proposed. An in-camera meeting of members appointed specifically for the purpose by each House, could attempt to thrash out a compromise. The managers then reported back to their Houses, and the results and terms they report constituted the only record of what took place behind the closed doors of the meeting. The fate of the bill concerned rested on the managers' ability to reach a compromise. Free conferences dealt only with amendments to bills; no Free Conference would apply if either House rejected a bill outright ¹.

- During period 1947 to 1995 the following were the outcomes:

FREE CONFERENCES 1947-95

YEAR	NUMBER HELD	APPARENT CONCESSIONS MADE BY			FAILED/ LAPSED
		ASSEMBLY	COUNCIL	BOTH	
TOTALS	122	33 (27%)	21 (17%)	52 (42%)	16 (13%)

FREE CONFERENCES - STATE AND FEDERAL - COMPARISONS ¹

PROVISIONS OF STANDING ORDERS	TAS	NSW	SA	WA	FED
Request to be in writing.		X	X		X
Resolution/Report to be in writing.	X		X	X	
Resolution/Report to be signed by Chairman.	X				
Resolution/Report to be signed by Managers.				X	
Managers to be named in message.	X	X	X	X	X
Managers appointed as part of original motion.	X	X	X	X	X
Managers selected by ballot if any member requires.	X	X	X	X	X
All communication between Houses to be by message.	X	X	X	X	X
Number of Managers to be in message.	X	X	X	X	X
Number of Managers to be equal.	X	X	X	X	X
General objectives to be in message.	X	X	X	X	X
House agreeing to request names time and place.	X	X	X	X	X
Managers of House agreeing to request receive Managers of other.		X	X	X	X
Business of the House to be suspended/adjourned, unless ordered.	X	X	X	X	X
Subject matter of conference not to be in other House.*	X	X	X	X	X
When terms agreed, Managers shall be at liberty to confer freely.	X	X	X	X	X
Chairman to be elected from requesting House.	X				
Managers to report forthwith to own House.	X	X	X	X	X

Minimum number of Managers set down.	10	5	3	5
Maximum number of Managers set down.	4			
Not more than one Conference on any matter.		X		X
Managers' duty stated as being to attempt to reconcile differences.	X	X		

There is no provision in the Standing Orders in Victoria for any Free Conference procedure; according to the Usher there has not been one for some fifty years, and it may only come about when a situation is not provided for in the Standing Orders and resort is had under the Constitution to the rules applying to the House of Commons.

* Specific provisions apply in s.5B of the NSW Constitution Act to enable the House to circumvent Council approval after:-

- (1) Council rejection or unacceptable amendment;
- (2) failed Free Conference;
- (3) joint sitting;
- (4) approval of measure at a referendum.

- Free conference of managers was the method of resolving disputes between the two houses of Parliament in Tasmania. They have been in place in their contemporary form since 1908. In 1996 the House of Assembly removed the formal mechanisms for a Free Conference of managers from its standing orders.
- Other states also use this mechanism e.g. WA, NSW, SA, however in these jurisdictions they are rarely used.
- Other procedures are used in other jurisdictions such as Joint sittings and election based mechanisms.

9. To facilitate the good working of the Legislative Council as the provider of checks and balances to the Government of the day the Parliament

accept the more robust system of Legislative Council Committees as recommended by the Beaumont Royal Commission of 1982. The effect being that the Public Accounts Committee, the Subordinate Legislation Committee, the Estimates Committees and such other Committees as may be determined by the Parliament to be necessary to the need, reside within the Council.

See Attachment 1 for the Beaumont Royal Commission Recommendations.

THE COMMITTEES OF THE COUNCIL FOR 1998 (prior to House of Assembly Election) ¹.

The following are the various committees of the Council:

Standing Committees are appointed after an election and last for the duration of that Parliament -

Joint Standing Committees -

Public Accounts

(3 Council members; 3 House members. Secretary and administration - Assembly)

Examines accounts of appropriations granted by Parliament; reports back to Parliament.

Public Works

(2 Council members; 3 House members. Secretary and administration - Assembly)

Examines proposed public works estimated to cost in excess of \$1 million; reports to Parliament.

