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Colleen Lewis

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AUSTRALASIAN STUDY OF PARLIAMENT GROUP (ASPG) AND THE *AUSTRALASIAN PARLIAMENTARY REVIEW* (APR)

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Australasian Parliamentary Review

Editor: Dr Colleen Lewis, colleen.lewis@monash.edu

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From Your Editor

Colleen Lewis

In the previous edition of the *Australasian Parliamentary Review* (APR), I commenced my 'From the Editor' comments noting that Australia was preparing to elect a new federal government. The Liberal-National Party coalition was returned with a very slim majority in the House of Representatives and neither of the two major parties controls the Senate. This result delivers an interesting, thought provoking and dynamic parliament, especially as it requires continual negotiation. For some this is seen as a good outcome for democracy, while others have a different view. Regardless of a person's perspective, such a result focuses greater attention on our sovereign institution: parliament. For an organization that exists to study parliaments, their structures and processes, the contributions of members of parliament to public policy and other related matters, the 45th Federal Parliament presents many opportunities for analysis and evaluation. As editor of the Australasian Study of Parliament Group's (ASPG) journal, APR, I hope it results in articles being submitted to the journal.

In 2016 some state and territory elections were held and early 2017 will see other states going to the polls. The electoral process and final outcome of these elections will attract the interest of members of our Group, and beyond, and hopefully will also attract articles on state and territory matters.

I have deliberately opened with the above comments because of the pivotal role federal, state and territory parliaments play in democratic political systems. Publications that focus on such issues contribute to the enhancement of people's understanding of the complexities surrounding parliamentary processes and the relationships and cultures that shape each parliament. Such analysis also helps to explain some policy outcomes. Democratic societies, such as Australia and New Zealand, need to harness the knowledge and expertise of professional insiders and expert outsiders to help inform public debate. One way to achieve this is to publish publicly available articles on the workings of parliament at the macro and micro levels.

This edition brings together contributions that cover a range of topics several of which examine elections, budgetary processes and parliamentary committees. Other articles address dual language legislation, Hansard editorial policy, and referendums. Contributors include parliamentary officers, academics and post-graduate students interested in parliaments and public policy.

David Clune's contribution focuses on state issues and examines the 2015 New South Wales election. Also on the theme of elections is David Elder's article. It examines the 2016 federal double dissolution election.

Parliamentary committees are the topic of several articles. Laura Grenfell addresses the question of whether parliamentary committees always enhance parliament's reputation as the 'pre-eminent' institution for defending people's rights. Sarah Moulds concentrates on committees of influence in the context of changing Australia's counter-terrorism laws. Also taking up the committee theme are Pauline Painter and Colby Hannan. Pauline Painter examines whether social media is changing public engagement with committees or if the sphere of influence on committee decisions still comes predominantly from a few organisations and academics. Colby Hannan addresses effectiveness issues asking if fixed reporting dates for senate reference committees are effective.

Contributors interested in budgetary processes are Kylie Coulson and Usman Chohan and Kerry Jacobs. Kylie Coulson offers an examination of budgetary scrutiny in Australian state parliaments while Usman Chohan and Kerry Jacobs focus on a parliamentary budget office in Fiji.

Dual language legislation is the topic of Helena Strange's paper and she evaluates what New Zealand might learn from the Canadian model. A topic that is somewhat under researched, is Hansard. Cecilia Edwards' contribution analyses the political consequences of Hansard editorial policies in terms of transparency.

Graeme Orr and Samara Cassar look at a situation in which 'referendums can go wrong'. They do so in relation to Queensland's proposal for fixed four-year terms.

Steven Reynolds' article has the interesting title of 'Making Honey in the Bear Pit'. Its focus is on parliament's impact on policy making.

Liz Kerr's 'From the Tables', presents all APR readers with a valuable snapshot of matters of interest in Australian parliaments and in the New Zealand parliament.

This edition of APR has a book review by June Verrier. She reviews *Parliamentarians' Professional Development* edited by Colleen Lewis and Ken Coghill.

In closing, I would like to thank, most sincerely, the South Australian chapter of the ASPG for hosting such an informative, stimulating and highly enjoyable conference in Adelaide this year. The topic 'The Restoration and Enhancement of Parliaments' Reputation' resulted in many thought-provoking papers and debates.

I also thank all those who contributed article to the APR in 2016 and those who kindly gave freely of their time to review those that were subject to the double- blind review process.

I wish all subscribers to APR a joyful Christmas season and a new year that is kind to you and yours in every way.

Articles

‘The Accidental Leaders Play Their First Gig’[1]: The 2015 New South Wales Election

David Clune

David Clune was the New South Wales Parliament’s Historian and is currently an Honorary Associate in the Department of Government and International Relations at the University of Sydney.

