



# New South Wales Legislative Council Practice

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The Crown Solicitor takes a different view of the authority of the House to meet and transact business following prorogation. Following the prorogation of the Parliament in December 1994, the Crown Solicitor provided written advice to the Clerk of the Legislative Assembly stating that the former Assembly standing order 374A (and the equivalent Council standing order 257C), to the extent to which it purported to authorise the transaction of business by standing committees following prorogation, was invalid.<sup>194</sup> The Premier's Department immediately issued a memorandum indicating that any transfer of documents or submissions to standing committees should cease immediately.<sup>195</sup> The President wrote to the chairs of the Council's standing committees advising that in view of the Crown Solicitor's advice it was not competent for the committees to hold deliberative meetings, conduct hearings or table reports, nor was it competent for the chairs to carry out any functions as committee chair.

The Crown Solicitor's advice was based on an extremely restrictive view of the powers of the Council (and Assembly). It is possible that another counsel may provide different advice on this matter and that, should the matter ever come before the courts, there may be a different outcome to that suggested by the Crown Solicitor. There appears to be no restriction on the Council passing a resolution to authorise a committee to sit during prorogation other than in circumstances governed by section 22F, discussed above.

In the absence of contrary advice at this time, on recent prorogations, the Clerk has issued written advice to members of the Council drawing attention to the content and effect of the Crown Solicitor's advice of December 1994. The advice of the Clerk has stated that, assuming the Crown Solicitor's advice is correct, the effect of prorogation on standing committees includes the following:

- the standing committees continue in existence after prorogation;
- current references remain on hold and are held over until the commencement of the next session of Parliament;
- the standing committees cannot meet or transact any business until the commencement of the next session;
- submissions, evidence and other material before a committee continue to be valid and open to be used by a committee after the commencement of the next session;
- questions on notice submitted to a committee, or forwarded to a witness (or minister in anticipation of a budget estimates hearing) remain valid. However, further questions on notice cannot be accepted or transmitted during prorogation, and it is not possible for the committee to enforce any

194 The advice distinguished those committees established under statute which were specifically provided with statutory authority to meet and transact business after prorogation.

195 Premier's Department, 'Status of Standing Committees after prorogation of the Parliament', Circular 94-29, 15 December 1994.

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where the House has referred the report of a select committee<sup>190</sup> and the report of a GPSC<sup>191</sup> to the Leader of the Government for a response in a similar manner.

Standing order 233 now requires the Clerk to refer all committee reports which recommend that action be taken by the government to the Leader of the Government for a government response. The government must, within six months of a report being tabled, report to the House what action, if any, it proposes to take in relation to each recommendation of the committee. If the House is not sitting when a minister seeks to report to the House, a response may be presented to the Clerk.

The President is required to report to the House if a government response has not been received by the six months' deadline (SO 233(4)). The record of governments to date in providing responses within the required time frame is generally very good. However, on several occasions, ministers have written to the Clerk advising that a response will be provided, but outside the deadline.<sup>192</sup>

### THE EFFECT OF PROROGATION ON COMMITTEES

The effect of prorogation is to terminate all business pending before the House until Parliament is summoned again for the next session. However, the consequences for committees are not straightforward.

Sessional committees cease to exist on prorogation and must be re-appointed at the commencement of the new session.

Statutory committees have power under the relevant Act constituting each committee to 'sit and transact business despite any prorogation of the Houses of Parliament or any adjournment of either House of Parliament'.<sup>193</sup>

Committees appointed for the life of the Parliament, including the Procedure Committee (SO 205), standing committees (SO 206) or select committees (SO 207), have power to sit during the life of the Parliament. As such these committees have authority under the standing orders to continue to meet and dispatch business after any prorogation of the Council and up until the dissolution of the Assembly. Section 22F of the *Constitution Act 1902* provides that the Council is not competent to dispatch any business during the period commencing on the day of the termination, either by dissolution or expiry, of the Assembly and ending on the day fixed for the return of the writ for the periodic Council election held after that termination. Consequently, no committees may meet and dispatch business once the Assembly has been dissolved.

190 LC Minutes (6/9/2000) 634 (*Report of Select Committee on Increase in Prisoner Population*).

191 LC Minutes (4/6/2002) 174 (*Report of GPSC 5 on Sydney Water's Biosolids Strategy*).

192 See, for example, LC Minutes (17/3/2004) 619, (7/6/2005) 1420, (7/3/2006) 1875.

193 See the *Health Care Complaints Act 1993*, s 70(8); the *Independent Commission Against Corruption Act 1988*, s 68(8); the *Ombudsman Act 1974*, s 31F(8); and the *Legislation Review Act 1987*, s 8(8). Similar provisions apply to the Public Accounts Committee and Standing Ethics Committee of the Legislative Assembly.

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timeframe for the answering of such questions on notice until the commencement of the next session.<sup>196</sup>

There have been instances in the past where legislation has been passed specifically to enable committees of both Houses, other than statutory committees, to continue to meet and transact business after prorogation. The most recent legislation was the *Parliamentary Committees Enabling Act 1996* and the *Parliamentary Committees Enabling Amendment Act 1997*.

Perhaps one reason why the question of the powers of the Council and its committees to meet between prorogation and the commencement of the next session has not been tested is the fact that recent prorogations have been timed so as to provide only a brief interval between the termination of one session and the commencement of a new session. For example, both Houses were prorogued on 3 February 1999, before the expiry of the Assembly (the 51st Parliament) on 5 March 1999. This contrasted with the prorogation of both Houses on 7 December 1994, before the expiry of the Assembly (the 50th Parliament) on 3 March 1995. Recent prorogations before the official opening of a new session of Parliament have also been timed so as to provide a brief period before the commencement of the new session.<sup>197</sup> While prorogations take place either close to the termination of the Assembly (and general election) or the commencement of the next session of Parliament, the question of the powers of the Council or its committees to meet and transact business during these periods is likely to remain dormant.

In the Senate, the question of whether or not it is competent for the Senate and its committees to meet after prorogation has been a matter of some controversy since the 1980s.<sup>198</sup> The matter has been the subject of conflicting legal advice, and the House of Representatives and Senate have continued to take different views on the matter. To some extent, the view taken by the Senate is based on the fact that the Senate, unlike the House of Representatives, continues in existence after the end of each Parliament, except in the case of a double dissolution. In recent years Senate committees have continued to meet and take evidence after the prorogation of the Parliament and the dissolution of the House of Representatives.

## STAFF AND RESOURCES

Standing order 234(1) requires that a committee be provided with the resources necessary to carry out their functions. In particular, standing order 234(4) requires

<sup>196</sup> Memorandum to members 11 August 1999, Correspondence to Mr Dyer, 9 August 1999.

<sup>197</sup> For example, both Houses were prorogued on 11 August 1999, and the official opening of the second session of the 52nd Parliament took place on 7 September 1999. Both Houses were prorogued on 20 February 2002 and the official opening of the third session of the 52nd Parliament took place on 26 February 2002. Both Houses were prorogued on 19 May 2006 for the sesquicentenary celebration of responsible government in New South Wales and the official opening of the second session of the 53rd Parliament took place on 22 May 2006, which was 150 years to the day that the first bicameral Parliament met on 22 May 1856.

<sup>198</sup> *Odgers*, 11th edn, pp 498-505.