PROROGATION

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On Wednesday 25 June 2003, the Leader of the House in the Legislative Assembly of Western Australia said it was not the intention of the Government to ask the Governor to prorogue Parliament on an annual basis as had been the practice to that date.

The Procedure and Privileges Committee (which I chair) then considered what modifications to the Standing Orders were required following this change but looked first at the necessity for prorogation.

Necessity For Prorogation

Section 4 of the Western Australian *Constitution Act 1889* provides —

> "
> *There shall be a session of the Legislative Council and Legislative Assembly once at least in every year, so that a period of twelve months shall not intervene between the last sitting of the said Council and Assembly in one session and the first sitting of the said Council and Assembly in the next session.*
> "

The Committee looked at practice in the Australian Federal Parliament as Section 6 of the Australian Constitution contains a provision identical to section 4 of the Western Australian Constitution. *House of Representatives Practice*[1] observes —

> "
> This [requirement for annual sessions] has not been in practice interpreted to mean that a session cannot continue beyond a year but that there shall not be an interval of 12 months between consecutive sittings.
> ".

[1] *House of Representatives Practice*, (Barlin) 3rd ed. 1997, p 239.

It was noted that the Commonwealth Parliament has been prorogued only 4 times between 1961 and 1997 apart from a prorogation that normally precedes dissolution of the House.

Australian Senate Practice[2]*,* follows the same line –

> "
> The Parliament complies with the intent of this section in that each year it has two or three sitting periods of several months' duration. However, it has not been the practice to divide a parliamentary term into annual sessions by the annual use of prorogation, and consequently a session will normally last for the duration of the term of the House of Representatives.
> ".

The 1997 annotated Australian Constitution[3] notes —

> "
> . . . the practice of holding separate "sessions" of Parliament has almost disappeared, but two major "sittings" of Parliament generally are held each year.
> ".

Professor Pat Lane, in his 1986 *Commentary on the Australian Constitution* says –

> "
> Section 6 ensures that a year will not lapse between the last sitting of Parliament in one session and the first sitting in the next session. The section is concerned with a less-than-twelve-months-interruption rather than with a once-at-least-every-year-session.
> ".

The Privileges and Procedure Committee also looked at the other Australian States, and adopted the categorisation of them as either "strict constructionist" or "non-observant". Until last year, besides Western Australia, Queensland and South Australia were strict constructionists; with South Australia also reassessing the necessity for annual sessions. The "non-observants" are New South Wales, Victoria and Tasmania. While these States may, or do, prorogue from time to time within a parliamentary term, they do not feel constrained by their section 4 equivalents to separate their sitting periods into sessions by an annual prorogation.

it was argued that although Section 3 of the Western Australian Constitution provides the Governor with the power to prorogue Parliament, the Governor will act on the advice of Ministers which means in effect that responsibility lies with both the Crown and its Ministers to determine how section 4 is to be read and applied.

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[2] *Senate Practice*, (Evans) 10th ed. 2001, p 168.

[3] Constitutional Centenary Foundation, *The Australian Constitution* (Saunders), 2nd ed., p 26.

Law in the Pacific

In Fiji's constitution, section 68 provides that the first session must commence not later than 30 days after the last day of polling and no longer than 6 months must elapse between the end of one session and the start of another. In my view this demonstrates the better way to address the issue, with clear language implementing the idea that the government, through the Head of State, cannot prevent the Parliament from meeting by refusing to summon it for a new session.

The Kiribati constitution also follows a clear style of wording and it provides in section 77 that meetings of the Maneaba will be held so that a period of 12 months does not intervene between the end of one meeting and the first sitting of the Maneaba in the next meeting.

Similarly, the Solomon Islands constitution contains in section 72 that sessions shall be held so that a period of 12 months does not intervene between the end of one session and the first sitting in the next session. The constitution of Samoa contains a nearly identical provision in section 52.