THE BACKGROUND

The Coalition under Barry O’Farrell won government in NSW on 26 March 2011 with a two-party preferred vote of 64.2%, a swing of 16.5%. The Liberals and Nationals won 69 of the 93 electorates, 41 of them with margins above 20%. Labor’s vote was its lowest since 1904, and the number of seats it won the lowest since 1898. The Liberals won a swathe of seats in the former Labor strongholds of western Sydney and the Hunter Valley. The Nationals reasserted their dominance in rural NSW.[2]

In office, the Government moved methodically to implement its election agenda. It released a long-term master plan for infrastructure. Light rail was extended in Sydney and work begun on a heavy rail line connecting Sydney’s northern and western suburbs. The Government committed to building the WestConnex motorway, a $13 billion toll road and urban renewal project. Ports at Botany, Newcastle and Wollongong were privatised, with the profits channelled back into infrastructure via the Restart NSW fund. A Public Service Commission was established to depoliticise the public sector. Powers over staffing and finance were delegated to school principals. Painful cuts were made to the public sector which reduced the deficit and brought recurrent expenditure under control. The Government’s economic management produced demonstrable benefits. CommSec’s *State of the States* report for January 2015 showed NSW at the top of the State economic performance rankings.

The main elements of the O’Farrell model emerged as: a preference for the middle way; astute politics; capable administration; forward planning; implementing policies, but pragmatically. The Government remained electorally popular. A Newspoll conducted in January/February 2014 showed the Coalition two-party preferred vote at 58%. O’Farrell had a commanding advantage of 30% over Opposition Leader John Robertson as preferred Premier. The Government was assisted by the Independent Commission

1 Headline in *SMH*, 28.2.2015.

2 See Clune, D, and R Smith (eds.). 2012. *From Carr to Keneally: Labor in office in NSW 1995-2011*. Crow’s Nest: Allen and Unwin.

Against Corruption's (ICAC) exposure of the corruption and misconduct of ALP power broker Eddie Obeid and former Labor Minister Ian Macdonald.[3]

For O'Farrell, nemesis came in the form of ICAC's revelations about the insidious tentacles of the Obeid family's covert business empire which extended into the Liberal Party. Australian Water Holdings (AWH), a company in which the Obeids had a significant interest, had a contract with Sydney Water Corporation to provide infrastructure and was pursuing an even more lucrative public-private partnership agreement. ICAC's hearings revealed widespread misconduct on the part of AWH. The CEO was a prominent member of the Liberal Party, Nick Di Girolamo. It was alleged that he gave O'Farrell a $3,000 bottle of wine as a gift. At an ICAC hearing on 15 April 2014, the Premier stridently denied this. The next morning, a note in O'Farrell's handwriting thanking Di Girolamo for the gift was tendered in evidence. O'Farrell immediately announced his resignation, saying: 'In no way did I seek to mislead, wilfully or otherwise, ICAC. But this has clearly been a massive memory fail …. I accept the consequences of my actions'.[4] ICAC stated that there was no suggestion of corrupt conduct by O'Farrell. However, he believed that his personal and political credibility had been fatally undermined and left office.

PREMIER MIKE BAIRD

Treasurer Mike Baird and Transport Minister Gladys Berejiklian were the front-runners to succeed O'Farrell. The former Premier had long favoured Berejiklian as his successor but Baird had the numbers. The transition was well-ordered: Baird and Berejiklian ran as a ticket for Leader and Deputy, respectively, and were elected unopposed on 17 April 2014. The new Premier was 46 and married with three children. The son of former State and Federal MP Bruce Baird, he was a banker for 18 years before becoming MP for Manly at the 2007 election. Mike Baird was an economic conservative and a Christian, but his political instincts were centrist. The new team clicked into place and the Government moved on smoothly.

Baird did not denigrate his predecessor's legacy or embark on changes of questionable necessity to assert his authority. Basically, he continued to govern in the successful style created by O'Farrell. However, there was one major new direction. In June 2014, Baird announced he would seek a mandate at the forthcoming election to lease for 99 years 49% of the State's electricity transmission and distribution network. The 51% which remained in public ownership would be placed in an independently governed fund to service the State's superannuation liabilities. Essential Energy, which services rural and regional areas, was excluded due to pressure from the Nationals. More of the other network companies (Transgrid, Ausgrid and Endeavour Energy) was added to make up the 49%. The proceeds of the privatisation would go into a Rebuilding NSW fund to

3 On Obeid see McClymont, K, and L Besser. 2014. *He who must be Obeid: the untold story*. North Sydney: Vintage Books.

4 *SMH*, 17.4.2014.

finance a massive infrastructure programme. At the time, this initiative was reasonably well received. As polling day approached, it seemed a more courageous decision.

Baird had barely settled in when ICAC struck again. Operation Spicer revealed that key Liberal Party figures on the Central Coast and in the Hunter Valley had secretly solicited and accepted donations from property developers, illegal in NSW since 2009. Two senior Ministers, Chris Hartcher and Mike Gallacher, were forced to resign from Cabinet because of their involvement. The Liberal MPs for Newcastle and the neighbouring electorate of Charlestown, Tim Owen and Andrew Cornwell, resigned their seats after it was revealed they had concealed illegal donations. By the time ICAC's public hearings ended on 12 September 2014, six more Liberal Members had been forced to leave the Parliamentary Party over allegations of election funding irregularities. By-elections were held in Newcastle and Charlestown on 25 October. The Liberal Party did not contest either as an apology for letting the voters down. The ALP regained both seats.

