

The Role of the Legislation Review Digest in NSW

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The NSW Legislation Review Committee, of which I am Chair, has two broad functions: to scrutinise all bills introduced to Parliament and to scrutinise all regulations subject to disallowance. The *Legislation Review Amendment Act 2002* conferred the bills scrutiny function during the 53rd Parliament in 2003. The regulatory scrutiny function has been in operation since 1988. Between 1988 and 2002 the Committee operated as the Regulation Review Committee under the *Regulation Review Act 1987*.

The bills scrutiny function of the Legislation Review Committee is to examine all bills introduced into Parliament and report to both Houses if any bill adversely affects personal rights or parliamentary propriety as set out in the five criteria in section 8A(1)(b) of the *Legislation Review Act 1987*.

As the Legislation Review Committee has now been in existence for six years I thought I would use this opportunity to discuss some of the effects the existence of the Committee appears to have had within the NSW Parliament.

As we all know, setting performance measures for Parliamentary Committees apart from counting numbers of meetings and reports is difficult. Measuring the positive effects of legislative scrutiny committees in a qualitative way with regard to its effects on government legislation is almost impossible given the impact of the many outside variables. Certainly it has been the NSW Legislation Review Committee's experience that bills are rarely changed by the Parliament once they are introduced into the House as a result of the Committee's comments, even when criticisms made in its *Legislation Review Digest* are widely quoted in the media.

As the Committee only sees bills after they are introduced into Parliament and often works within a timeframe of five days (including weekends) from introduction to the

passing of the bill there is little time for conducting detailed research or seeking expert opinion. Further, we are obviously receiving bills at a time when they have already passed the Cabinet process and been discussed in Caucus and other party meetings. While cross bench Members in the Legislative Council such as the Greens often emphasise the Committee's comments regarding trespasses on personal rights and liberties, most legislation still goes through both Houses largely unchanged.

The argument could be made that perhaps the Committee has a deterrent effect in regard to the making of legislation. Through its very existence greater recognition may be given to human rights and liberties when formulating and drafting legislation. However, this is even much more difficult to measure.

As Parliamentarians we all know that there are many factors that influence legislation and we increasingly see governments legislating in all kinds of areas they would never have gone a few decades ago in the quest to protect the "public interest". This year in NSW we have seen the introduction of quite a few bills that the Committee has been highly critical of such as the extension of the covert search warrant powers, the so-called "bikie legislation", and retrospective legislation which allows that prisoners may be held separately from other inmates without the making of a segregated custody direction. All these bills have proceeded through both Houses with great haste.

I have therefore chosen to focus on the benefit the Committee and its *Legislation Review Digest* provides to both individual Members and the functioning of Parliament as a whole in an educational and informative capacity. The Committee has always considered that it should perform this role as one of its key functions. A decision was made from the outset that the *Digest* would not only make comment on issues in bills but that it would also summarise them and provide background information for the use of Members.

This can be a difficult task in tight timeframes but the Committee wants the *Digest* to be as widely used as possible. Also, while Members, for political and other reasons, may not choose to challenge elements of legislation in the House, the very fact that the Committee is making them aware of the issues is important in itself.

In 2004, not long after the introduction of the *Digest*, the Committee surveyed all Members of the NSW Legislative Assembly and the NSW Legislative Council regarding how useful they found the Committee and its *Legislation Review Digest*. Twenty four responses were received. All respondents said that they had used the Digest and all said that they found it helpful. 93% felt that the Digest contained all the necessary information regarding a bill in one document while 100% of responses considered that the Digest provided a clear discussion of a Bill's impact on individual rights.

Comments included *"A quick reference when preparation for speeches is needed"* and *"It is very helpful to use when speaking in the House or as background information"* and *"One of the great things about the Digest is that it supports caucus briefing notes. It helps clarify thoughts and issues"*. *"I think that this has been an excellent initiative – all bills should have some scrutiny even though they remain the government's prerogative"* *"The Digest is a handy reference for a bill before Parliament and is useful for all newly elected MPs who are not always sure of what we are always deciding"* and *"I am surprised by some of the comments made in the Digest that are critical of government bills but that is not necessarily a bad thing"* *"Keep Ministers on their toes. Well done!"*

The adoption of family friendly sitting hours in the NSW Legislative Assembly at the beginning of the current 54th Parliament meant a change in the routine of business. One of the consequences has been the revival of the debate to take note of reports from committees. Previously, take note debates had been scheduled at 1 pm on Thursdays. Previously on Thursdays the Speaker would leave the chair at 1pm for lunch before the calling on the order of the day (for committee reports). The House then resumed at 2.15 pm for question time. Therefore, prior to last year, the last occasion the House had considered committee reports was in October 2003. So, for almost the entire 53rd Parliament the opportunity was not provided to take note of the more than 100 reports that had accumulated from the various committees.

