PROROGATION: USES AND ABUSES

A Paper by Mr Harry Evans, former Clerk of the Senate

The action of the then New South Wales government, late in 2010, of proroguing the state parliament, allegedly in an attempt to stop an inquiry by a Legislative Council committee, has drawn attention to a little-known but potentially significant feature of current constitutional arrangements: the power of the executive government to terminate at least some parliamentary operations by decree.

This was not the first occasion on which the NSW government resorted to prorogation when a Council committee was conducting a politically sensitive inquiry. That the prorogation was immediately followed by government claims, supported by government legal advisers, that the committee could then not lawfully meet and would not be protected by parliamentary privilege, is sufficient evidence that this was the motive behind the government's action. Also, as will be seen, prorogation now has no other purpose.

Under the Commonwealth Constitution, and the constitutions of each of the states, the Governor-General and the state governors have the power to prorogue their respective parliaments. This power, of course, is normally exercised on the advice of prime ministers and premiers, advice which the vice-regals are normally obliged to accept. Prorogation is an ancient procedure inherited from Britain, where it is now also in practice exercised by the prime minister of the day. It owes its origin to the notion that parliament was an advisory council to the monarch and functioned only as the monarch wished. It was famously used by various monarchs of an absolutist bent to stop parliaments encroaching on royal turf. Its transfer to the Australian and other colonies reflects in part the original role of the colonial vice-regals of representing the imperial government, as it then was.

The effect of prorogation is not constitutionally specified, and in Australia has been the subject of some dispute. It is accepted that prorogation ends a session of parliament, and a new session begins when the parliament is summoned to meet by the vice-regal, again acting on advice, and that any business pending before the Houses at the end of the session, including proposed legislation, has to be renewed in the new session. Does prorogation prevent the houses individually meeting and transacting business not requiring action by the whole parliament, and does it prevent their committees meeting and continuing inquiries? The view generally taken by government legal advisers is that it does. The alternative view is that the houses and their committees, the latter if duly authorised by their appointing houses, may continue with their own activities until the beginning of the next session. In 1973 a leading constitutional scholar, Professor Colin Howard, gave advice, based on Australia's constitutional arrangements, that the Senate could meet after a prorogation if it chose to do so. Since the establishment of the Commonwealth in 1901 the Senate has regularly authorised some of its committees to meet after a prorogation, and they have regularly done so, including for the purpose of public hearings. In 1984, when the question arose in relation to a particularly controversial committee, the government's legal advisers, in the shape of the solicitor-general, conceded that the Senate could so authorise its committees, but could not then meet itself, a somewhat paradoxical conclusion. This advice, however, is not readily transferable to the all of the states.

The Commonwealth and most of the states have constitutional provisions conferring on their houses the powers of the British House of Commons as at a specified date (1901 in the case of the Commonwealth). As the House of Commons before 1901 authorised its committees to meet after a prorogation, it has to be concluded that the Australian federal houses have the power to do likewise. New South Wales, however, does not have this constitutional prescription. Its houses rely on a common law doctrine that they possess the powers reasonably necessary for their legislative functions. The state government's legal advisers claim that authorising committees to meet after a prorogation is not amongst those powers.

Those advisers have a record of being wrong about parliamentary, and indeed other, matters. In 1994 they argued that the Legislative Council did not have the power to demand the production of government documents and to exclude the then Treasurer, Mr Egan, from the Council when he refused to comply. When the matter was litigated, the state Supreme Court found that the Council did possess that power. Since that time the government has been forced to disgorge many documents it would rather have kept secret. If called upon to determine the prorogation matter, the court would probably find that the Council could authorise its committees to meet after a prorogation, as that is a long-established parliamentary procedure. It is highly unlikely that the court would strip a committee of the protection of parliamentary privilege.

Prorogation now serves no useful purpose, unless it is thought that having a ceremonial opening of a new session, with a royal or vice-regal speech, is valuable in itself. In Britain there are usually prorogations and openings (vastly more ceremonial than in Australia) within a parliamentary term. Ironically, this somewhat weakens governments and plays into the hands of their opponents: if government legislation can be stalled until the end of a session, it will have to start over again in the new session. In Australia governments have tended to abandon prorogations within parliamentary terms, and a prorogation usually occurs only as a preliminary to the dissolution of the lower house for a general election. That has been the case at Commonwealth level for many years, even though section 6 of the Constitution appears to require annual sessions. The only time a prorogation of the Commonwealth Parliament now occurs is immediately before a dissolution of the House of Representatives. (In the distant past there were prorogations within terms apparently based on a literal reading of section 6 and reverence for British practice. Later such prorogations were used when the monarch was present in the country and the government desired to have a royal opening of a session, but this has not happened for over 30 years.)

Contrary to the claims of the NSW government in defence of its action, a prorogation is not necessary even as a preliminary to a general election. Between 1928 and 1993 the Commonwealth government did not prorogue before dissolving the House of Representatives. This was due to the amalgamation of the prorogation and dissolution proclamations combined with a misunderstanding of the language of the earlier British and Australian proclamations. Under the old practice, the parliament was prorogued to a future date, and by a subsequent proclamation the lower house was dissolved and the members of the upper house excused from attendance on the date specified. The amalgamated proclamation adopted in Australia in 1928 simply

dissolved the House and dismissed the senators from attendance. In effect there was no prorogation.

In 1984 when the question of Senate committees sitting after prorogation arose, there was a possibility of the Senate as well as the committee concerned meeting after the dissolution, a course which the government opposed. It was pointed out that, in the absence of a prorogation before the dissolution, there could be no question of the Senate's right to do so, and the Senate passed a resolution asserting that right. The government and its advisers then pretended that the wording of the dissolution proclamation, which resulted from the misunderstanding referred to, contained an implied prorogation. This pretence was maintained until 1993, when the practice of proroguing immediately before a dissolution was adopted. So prorogation is not essential for a dissolution, and there is certainly no justification for proroguing months before an election as the NSW government has done.

That this is not exclusively an Australian problem, and that prorogations may be put to other uses, is demonstrated by the recent action of the Canadian government in proroguing to avoid a no-confidence motion in the House of Commons.

Prorogation is a "sleeper" in the Australian state and federal constitutions. It provides executive governments with the ability to attempt, at least, to close down parliamentary debate and inquiry. The refusal of some witnesses to appear before the Legislative Council committee on the ground that they could lack the protection of parliamentary privilege shows that the attempt can be at least partially successful. The prorogation power has been abused in the past and may well be abused, and in more serious circumstances, in the future.

Abolition of the prorogation power would remove the opportunity for abuse without losing anything. The disputes about the meaning and effect of prorogation strengthen the case for abolition. There is no reason why the houses of the parliaments could not meet, and begin their business anew, in accordance with a constitutional and statutory timetable after a general election, and then meet and adjourn solely by their own resolution until that timetable again takes effect. Such a change would require constitutional amendment in each jurisdiction. It is unlikely that the required amendment would be put forward in isolation, but would have to be part of a general constitutional revision. It should obviously be part of any change to a republic, as prorogation is a peculiarly monarchical procedure, a point that has generally eluded consideration of the republic issue. It should be on the list for future attention. In the meantime, governments should be warned off any clever use of prorogation to avoid scrutiny, and should be asked to include a pledge against such misuse as part of their promises to the electorate.

Harry Evans