As well as disciplining MPs found to have acted improperly, Baird launched a flurry of damage control measures. A three person panel, headed by former Premier John Fahey, took control of the Liberals' finances. The Party also hired a former ICAC investigator to ensure it complied with electoral funding regulations in the future. Ministers were required to publish, within one month of the end of each quarter, extracts from their diaries detailing meetings with stakeholders, external organisations and individuals. The Premier set up an expert panel, chaired by the former head of Sydney Water, Kerry Schott, with former Liberal front-bencher Andrew Tink and former ALP Deputy Premier John Watkins as members, to review public funding and electoral donations. It produced its final report in December 2014. Some of the recommendations were implemented by amendments to the *Election Funding, Expenditure and Disclosures Act*, which put in place a new public funding model for the forthcoming election and introduced a tougher enforcement regime. In March 2015, Baird announced that he had accepted 49 of the Committee's 50 recommendations.

By the end of 2014, the Government seemed to have survived its tribulations relatively well. The November/December Newspoll had it leading Labor in the two-party preferred vote by 56% to 44%. Mike Baird had established himself convincingly, being preferred as Premier by 56% to 17% for Opposition Leader Robertson. The *Sydney Morning Herald*'s Sean Nicholls commented that Baird was often described as a 'good communicator whose honesty and credibility are his finest qualities'.[5]

By the time of the election, NSW also had a new National Party Leader and Deputy Premier. On 17 October 2014, the incumbent, Andrew Stoner, stepped down. Troy Grant was elected unopposed as his replacement. A 44 year old ex-Police Inspector, Grant had a meteoric rise. He was elected MP for Dubbo in 2011 and only became a Minister in April 2014. Grant re-energised the Nationals and provided a solid bush balance to Baird.

5 *SMH*, 28.2.2015.

THE CAMPAIGN CLIMATE

Two events greatly influenced the climate in which the campaign for the 28 March 2015 election took place. It emerged at the end of 2014 that John Robertson's electorate office had made representations to the Department of Community Services on behalf of a constituent, Man Haron Monis – the gunman in the December siege of the Lindt Café. Robertson's colleagues, who were unhappy with his performance, seized on this to force him out. The chief rivals for the leadership were shadow treasurer, Michael Daley, and environment spokesman, Luke Foley. Daley had long been interested in the job. Foley had previously been ambivalent, citing the needs of his three young children – although many saw him as Labor's best hope for the future. Foley had two disadvantages: he was a left-winger and a member of the upper house. However, he had the backing of NSW Party Secretary, Jamie Clements, who provided support from the right. By the time of the leadership ballot on 5 January 2015, Foley was the only candidate and was elected unopposed. The problem of finding an Assembly seat was resolved when the MP for Auburn, the electorate next to where Foley lives, decided not to recontest, allowing him to be endorsed as the Labor candidate.

In spite of his factional background, Foley was moderate in his views and a committed Catholic. He was described as 'intelligent, hard-working, inclusive and an independent thinker'.[6] Before becoming an MLC in 2010, Labor's new leader had been a union official and NSW ALP Assistant Secretary. Foley said that he saw the party as one of 'solutions and never a party of mere protest. I want NSW to be the great economic powerhouse of Australia … At the same time I want it to be our nation's social conscience. It's possible to be both'.[7] The Opposition thus entered the campaign with a leader who was much more of a viable alternative than his predecessor.

The other important event was the defeat of the first term Liberal National Party Government in Queensland on 31 January. Campbell Newman had been elected in 2012 in a landslide of similar proportions to O'Farrell's. He lost office with a two-party preferred swing to the Opposition of 14%. Labor won 44 seats compared to the seven it held after the 2012 poll. Such an extraordinary result overturned established notions of electoral volatility. In addition, an important factor in the LNP's defeat was the unpopularity of the Government's privatisation program. Polling indicated that NSW voters had a deep, populist distrust of the concept of privatisation.[8] Suddenly, the Coalition's re-election began to look less certain.

Election analyst Antony Green summed up the state of play in March:

> Discounting resignations and taking account of the [2013] redistribution, the starting point for the 2015 election is Coalition 69 seats, Labor 20, two Greens and two Independents … Labor needs to win 27 seats on a uniform swing of around 17%. The more worrying scenario for the Coalition would be a swing of 14–15%, enough

6 *SMH*, 5.1.2015.

7 *SMH*, 31.12.2014.

