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PARLIAMENTARY SCRUTINY, PARLIAMENTARY SOVEREIGNTY: WHERE ARE WE NOW AND WHERE ARE WE HEADED?

Putting the West in Westminster

Establishment of a Legislative Committee of the Western Australian Legislative Assembly

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Summary

The Government of Western Australia introduced a new Public Health Bill to replace the outdated and inadequate Western Australian *Health Act 1911* in November 2014.

The 1911 Act still referred to removal of nightsoil, custody of lepers, regulation of bone mills, knackeries and protection of water holes from trespassing pigs, dogs, ducks and geese.

The need for modern, comprehensive and flexible legislation regulating public health in Western Australia had been long recognised and anticipated.

The West Australian Public Health Bill 2014 is best described as vast and further complicated by the consequential amendments which required scrutiny by the Parliament on behalf of the community.

The Bill was introduced into Parliament subsequent to extensive consultation but languished there.

The lack of progress to debate and competing demands of affording the attention required to the provisions of the Bill led to the Government requesting the Opposition agree to refer the bill to a Legislative Committee which would sit in a "second chamber".

This highly unusual step for the Parliament of Western Australia had not occurred for over ten years. Initially the Opposition was of the opinion that the bill should be dealt with in the Legislative Assembly chamber. However continued delays resulted in the Opposition's agreement to a "second chamber" in November 2015.

What is a Legislative Committee?

A Legislative Committee operates like the Federation Chamber of the Commonwealth Parliament. It had last been used to consider the Workers Compensation and Reform Bill in 2004, and the Environmental Protection Amendment Bill in 2002.

The creation of a Legislative Committee allows the Legislative Assembly to occur in two places concurrently. Complex legislation can be considered in detail, while the rest of the business of the Legislative Assembly can continue uninterrupted.

The Committee has a number of benefits that distinguish it from the Assembly, including:

- a lower quota is required to proceed (three members)
- senior public servants can participate in the Committee to provide detail and share their knowledge of the drafting process

- the deliberative process allows for the questioning, answering, and clarification to both Minister and by reference to advisors
- the possibility and desirability of amendments may be discussed prior to their being drafted and tabled.

The process is more congenial than typical of the Legislative Assembly chamber and while the 5 minute time limit for questions remained, in practice the format was usually an interactive series of *question, answer, clarification*.

In the Legislative Assembly, Opposition amendments are often hastily proposed, drafted with assistance of the Clerk, and placed on the Notice Paper. When proposed by the Opposition, they are often treated with suspicion by the Minister and their advisors and rarely accepted.

The Legislative Committee, in contrast, enabled amendments. The possibility of amendments were generally discussed before being drafted, with guidance from advisers as to suitable amendments and drafting assistance.

The Legislative Committee could then vote on amendments once they were agreed to. Any clauses or amendments which were contentious were referred back to the Legislative Assembly for full debate in the chamber.

As the Public Health Senior Public Servant stated:

I am totally committed to parliamentary and public scrutiny of government departments and legislation, and the in-depth questioning by Committee members was at all times respectful and purposive, and indeed led to changes in the legislation that were accepted by the Government. (email to author)

The case against a Legislative Committee

One argument against a Legislative Committee is that a second chamber can be a strain on resources given the smaller size of the Legislative Assembly and the increased pressure on public servants and parliamentary staff.

Michelle Roberts MLA, Opposition Leader of the House, said in response to the referral to Legislation Committee motion “*this committee process is a bit more cumbersome for our house, having only 59 members, than it might be for some bigger Parliaments such as the federal Parliament*”.¹

Further comments from a Senior Health Public Servant illustrated that the process did incur a significant cost but also offered a genuine benefit:

The process undertaken for Lower House scrutiny of the Health Services Bill 2016 of convening a separate Legislation Committee, while costly and labour intensive on parliamentarians, parliamentary staff and public servants was very productive in that it enabled a very complex Bill to be explained to those present in far greater detail smoothing its passage through the House. (email to author)

¹ Michelle Roberts MLA, Legislative Assembly, *Parliamentary Debates (Hansard)*, 17 March 2016, p1376.

Another concern expressed is that, like the counterpart Federation Chamber, the Legislative Committee could place pressure on a few Members to perform the necessary scrutiny. As the Shadow Health Spokesperson Roger Cook MLA pointed out:

One weakness is that our colleagues didn't get exposed to the debate. Whereas they probably weren't all that interested in the detail they were relying on us to 'get it right', which does place pressure on the committee members when the legislation goes back to the main chamber. (email to author)

However it seems that despite these concerns the Legislative Committee process expedited the stalled historic legislation which had significant community interest. As highlighted by a Senior Public Health Public Servant:

Many hundreds of 'public servant person-hours' were utilised in developing, refining and negotiating the legislation, through internal discussions, public consultation, ministerial briefing notes, stakeholder briefings and the like. More importantly, the significance of the Bill, in replacing the Health Bill 1911 was deeply felt by the public health community, both within and outside the Department of Health. (email to author)

How well did the Legislative Committee work?