Section 29 of the Cook Islands constitution contains a provision as a proviso to subsection (1) that is in nearly identical terms to the Western Australian provision but we were unable to identify any case law in relation to that and this change may or may not be of interest there.

Niue has an interesting way of dealing with the matter in section 22 of the constitution. It provides that if more than 6 weeks have elapsed since the last meeting of the Assembly, any 4 members who are not ministers may request the Speaker to call a meeting of the Assembly, which meeting must be held between 5 and 10 days after the request.

The constitution of Vanuatu has a provision in section 21 which provides simply that Parliament shall meet twice a year in ordinary session.

So in most of the Pacific, the constitutional provisions designed to ensure that the Parliament is not prevented from meeting, are much plainer than in Western Australia.

Canadian Practice

Originally arising out of the *British North America Act*, (the Canadian constitution), the Canadian federal and provincial parliaments had provisions regarding prorogation which were virtually identical to the Australian and Western Australian provisions.

Most of the provincial parliaments allow a session to continue beyond a year: specifically British Columbia, Manitoba, Newfoundland and Labrador, Ontario and Saskatchewan. Prince Edward Island was the exception which had a prorogation every year.

The National Canadian Parliament had formal sessions on a more or less annual basis until 1968 and these sessions often extended up to two years until 1982 when the Constitution Act 1982 of Canada changed the wording to provide –

> "There shall be a sitting of Parliament and of each legislation at least once every twelve months"

This practice, while somewhat compelling, did not of course, bear directly on the Western Australian practice.

Legal Views

Legal opinions were by no means unanimous on the meaning of Section 4. Persuasive however, was the opinion of Professor Geoffrey Lindell[4] who said in summary "……..my opinion is that it is not legally necessary to prorogue both Houses of the Parliament every year. However…….. it is advisable to ensure that twelve months does not separate one sitting of both Houses from another sitting of those Houses, if a session does continue for more than one year."

Issues

Having reviewed the legal position, the Committee recognised both procedural and administrative issues that needed to be addressed.

Governor's Speech and Address in Reply

Until last year, the Governor's Speech was used by the Government to announce its main legislative program for the year and in the Address-in-reply to that speech for the Opposition and private members to debate Government policy. The Opposition was accustomed to moving amendments to the Address in Reply which are critical of specific Ministers or of Government policy. These form mini debates which will be lost to members in each of the following three years after the opening.

It was noted that, in New Zealand, at the beginning of each year following a formal opening of Parliament, Standing Order 338 provides for the Prime Minister to make a statement about the Government's program for the next 12 months to the House of Representatives in place of the formal speech from the Throne by the Governor General. Debate is limited to approximately 75% of the time allocated for an Address in Reply.

The Committee considered that the retention of an annual capacity by the Government to provide the legislature, and co-incidentally the public, with an overview of the Western Australian Government's legislative program for the next 12 months was important, and proposed that on the first sitting day in each calendar year after the Opening of a new Parliament, a Premier's Statement be presented by the Premier in the Legislative Assembly.

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[4] GJ Lindell, Adjunct Professor of Law, University of Adelaide and the Australian National University, Opinion, 19 February 2003

Although no formal response from the government has yet been received, preliminary indications are that this proposal is not favoured.

Clean up of the Notice Paper

Notices of Motion

Before August 1999, notices of motion were cleared from the Notice Paper either when members withdrew them or through the cessation of all business upon prorogation of Parliament. At the moment notices are removed from the Notice Paper after 30 sitting days providing the affected member doesn't require the notice to be continued. The absence of prorogation now provides a potential that members could retain a notice of motion on the Notice Paper for up to 4 years. The Committee therefore proposed that members should only be permitted to renew a notice of motion for one period of 30 sitting days. The total time a notice could potentially remain on the Notice Paper would then equate to approximately one year.

Questions on Notice

It was noted that unanswered Questions on Notice are removed on prorogation and under the changed prorogation arrangements, unanswered Questions on Notice will remain on the Notice Paper until the Minister answers them.