Subordinate Legislation

(3 Council members; 3 House members. Secretary and administration - Council)

Examines all regulations, by-laws and rules made by councils, marine boards and other semi-government bodies as soon as they are gazetted. Retains legal counsel to provide advice.

Council Standing Committees -

Privileges

(5 Council members)

Standing Orders

(President, Chairman of Committees, 5 other Council members)

Sessional Committees are appointed each year when Parliament resumes after prorogation -

House

(Joint - President and 2 other Council members)

Library

(Joint - President and 4 other Council members)

Printing

(Council - 3-7 members)

Select Committees are appointed to consider specific topics. They may be Council only or joint; 3-7 members. Terminated by prorogation of Parliament but may be reappointed in the next session.

Current Select Committees (in 1998) -

Correctional Services and Sentencing in Tasmania

(3 Council members)

Registration of Overseas Trained Medical Practitioners

(4 Council members)

Tasmania's Workers' Compensation Scheme

(Joint: 4 Council members)

Operation of the Legislative Council

(5 Council members)

Working Arrangements of the Parliament.

(Joint: 3 Council members)

LEGISLATIVE COUNCIL SELECT COMMITTEES 1972-95 (not including joint House committees) had an Average duration of committee - 19.3 months.

- Already the Legislative Council has instituted its own Estimates Committees (trialed for 1998/99 budget). In addition in 1999 (March) there will be a Legislative Council Committee examining Government Business Enterprises and Corporations.

10. To protect the democratic rights of the people of Tasmania as provided in the Constitution Act 1934, and in keeping with the recommendations of the Beaumont Royal Commission of 1982, two thirds majority of each House be required to amend that Act.

See Attachment 1 for the Beaumont Royal Commission Recommendations.

- Entrenchment of individual sections or the entire Act is theoretically possible, in fact section 23 (Four Year Terms) is already entrenched with a similar provision to that proposed above by section 41A. However if section 41A was repealed then the entrenched section could probably be repealed with a simple majority.
- Other states have various forms of entrenchment such as special majorities or referendum provisions.

11. That a Constitutional Convention process be established to review the structure and roles of the Parliament on a regular basis into the future.'

- This could possibly mirror various similar processes used for the Commonwealth Constitution over the years. If this was done care would need to be taken to assure that all interested parties were able to be involved in the process.
- It would also need to be decided if these conventions would have the ability to initiate a reform process or be only advisory.

SUMMARY TABLE and INTERSTATE COMPARISON.

AUSTRALIAN STATES - UPPER HOUSES - COMPARISONS

	NSW	VIC	SA	WA	TAS
<i>(Created), Est.</i>	(1823) 1856	(1851) 1856	(1851) 1856	(1832) 1890	(1825) 1856
<i>Bi- Camerat</i>					
<i>No. of Members</i>	40	44	22	34	19 (To be reduced to 15)
<i>No. of Electorates</i>	1	22	1	6	19 (reducing to 15)
<i>Frequency of Elections</i>	(whole State)	(2 members each)	(whole State)	(2 x 7; 4 x 5)*	(1 each)
<i>Terms of Members</i>	Half every 4 years	Half every 4 years	4 years	4 years	Annually
<i>Power over Supply Bills</i>	(General with Assembly)	(General with Assembly)	(General with Assembly)	(General with Assembly)	(3 or 4 each year)
<i>Deadlock provisions</i>	8 year fixed term	8 years maximum	6 years minimum	4 years	6 year fixed term
<i>Power over Supply Bills</i>	Cannot refuse supply. Supply bill may receive royal assent one month after presentation to Council.	May refuse. May request. May not amend.	Power to refuse not provided by Constitution. May suggest amendments.	May refuse. May request. May not amend.	May refuse. May request. May not amend.
<i>Deadlock provisions</i>	Special provision to enact deadlocked bill after managers' conference, joint sitting	No Free Conference. Bill rejected by Council may be declared to be 'of special importance'	Bill rejected, lower House may be dissolved; rejected again after receiving absolute majority in new House: double dissolution <u>OR</u> writs issued for two extra Council seats.	No provision for resolution of deadlocks if managers' conference fails.	No specific provision but Standing Orders allow for managers' conference. (This provision

	and referendum.	and if rejected again Assembly may be dissolved, and Assembly and half-Council election called.			removed from HA Standing Orders by vote on ALP motion 13 November 1996)
<i>Is dissolution possible?</i>	No.	No.	Provision for double dissolution, but not for Council only.	No.	No.
<i>Killing of bills</i>	See 'Deadlock provisions'	See 'Deadlock provisions'	Bill may be 'laid aside' if managers fail to agree	Bill may be defeated on second reading (no vote on first reading)	Bill may be defeated at any stage.
				*Two electorates have 7 members; four have 5.	