8 See *SMH*, 28.2.2015, *Australian*, 7–8.3.2015.

> to deprive the Government of its majority. That such a swing is possible was shown by the Queensland result … While Mike Baird's popularity is in stark contrast to [Campbell Newman's], the two elections share a common factor – the unpopularity of Prime Minister Tony Abbott.[9]

THE OPPOSITION CAMPAIGN

Baird's commitment to privatise the 'poles and wires' handed Foley an issue to build his campaign around. It allowed him to shape and focus his efforts. The Opposition Leader stood astride the Queensland/NSW border and declared:

> Here is Queensland, where people stopped the sale of their electricity network by electing a Labor Government. We are now taking [up] the people's campaign, picking it up here at the border where it left off, fighting over the next 24 days to save the NSW electricity network from a sell-off by the Liberals and Nationals.[10]

Opposition to privatisation also guaranteed the strong support of the union movement, which launched a well-funded advertising campaign with the slogan, 'NSW not for sale'. It was based on a campaign used in Queensland, and was supplemented by a telephone and door-knocking effort by volunteers.[11]

Foley claimed that payments from the electricity sector were 'an essential part of the State's revenue' which raised $1.7 billion annually. Labor's spending commitments would be financed by this revenue stream. The Opposition Leader told a rally towards the end of the campaign: 'We will keep the profits from the state-owned electricity network to invest in the front line services this State always needs. Mr Baird will send the profits to a private owner and permanently rob the State of the funds it needs to serve our community'. Foley received some support from Economics Professor, Bob Walker, who had chaired the Carr Government's Council on the Cost of Government. He claimed that 'if people realised how profitable these businesses were, marketing the idea that we'll sell off these surplus assets to invest in non-income producing roads is absurd'. Walker added that the Government could easily borrow to fund $20 billion worth of infrastructure because of its 'miniscule' level of debt. Treasurer Andrew Constance admitted revenue would 'take an annual hit', but said Treasury forecasts showed that payments to government from the electricity network 'would fall substantially', due to decisions of the Australian Energy Regulator. The projected return over the next four years would be $4 billion less than Labor claimed.[12]

Foley received a boost from a Government stumble over the value of the revenue from the 'poles and wires'. The Government's chief adviser on the privatisation, investment

9 *SMH*, 3.3.2015.

10 *SMH*, 5.3.2015.

11 *SMH*, 15.2.2015.

12 *Australian*, 22.3.2015, 23.3.2015; *SMH*, 27.2.2015, 4.3.2015, 16.3.2015, 18.3.2015.

bank UBS, issued a report saying that the cash proceeds of the sale would be exceeded by foregone revenue in 18 years time. This triggered 'a fair degree of angst' in the Premier's office.[13] Staff contacted UBS to express concern that the report had not taken account of the fact that spending on infrastructure would generate economic activity that would more than compensate for the lost revenue. UBS quickly produced an amended document to this effect. It said that the decision to revise the report was made independently. This incident led to claims that the Premier had improperly used his influence to suppress information injurious to his key policy. One commentator believed it had the potential to send 'the poisonous message that he's actually a politician. Just like the rest of them'. However, no wrongdoing was actually proved and the allegation gained little traction as a campaign issue.[14]

Labor continually alleged that electricity prices would rise under private ownership. This claim looked increasingly dubious as the campaign proceeded. The head of the Australian Competition and Consumer Commission said that electricity prices in NSW would now be lower if the network companies had been sold off five years ago, as former ALP Premier Morris Iemma wanted to do.[15] Former Labor Minister and western suburbs MP, David Borger, now Western Sydney Director of the Sydney Business Chamber, said: 'Network charges have reduced substantially in states where there has been privatisation. Secondly, the price is determined by government [through the Australian Energy Regulator], not by the market'.[16]

The anti-privatisation scare campaign was broadened to include claims that the Government intended to sell-off other key parts of the public sector, such as vocational education and health. Labor also ran a negative campaign against Prime Minister Tony Abbott. The slogan 'Same leaders, same agenda' was 'plastered on billboards around Sydney'. Foley said he was offering a 'two for one deal' if elected: 'If Mr Baird goes on Saturday, Mr Abbott goes on the Monday'.[17]

There was a down side for the ALP in basing its campaign around opposition to privatising the 'poles and wires'. Alex Mitchell observed: 'Having attempted to flog the power industry in 1998 and 2008, Labor is hardly in a position to take the high moral ground against the Coalition's sale, and its opposition sounds hollow'.[18] It made the Labor campaign appear to be without ideas or vision, contradicting the Opposition's slogan of 'A new approach'. The other major problem was that, unlike the Government with its privatisation war chest, the ALP was limited in how much it could promise without large scale borrowing, a bridge too far in terms of economic credibility.

13 *SMH*, 20.5.2015.

14 *SMH*, 18.3.2015, 21.3.2015, 22.3.2015, 20.5.2015.

15 *SMH*, 28.2.2015.

16 *Australian*, 14.3.2015.

17 *Australian*, 23.3.2015, 28.3.2015.

18 *Crikey*, 25.2.2015.

This last problem quickly became apparent with the launch of Foley's infrastructure plan. He committed Labor to a $10 billion program, compared to the Government's promised $20 billion. The Opposition Leader struggled to get to even this figure. Some existing infrastructure projects would be put on hold, such as the second Sydney Harbour tunnel and part of the Westconnex motorway. Conveniently, the latter appealed to inner city voters unhappy about the project. A range of business taxes abolished by the Government would be reapplied for ten years. A further $5 billion would be raised by raiding uncommitted funds in the Government's Restart NSW fund. Putting the best face on it, Foley said his plan was 'a smarter and fairer way to build the schools, hospitals and roads we need'. It would keep the budget in surplus and not jeopardise the State's credit rating. He would not make 'the extravagant promises that Mr Baird is currently making, that all rely on the blackmail of people to agree to privatising their electricity network'.[19]