Bills and Motions

The same question rule exists to prevent the Legislative Assembly regularly being presented with the same matter for a decision. As it stands, the rule could effectively prevent the re-introduction of the same bill or motion for up to 4 years in single session Parliaments, plainly an undesirable outcome. With the removal of annual sessions, the Committee recommended the same question rule be amended to apply to each year commencing 1 January.

Orders of the Day

On prorogation all business on the Notice Paper is removed. Standing Orders allow Orders of the Day for bills to be restored on motion. If no prorogation occurs however, some Orders of the Day could remain on the Notice Paper for several years. It is desirable to have a mechanism that allows an automatic clean up of stale Orders of the Day which are not being proceeded with and accordingly the Committee proposed that Orders of the Day which have not been debated for 12 months be automatically removed from the Notice Paper. In relation to Orders of the Day for bills, a member should still be able to move a motion to restore them to the point they had reached when they were automatically removed.

Disallowance of Subordinate Legislation

An extended session will enable a notice of motion to disallow subordinate legislation to remain on the Notice Paper for up to four years. It is possible that subordinate legislation could be disallowed by the Legislative Assembly after it has been in force for a much longer time than previously.

The Committee noted that disallowance occurs in more than one procedural way. An example given was the *Metropolitan Region Town Planning Scheme Act 1958* where amendments under section 33 come into force when they are no longer subject to disallowance. If the House did nothing about a notice of motion given to disallow a proposed amendment, that amendment could not come into effect. In practice the Government will arrange to bring the disallowance motion on and then defeat it. The same question rule prevents the motion being again proposed and the amendment can then come into effect.

The Commonwealth of Australia's section 48(5) of the Commonwealth's *Acts Interpretation Act 1901* was noted with approval. I4t provides –

> "If, at the expiration of 15 sitting days after notice of a motion to disallow any regulation has been given in a House of the Parliament, being notice given within 15 sitting days after the regulation has been laid before that House:
>
> (a) the notice has not been withdrawn and the motion has not been called on;
>
> (b) the motion has been called on, moved and seconded and has not been withdrawn or otherwise disposed of;
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> the regulation specified in the motion shall thereupon be deemed to have been disallowed. ".

Adopting a similar provision in Western Australia would –

- introduce a finite period for dealing with disallowance motions;
- effectively create an obligation on the relevant Minister in the Legislative Assembly to ensure a disallowance motion is dealt with; and
- potentially increase the number of these motions in the Legislative Assembly as the Legislative Assembly procedure will be as effective as the present Legislative Council arrangement.

One quirk of the change in prorogation was provided by Section 38(g) of the *Constitution Acts Amendment Act 1899* which provides that a member's seat becomes vacant if the member fails to attend the Legislative Assembly for an entire session without permission of the Legislative Assembly.

The Committee thought it unacceptable for a member not to attend the House for up to 4 years and in keeping with the intention of the section, suggested a period of one year should be specified in the Constitution.

Temporary Orders

Sessional Orders cease to have effect upon prorogation. They have often been used as a method of trialing proposed new Standing Orders or to temporarily alter the operation of an existing Standing Order. The proposal from the Committee was to provide for a default period of 12 calendar months, and change the name to 'Temporary Order'.

Other Matters

A number of other minor matters were considered. One item of interest is how members who are 'named' by the Chair are dealt with. Standing Order 45 provides for the suspension of members, after naming, for two sitting days (including the day of suspension) on the first occasion in a session, four sitting days on the second occasion in the same session and 13 sitting days on any subsequent occasions in the same session. The retention of " in a session " and " same session " time frame increases the penalty's severity by increasing the chance of members being named a second or more times during a session lasting up to 4 years and thereby incurring more severe penalties for misconduct if cumulative over a 4 year period. The Committee proposed that the timeframe be changed to a year commencing 1 January.