ATTACHMENT 1

Beaumont Royal Commission Recommendations

Recommendation 1:

"In the case of bills that are not money bills or constitutional bills, as defined, as follows:-

- a. **Where the Council has not passed any bill within three months of its receipt from the Assembly, the Assembly may, by resolution, declare it to be a "prescribed bill" for purposes of the Constitution Act.**
- b. **If the Council has not passed a prescribed bill within six months of its having been so declared, the Governor may, on the advice of his ministers, either:-**

- i. **Issue a writ for a referendum of electors to decide whether the bill should become law; or**
 - ii. **Issue a writ for a referendum of electors to decide any questions in relation to the bill that have been agreed upon by resolution of both Houses; or**
 - iii. **Dissolve the Assembly.**
 - c. **A dissolution of the Assembly shall not be deemed to be in pursuance of paragraph (b) above if:-**
 - i. **More than three months have elapsed since the Council rejected a prescribed bill, or voted that it should be read on this day six months; or**
 - ii. **More than nine months have elapsed since the Assembly declared a bill to be prescribed; or**
 - iii. **The dissolution occurred within six months of the expiration of the term of the Assembly.**
 - d. **If the Assembly is dissolved pursuant to the above provisions a prescribed bill may, if the Assembly so resolves, be presented to the Governor for assent without the approval of the Council at any time within three months of the first sitting of the Assembly after the return of the election writs. There should be no "stockpiling", i.e. the procedure shall be available in the case of one bill only.**
- a. **If a prescribed bill is approved by electors at a referendum it may be presented to the Governor for assent without approval of the Council at any time within three months of the return of the referendum writ, if the Assembly so resolves."**

Recommendation 2:

"that an appropriation or supply bill confined to the ordinary services of the government should be subject to Royal Assent if not Passed by the Legislative Council within six weeks of its transmission to that Chamber."

Recommendation 3:

"that the proposed suspensory veto for a period of six weeks should apply to all bills that are solely concerned with the appropriation of funds other than appropriations for new policies not authorised by special legislation or in respect of which funds have not been appropriated in the previous year. If a bill appropriating funds contains other provisions the Legislative Council's power should be the same as that in respect of any general legislation, provided that any amendment does not insert any provision for the

appropriation of moneys or impose or increase any burden on the people. We also recommend that existing provisions that all supplementary appropriations for expenditure on new and previously unauthorised purposes made under s.5A, 5B and 7A of the Public Account Act 1957, and for emergency expenditure under the Audit Act 1918 and its Regulations that require ratification by both Houses of Parliament, be retained."

Recommendation 4:

"that provision should be made in, for example, the Public Account Act 1957 to require the appropriation of funds granted to the State by special grant under s.96 of the Commonwealth Constitution where the terms of the grant require the expenditure of other State moneys. In all cases of special grants, the terms of the grant should be tabled in each House of Parliament. (cf. S.9(13) of the Public Account Act, 1957 - omitted by s.3 of Act No. 75 of 1964)."

Recommendation 5:

"that all taxation bills should be subject to the same procedure and these should include bills imposing franchise fees, where the fee is calculated by reference to the value or quantity of goods produced, sold or purchased."

Recommendation 6:

"that the proposed suspensory veto provision for a period of six weeks should apply to all bills dealing with taxation."