Take note debates now take place on Fridays after the conclusion of Government business and prior to taking private members' statements. Although they have a dedicated 30 minute slot between 1 and 1.30 pm in the new sessional orders, they are often begin much earlier and run until any Member who wishes to speak has finished.

As the Digest comes out every sitting week the Legislation Review Committee usually takes part in each take note debate. What has been surprising, and is certainly not common with other Committee Report debates, has been that Parliamentary Members who are not Members of the Legislation Review Committee, rise to speak every week on the Digest. On the 15 occasions that Take Note debates have taken place on the Digest, 23 non-Committee Members have risen to speak.

It may have been predicted that the Opposition would have used this opportunity to attack government legislation and this does occur. However, the Committee has generally found that non-Committee Members also take the opportunity to acknowledge how important they consider the *Digest* to be and to acknowledge how hard the Committee works.

Opposition Members, in particular, tell the House that they are regular readers of the Digests with comments such as "*I want to congratulate the Legislation Review Committee on its Digest. Members of the Opposition, of course, do not have the staffing levels of Government members or, indeed of Independent Members. When the Committee puts out this report every week I go through it and read it.*" And "*I put on the record my appreciation of the hard work the Committee obviously regularly undertakes to assist members like me with regard to bills before the House.*"

Some of the highest praise from Opposition Members has been that "*The Committee is non-political. The report expressed the view of the committee members as they see the issues and I compliment them for that.*" and "*It is very handy for us to have a good non-partisan viewpoint of the impacts of proposed legislation and its legal ramifications, particularly those of us who are not from a legal background.*" Some Members have even been criticised for reading straight from the Digest in bill debates.

Similarly government Members have expressed enthusiasm for the *Digest*, despite the often controversial stance the Committee can take on government legislation. Comments have included “*All Members refer to the Digest to assist them to take part in particular debates and to see what the issues are. The reports are of great assistance and certainly have assisted me time and time again in debating bills.*”

The Committee has also received some constructive comments during the debates which it has acted upon to improve the usefulness of the *Digest* for Members. The Opposition Whip, for example, asked if all Members could be informed electronically as soon as the *Digest* was tabled on the Monday of a sitting week in order for them to prepare for the first debates on Tuesday. The Committee complied with this request and Members have continually acknowledged their appreciation in the House. The Opposition considers bills on Tuesday mornings and has placed on the record the fact that the *Digest* has assisted with Opposition meeting discussions considerably.

The Committee has also routinely commented on bills which commenced on proclamation rather than assent. As reasons were rarely given for why this occurred a generic statement was made in the *Digest* at the end of each bill report regarding the Executive being given the power to decide when to commence a bill. Opposition Members commented on several occasions during take note debates that the government should be more forthcoming with the reasons why they have chosen to commence a bill on proclamation and the Committee wrote to the Premier last year on the subject.

As noted by the Premier in his reply: “*It remains a matter for Parliament to determine whether a power to commence an Act by proclamation is appropriate*”.

The Committee has therefore taken the view that, whenever possible, Parliament should have the information before it to make such decisions. It was therefore resolved in June 2009 to write to all Ministers requesting them to nominate a liaison person within their office who could be contacted for information regarding proclamations.

The Committee has found Ministers extremely responsive to this request and the information received has been incorporated within the most recent five *Legislation Digests*. There normally seem to be good reasons for proclamations but these are rarely included in Agreement in Principle or Second Reading Speeches.

So, in conclusion, I think it is important to recognise that backbench Members tend to have limited resources and are often time poor. The legislation which comes before a Parliament is complex and varied. Scrutiny of legislation committees can play an important informative and educative role here and contribute significantly to the level of debate in the House.