The general reaction was negative. The *Sydney Morning Herald*'s transport reporter commented:

> There is nothing in the positions revealed by Opposition Leader Luke Foley to suggest the party has spent much of the past four years giving serious thought to how to make Sydney or NSW better places to move around. There was plenty of criticism of the Government's agenda. But what was Labor's vision? Less of the same.[20]

The *Australian*'s Mark Coultan commented that Foley 'looked like an Opposition Leader on training wheels as he was caught short on detail'. He added that 'by cancelling or deferring major projects, [Foley] brings up a lot of bad memories of previous Labor governments'. Business was antagonised by the threat of revived taxation. The head of an infrastructure think tank commented: 'Labor's plan is missing the double bypass needed to fix Sydney's congested heart'.[21]

The other issue Labor campaigned hard on was opposition to coal seam gas (CSG) extraction. In rural areas, it was capable of uniting environmentalists, alternative lifestylers, farmers and retirees. Seats on the upper north coast, all held by the Nationals, were a particular focus of hostility. Foley spent much time in the area, accusing the Nationals of betraying their constituents. Claiming the environmental risks were unacceptable, the Opposition Leader promised a permanent ban on CSG mining in the northern rivers region and near water catchments. Baird responded that Labor's criticism was like 'Lance Armstrong coming out here and telling us we should be against drugs in sport'. In office, the ALP had handed out exploration licences 'like confetti' with 'no protections'. The Government was 'making sure the industry moves forward on our terms' with the 'best, toughest regulations'. For some time, the Government had been cancelling and buying back existing CSG licences. In a

19 *SMH*, 19.2.2015; *Australian*, 19.2.2015.

20 Jacob Saulwick, *SMH*, 19.2.2015.

21 *Australian*, 20.2.2015.

sign that the issue was biting, a number of such announcements were made during the campaign.[22]

As well as the negatives, Foley outlined a range of constructive policies. In the environment area, $150 million would be spent on new national parks, and a healthy rivers commission established. Every new school would have child care, or before and after school care facilities, on site. An extra 840 nurses would be hired, and a three-to-one patient to nurse ratio in emergency departments 'enshrined in law'. Nurse-run clinics would be established to relieve pressure on hospital emergency departments and 500 more paramedics hired. Foley promised a 'rescue plan' for the Technical And Further Education (TAFE) system, with a guaranteed 70% share of vocational education funding going to TAFE. First home buyers would be able to pay stamp duty over five years instead of up front. The racing industry was promised a tax cut which would create 'an additional 2,000 racing jobs'.[23]

THE GOVERNMENT CAMPAIGN

The Government's strategy was to focus on the popularity of Baird to counter-balance the electorate's reservations about his main policy. A journalist on the campaign trail with the Premier observed:

> Baird's special trick is that, despite a privileged upbringing, banking background and an unfashionably religious view of the world, he can convince almost anyone he's one of them. Or just make them laugh. There hasn't been a politician in NSW with so much charisma since a young Neville Wran. And there hasn't been a campaign like this in a long time. Everything rests on Baird … His stump speech goes along these lines: I came into politics to make a difference. I'm not here to hold on to power for its own sake. I'm not a career politician.[24]

Baird did not resile from his electricity privatisation commitment. He said at the beginning of the campaign: 'This is a once in a generation opportunity. I believe in it. My job is to convince the people of NSW over the next 38 days of it, but it is something I am prepared to lose my job over'.[25] On another occasion, the Premier said that what kept him awake at night was the fear that 'the scare campaign is what grips, versus the vision of making a great State even greater'. He was determined to win 'the vision debate versus the scare debate'. Electricity privatisation was the 'turbocharger' that would provide NSW with much needed road, rail, education and health infrastructure.[26]

22 *Australian*, 5.3.2015, 9.3.2015, 25.3.2015; *SMH*, 21.3.2015, 24.3.2015.

23 *SMH*, 17.1.2015, 15.2.2015, 1.3.2015, 11.3.2015, 17.3.2015, 24.3.2015; *Australian*, 8.3.2015, 11. 3.2015

24 Mark Coultan, *Australian*, 21–22.3.2015.

25 *ABC News*, 18.2.2015.

26 *Australian*, 4.3.2015.

Some obfuscation took place, nonetheless. Baird repeatedly claimed that a 99 year lease of the electricity industry was not a sale. This ignored the inconvenient truth that the Government had been quite comfortable with describing the 99 year lease of Ports Botany, Newcastle and Wollongong as a sale. The Government also made much of the fact that only 49% of the 'poles and wires' was being leased. Although Essential Energy in regional NSW would remain in public ownership, all of Transgrid and 50.4% of both Ausgrid and Endeavour Energy were included.[27] The Government portrayed electricity privatisation as recycling, rather than disposing of assets. It attempted to switch the ground on which the campaign was being fought by stressing the major benefits that the privatisation would deliver. Cashed up with the potential proceeds, Baird was able to out-promise Labor significantly, without being accused of irresponsibility.