Recommendation 7:

"that constitutional amendments (as defined) should be made only in the following manner:-

- a. The proposed law must be passed by a two-thirds majority of each House of Parliament; or
- b. if the requirements of (a) are not satisfied but the proposed law is passed by a majority of voting members in each House, it may be submitted to the electors.
- c. If the requirements of (b) are not satisfied but the proposed law is passed by a two-thirds majority of voting members in either House on two occasions, the second occasion being at least three months after the first, the proposed law may be submitted to the electors.
- d. In the situation set out in (c) above the writ for the referendum shall be issued by the President of the Legislative Council or by the Speaker of the House of Assembly as the case may be within two months of

- compliance with the prescribed conditions and at least two weeks after notice to issue the writs has been given to the other presiding officer.
- e. **Before the issue of the writ application may be made to the Supreme Court of Tasmania by either the Parliament or the Speaker for declaration whether the writ for a referendum may validly be issued; the Court may make orders to delay the issue of the writ pending determination of the application.**
 - f. **Except as provided in (e) above no court shall call into question the validity of any referendum or of any Act on the ground of non-compliance with the prescribed procedures.**
 - g. **The Constitution should provide for a standing appropriation for purposes of a referendum."**

Recommendation 8:

"that the Constitution Act be amended by adding a provision enabling the Council to appoint, at the beginning of each session of every parliament, such number of committees from its own members, to be known as the Legislative Council Finance and Estimates Committees, as it considers necessary to ensure an adequate scrutiny and review of the appropriation and expenditure of public funds, including budgetary proposals and appropriation bills, whether from Consolidated Revenue or the Loan Fund. For the reasons we have given, we are of the opinion that the Constitution Act is the proper place for the vesting of these alternative powers, rather than rely upon the provisions of, for example, the Parliamentary Privilege Act 1898 (as amended) or the Standing Orders."

Recommendation 9:

"the appointment of a permanent research officer for this purpose by the President under the provisions of the Constitution Act 1934 (as amended) or alternatively under the provisions of the Parliamentary Privilege Act 1898 (as amended)."

Recommendation 10:

"that the Committees have statutory power to seek explanations and information from ministers and departmental officers concerned in the Committees' enquires (c.f. s.7 of the Public Accounts Committee Act 1970)."

Recommendation 11:

"that

- a. **except in special circumstances -**

- i. the Committee hearings should be open to the public;
- ii. the transcript of evidence before any such Committees should be available to the public;

b. the reports of the Committees should be freely available."

Recommendation 12:

"that the Public Works Committee Act 1914 be amended by providing that all new works recommended by the Committee shall only be commenced if a resolution declaring that the works be carried out has been agreed to by a joint resolution of both Houses."

Recommendation 13:

- a. **"that the Standing Orders Committee of the Legislative Council give consideration to some relaxation of the rules concerning the admission of the public to committees and the publication of evidence submitted to select committees; and**
- b. **that appropriate expert assistance and advice be provided for select committees if the subject of the inquiry calls for it."**

GLOSSARY OF TERMS USED IN THIS PAPER

bicameral - A parliamentary system consisting of two legislative Houses.

Committee - While there are standing, sessional and select committees which consider a number of different matters, they should not be confused with the Committee of the Whole (Council), which is one stage of the legislative process.

Entrenched - "Refers to legislation which cannot be repealed or amended by a simple act of Parliament. An entrenched law is usually in the constitution of a state or a nation, and requires special processes such as a referendum, or a majority of two-thirds or three-quarters of a legislature, to be amended."²

Standing Orders - A set of rules and procedures laid down for the orderly conduct of the business of each House. Each House determines its own Standing Orders.

subordinate legislation - means -

(a) a regulation, rule or by-law that is -

(i) made by the Governor; or

(ii) made by a person or body other than the Governor but required by law to be approved, confirmed or consented to by the Governor; or

(b) any other instrument of a legislative character that is -

(i) made under the authority of an Act; and

(ii) declared by the Treasurer under subsection (2) to be subordinate legislation for the purposes of this Act;" (taken from Subordinate Legislation Act 1992)

Suspensory veto -

unicameral - A parliamentary system consisting of only one legislative House.

References:

1. Parliamentary Research Service, 1997, Baseline Report *in* Operation of the Legislative Council, Discussion Brief pp. 55-69.

2. Jaensch, D and Teichmann, M., 1992, The MacMillan Dictionary of Australian Politics. MacMillan Education Australia.