The success of the Public Health Bill (and subsequently the Health Services Bills) in the Legislative Committee was assisted by the leadership of the Minister and Shadow Minister for Health, neither of whom were defensive or combative during the process.

As the Roger Cook MLA, Shadow Minister for Health, stated in the House on 24 November 2015:

It also freed up the Minister to ... step back ... and watch it [the debate] with a fresh set of eyes and provide further cross-examination on the Public Health Bill to make sure that we did our job competently as a committee ... I am indebted to the Minister for Health for the attitude he brought to that process. It was done in good faith and allowed us to consider a range of amendments.²

The Shadow Minister for Health also noted in his third reading speech of the Health Services Bill that, *"he [the Minister] provided ample opportunity for us to discuss each of the clauses ... he was also prepared to back the judgement of the committee in the face of contrary advice from the advisers and make some changes to the bill."*³

Additionally, in his third reading speech on the Public Health Bill Hon Dr Kim Hames MLA, the then Minister for Health, said *"It was a great way of dealing with detailed legislation, as it gave members, particularly opposition members, a chance to ask detailed questions".*⁴

But the greatest commendation was in the comments given by the Senior Public Health Public Servant that, *"It truly felt like the Westminster system operating at its best. Lastly,*

² Roger Cook MLA, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 November 2015, p8826.

³ Roger Cook MLA, Legislative Assembly, *Parliamentary Debates (Hansard)*, 10 May 2016, p2540.

⁴ Hon Dr Kim Hames MLA, Minister for Health, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 November 2015, p8828.

from a personal point of view, being able to explain parts of the legislation in detail and be named as part of the 'historical record' via Hansard, is one of the absolute highlights of my public health career." (email to author)

The Shadow Minister for Health argued that the process was beneficial for the Opposition in understanding the bill, and the reasoning used to draft it, saying that it *"provided us with an opportunity to speak to the advisers and get a better appreciation for not only the technical merits of the legislation, but also the extent to which I think the advisers though were crafting good legislation, not just technically competent legislation."*⁵

In an email exchange with the author the then Minister for Health also outlined that:

(t)he main benefit of debating the legislation in the secondary chamber was the ability of advisors to directly respond to questions by the opposition. In the main chamber ... all answers must be done through the minister. Advisors try to communicate the answers to the Minister on opposition questions, but hearing can be difficult, and understanding of complex issues often less than adequate.

Where opposition have significant expertise on a particular component of the legislation, it is often of great benefit for that member to have a direct discussion with either the drafter or the advisor with expertise in that area.

From the government perspective it saved considerable time in the main chamber, and also allowed a clear understanding by the opposition of the legislation. It also exposed areas where either the drafting was poor, or the legislation was inadequate, allowing amendments to be made where required. (email to the author)

The setting across a table also helped to encourage a different style of interaction, facilitating agreement on amendments that enhanced the bills for the benefit of the community such as consumer representation. The following excerpt of *Hansard* is illustrative of this point:

Clause 71: Constitution of health service provider's board- ...

Ms Freeman: Can we put an amendment in to have a consumer rep on there? ...

Minister: During the second reading debate I think that three or four members made the point that there should be consumer representation on there ... I am not insensitive to the concept.

Ms Freeman: Would you put an amendment in there ...

Minister: I think I probably would ... I move ... to insert

*(fa) experience as a consumer of health services or a carer;*⁶

In summary, Legislative Committees appear a valuable tool, which could enhance the ability of Parliament to investigate and improve legislation, outside of the adversarial environment of the main assembly chamber. The experience of the Federation Chamber in the Australian

⁵ Roger Cook MLA, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 November 2015, p8826.

⁶ Legislative Assembly, *Parliamentary Debates (Hansard)*, 23 March 2016, pp1826-28.

Commonwealth Parliament suggests, however, that it should remain a tool that is only used for specific purposes.

As a permanent second chamber in the Commonwealth Parliament the Federation Chamber has gone from scrutinising legislation (to prevent guillotining), to a “speech making” chamber for Members. This is illustrated in the June 2015 report which documented in 1994, 78% of the time in the Federation Chamber was spent on Government legislation reduced to 30% in 2014. In contrast no time was spent on private member grievances and constituent issues in 1994, however in 2014 this constituted 36% of the time in the chamber.

Conclusion

The Legislative Committee allows the Legislative Assembly to create a second house, in which legislation can be scrutinised and improved in a deliberate and deliberative manner. It enables advisers to contribute to the consideration and discussion, detailing the intent and drafting of legislation, and providing advice on the workability and necessity of amendments proposed throughout the course of consideration in detail.

Overall these benefits outweigh the costs of this process, in terms of additional strain it can place on parliamentary and public service resources. However given the primacy of the Assembly chamber as the place of Government, the Legislative Committee should remain an occasional option used to scrutinise a particular type of bill. It should remain only by agreement from the Opposition and for bills that are technical, bipartisan and struggling to compete for time and attention against more high profile or controversial legislation.