The Government promised new high schools in the inner city and at Parramatta in western Sydney, an extra 320 maths and science teachers, more school counsellors, and a scheme where a thousand of the best teachers would coach and mentor their colleagues. Scholarships would be given to students in vocational training courses. A total of $5 billion was promised for the refurbishment of hospitals across the State. Over the next four years, the Government would hire 700 doctors and 2,100 nurses. Small businesses were offered a tax rebate and low income households energy rebates. A 'cash for cans' recycling scheme would commence in 2017, and $100 million was pledged for the protection of endangered species. Baird promised to spend $300 million to make traffic move on Sydney's most gridlocked roads. A rail crossing would be constructed under Sydney Harbour, at a cost of $10 billion, as part of a 30 kilometre line linking northern and south western Sydney.[28]

The Premier lavished promises on western Sydney as he attempted to defend the Liberals' holdings in the area. He unveiled plans for a 200 hectare park at Doonside that would 'rival' New York's Central Park. The Powerhouse Museum would be relocated from inner Sydney to Parramatta, and a light rail network built around it. Baird said that Parramatta was set to become 'the infrastructure capital of the world'.[29]

The Premier said of the Opposition's infrastructure plan:

> If you want a state where debt is going up, we have thousands less jobs and we go back to the bottom economically, well Labor is your team … We have an Opposition that is promising more congestion, more crowded trains, more time in your car and on public transport getting home to your family.[30]

Foley was stigmatised as an inexperienced 'L plater', not fit to be entrusted with the future of the State.[31]

27 *SMH*, 28.3.2015.

28 *SMH*, 16.2.2015, 18.2.2015, 20.2.2015, 21.2.2015, 8.3.2015, 10.3.2015, 16.3.2015, 17.3.2015, 21.3.2015; *Australian*, 10.3.2015, 11.3.2015, 22.3.2015, 23.3.2015.

29 *SMH*, 26.2.2015, 9.3.2015, 11.3.2015.

30 *SMH*, 23.2.2015.

31 *Australian*, 11.3.2015.

The Government focussed much more than the Opposition on 'law and order' – more fertile territory for the Coalition than privatisation: 'On Tuesday it was new laws tackling bikie gangs, on Wednesday it was increased penalties for paedophiles, and on Thursday extra police numbers. By Friday morning it was a register of domestic violence offenders'.[32] National Party Leader Troy Grant advocated mandatory chemical castration of child sex offenders.[33]

Baird stressed the Government's record and warned voters not to let an unreconstructed Labor Party back into office:

> I said we were going to get the budget under control; we have. We said we were going to build the south west rail link; we have. We said we were going to get the north west rail link under control; we have … and at the same time what we have with Labor is a very simple proposition: it is fear and lies …. Old Labor is wanting to get back into town, that nightmare on Sussex St wants to come back and control all of your lives.[34]

The Liberals' ability to exploit corruption and misconduct during the previous Labor Government was circumscribed by their own collection of skeletons in the ICAC closet. It suited both sides to downplay the issue.

THE FINAL DAYS

At the beginning of the campaign, there was a possibility that, if the privatisation issue caught fire and Baird faltered, the Government could be facing defeat or a hung parliament. As the campaign entered its final days, neither of these things had happened. A Fairfax/Ipsos poll taken over 21–23 March had the Coalition on 54% of the two-party preferred vote. Baird was preferred as Premier by 56% compared to 27% for Foley.[35]

The Labor and union anti-privatisation campaign became more strident. It focussed on claims that a Chinese Government-owned energy company was interested in the electricity network and that this posed a security risk. As one journalist put it: 'In the last desperate days of the campaign, Opposition Leader Luke Foley has played the race card … He wants to stop the possible sale to Chinese Government Communist interests, suggesting they could cut off power to defence bases like Holsworthy (Army) and Richmond (RAAF)'.[36] This triggered an immediate backlash. Commonwealth Race Discrimination Commissioner, Tim Soutphommasane, described such claims as 'xenophobia'. Martin Ferguson, Resources Minister in the Rudd and

32 Mark Coultan, *Australian*, 7–8.3.2015.

33 *Daily Telegraph*, 5.3.2015.

34 *Australian*, 2.3.2015.

35 *SMH*, 23.3.2015.

36 Alex Mitchell, *Crikey*, 28.3.2015.

Gillard Governments, accused the Opposition of 'rank opportunism and blatant scare-mongering'. Former NSW Labor Treasurer Michael Costa said: 'It is not only disgraceful advertising, it is damaging to the national interest'.[37]

Although questions about possible foreign ownership of the electricity network 'dogged the Premier's press conferences', Baird stayed 'on message'. On the Friday before polling day, he visited the construction site of the north west rail link: 'Actions speak louder than words. We are making stunning progress in building a project that will change Sydney forever. You can see what we can do in four years. If we are given the privilege of continuing for another four years, you will see more … schools, roads, rail, hospitals'. The Premier assured voters that there were 'protections in place' to safeguard the interests of the State if an overseas investor leased the electricity assets: 'We are the ones that are in control of the process. I have undertaken transactions like this before … We control the bidders [and] the terms'.[38] The Liberal Party set up a website entitled 'Poles and Liars' to counter Labor's scare campaign. It also distributed a deck of cards with the same name, featuring Foley as the Joker and 'a roll call of 12 ALP luminaries said to support the sell off including former Prime Minister Paul Keating'.[39]

Preferences were a particularly important factor in this election. Both NSW and Queensland have optional preferential voting systems. Voters have increasingly tended to 'vote one' and not express a preference. The Queensland election saw a reversal of this, with a high number of electors deciding to preference against the Government rather than exhaust their votes. This was a key factor in the defeat of Campbell Newman. Although the Greens were locked in battle with the ALP in inner Sydney, the Party directed preferences to Labor in 23 key seats. The two Parties exchanged preferences in the Legislative Council. The Greens said that their decision was motivated by Labor's opposition to electricity privatisation. In response, the Government launched a 'Just vote one' advertising campaign.[40]

THE RESULTS[41]

The Government was re-elected with a two-party preferred vote of 54.3%, a swing against it of 9.9%. The exhaustion rate of preferences was 51.6% compared to 55.2% in 2011. Antony Green has calculated that this added 1.8% to the swing against the Coalition. The primary vote was: Liberal Party 35.08%, Nationals 10.55%, and ALP 34.08%. The Liberals won 37 seats, a loss of 14, and the Nationals 17, down two on 2011 (one of these due to the redistribution). Labor increased its strength by 14 to

37 *Australian*, 24.3.2015; *Australian*, 27.3.2015.

38 *SMH*, 27.3.2015, 28.3.2015.

39 *SMH*, 22.3.2015.

40 *SMH*, 17.3.2015; 26.3.2015.

41 For detailed results see the State Electoral Commission website *vtr.elections.nsw.gov.au/* and Antony Green's Election Blog *blogs.abc.net.au/antonygreen/*. Regional swing figures used are by Antony Green.

34. The Greens polled 10.2%, the same as in 2011. They held Balmain and won the new, notionally Green inner Sydney seat of Newtown. The Greens also had a surprise win in Ballina on the north coast, with a two-candidate preferred swing of 27.6%. There were swings of over 20% against the Nationals in Clarence and Lismore. Elsewhere in rural NSW, the swing to Labor was roughly half that figure. Existing Independents Alex Greenwich (Sydney) and Greg Piper (Lake Macquarie) were re-elected.

Former Labor Senator Graham Richardson commented: 'Victory is impossible for Labor unless that 34% becomes at least 37%. That last 3% may prove a bridge too far. Modern voters simply refuse to follow the script Labor has written for them'. Richardson added that the Greens were 'stuck on 10% for a reason. Much of what they hold near and dear is anathema to the great majority of people living further than 10 km from the GPO'. If the ALP could not win Balmain and Newtown with 'two well-known, well-resourced, popular candidates then it might be time to rethink the strategy … I wonder how much time and effort should be put into these areas that don't like what modern Labor is today'.[42]

In the Legislative Council, the Coalition polled 42.6% of the first preference vote, which gave it nine seats. As a result, the Government needed only the support of Fred Nile and his fellow Christian Democrat MLC, Paul Green, to win divisions, thus giving it the potential to pass its electricity privatisation legislation. An Animal Justice Party candidate narrowly won the final position. After the election, the make up of the Council was: Coalition 20, ALP 12, Greens 5, Christian Democrats 2, Shooters and Fishers 2, Animal Justice Party one.

While a swing of almost 10% seems impressive, it has to be seen in the context of the enormous victory won by O'Farrell in 2011. The Coalition in its wildest dreams did not anticipate maintaining such a margin. From this perspective, the swing had an element of return to a more normal electoral situation – a 'correction' as many commentators put it. The overall figures masked a widely divergent pattern of swing, perhaps a sign of a more volatile electorate and an upsurge in localism. According to Antony Green's calculations, swings on the upper north coast were the largest in the State, ignited by concerns over CSG. Labor reclaimed its Hunter heartland with a vengeance. Influenced by the misconduct of local Liberal MPs, the two-party preferred swing against the Coalition was 17.1%. ICAC's revelations no doubt also contributed to a swing against the Liberals of 13.1% on the central coast. Labor gained six seats in the Hunter and central coast regions (Maitland, Port Stephens, Swansea, Gosford, The Entrance, Wyong) and strengthened its hold on Newcastle and Charlestown. By contrast, the ALP gained only Strathfield and Rockdale in traditional swinging seat territory in suburban Sydney. Miranda, won by Labor at a by-election in 2013, was convincingly regained by the Liberal Party.

In western Sydney, the two-party preferred swing to the ALP was 7.9%. Labor gained six seats: Blue Mountains, Campbelltown, Granville, Londonderry, Macquarie Fields and

42 *Australian*, 6.4.2015.

Prospect. Nonetheless, a significant number remained with the Liberals: Camden, East Hills, Holsworthy, Seven Hills, Mulgoa, Parramatta, Penrith and Riverstone. There was, in fact, a small swing to the Liberal Party in Auburn, East Hills and Parramatta. One commentator has cited demographic differences as a determining factor. Labor did well in areas that were characterised by large overseas-born populations, weak employment prospects, and high concentrations of low-cost rental accommodation. The Liberals were predominant in areas with high mortgage levels, low public transport use, and incomes above $1,500 per week.[43] In other words, it was the 'battlers' as opposed to the 'aspirationals'.

A key question is why did the privatisation and Abbott factors not play a more decisive part in determining the result as they did in Queensland? One answer is the unpopularity of Campbell Newman – it ramped up the effect of these factors in Queensland, while Baird's popularity damped them down in NSW. Perhaps also Baird was more successful in convincing suspicious but susceptible voters that the re-election of the Government would deliver tangible benefits to them. Overall, it seems that the electorate was not prepared to remove a Government still showing signs of vitality, with a popular leader and a good record, for a Labor Party yet to shake off the shadowy elements of its legacy and prove itself worthy once again of the voters' trust.

Both Leaders conducted effective campaigns and managed relative civility in their exchanges. Foley was under particular pressure as an unproven leader, pushed almost immediately into a campaign. He proved to be a good communicator who did not crack. In three televised Leaders' debates, Foley held his own against a polished opponent. He had little choice but to 'go negative', seizing the weapon the Government thrust into his hands to attack its Goliath-size majority. Foley also presented a policy package that, although not without flaws, showed an awareness of the need for an Opposition Leader to put forward a constructive alternative. He emerged from the election with credibility and at the head of a party that was once again electorally competitive, if not obviously on the verge of office, with a uniform swing of 8.2% needed for victory in 2019.

Baird was also an accidental leader, pushed into the top job with relatively little parliamentary or ministerial experience and immediately facing a crisis. That he survived this and won an election well is a considerable achievement – although credit must be given to Barry O'Farrell, who created the legacy that Baird built on. Baird brought off that most difficult of feats, a successful changeover of Premiers. His campaign showed that if the hard work of persuasion is undertaken, as exemplified by Hawke and Howard, controversial policies can be sold to the electorate. For the conservative side of politics, Baird's victory was a turning point. First term conservative governments in Victoria and Queensland had been defeated and, at the beginning of 2015, the Abbott Government seemed headed for the same fate. It has been said that Wran's victory in 1976 gave heart to Labor after the defeat of the Whitlam Government. Baird's win was similarly encouraging for the Liberal Party.

43 Alex Sanchez, *Australian*, 14.4.2015.

‘A Perfect Storm’ – The 2016 Double Dissolution Election

David Elder

David Elder is Clerk, House of Representatives

INTRODUCTION

Our story begins on a bright Spring Canberra day on 12 November 2013 with the first sittings of the 44th Parliament following the general election held on 7 September 2013. On that day there were no signs of the particular series of events that would create a ‘perfect storm’ to trigger only the seventh double dissolution election in Australia’s history, almost exactly two and a half years later in May 2016.

At the election, a Liberal/National Party Coalition government under Prime Minister Tony Abbott had secured a very solid majority in the House of Representatives, with the Coalition holding 90 seats, the Opposition Labor Party 55 seats and minority party and independent members with 5 seats. However, the first signs of potential trouble with the Senate quickly became evident. In the period from the first sitting day through to 30 June 2014, the Government would face the same Senate that had prevailed for most of the 43rd Parliament. This was Liberal/National Coalition 34, Labor 31, Greens 9 and others 2. These numbers meant, just as they had for much of the 43rd Parliament, that a combination of Labor and the Greens commanded a majority in the Senate. This was particularly relevant to the potential success of legislation that the incoming Government considered to be central to its agenda, and a part of its mandate for government, that is legislation to repeal the carbon tax and to repeal the minerals resource rent tax (commonly referred to as the mining tax).

Perhaps of greater longer term concern to the Government was the composition of the newly elected Senate, which would come into office from 1 July 2014. This consisted of Liberal/National Coalition 33, Labor 25, Greens 10, Palmer United Party 3 and other minority and independent Senators 5.[1] This did not augur well for the Government’s legislative prospects after 1 July 2014 as it would need either the support of Labor, of the Greens or of six of the eight other Senators to be able to see the passage of its legislation through the Senate.

Thus the new Abbott Government faced what has been described as

1 The composition of the eight ‘other’ Senators became more disparate with Senator Glenn Lazarus and Senator Jacqui Lambie leaving the Palmer United Party and sitting as independent Senators.

> … a recurrent fixture of the Australian Parliament that the government of the day usually does not have a majority in the Senate and that it has to engage repeatedly in negotiation with opposition parties or one or two independent Senators to modify Bills rather than have them rejected outright.[2]

More significantly, in the case of the Senate to take office from 1 July 2014, concern was raised that the Senate voting system was delivering a distorted outcome in the election of Senators. This concern was well stated in the subsequent review of the 2013 election, which the Joint Standing Committee on Electoral Matters undertook. The Committee focused its attention initially on the Senate voting system. The then Chair of the Committee, the Hon Tony Smith MP (now Speaker of the House of Representatives), stated in his foreword to the report of the Committee:

> The 'gaming' of the voting system by many micro-parties created a lottery, where, provided the parties stuck together in preferencing each other (some of whom have polar opposite policies and philosophies) the likelihood of one succeeding was maximised.[3]

The Committee identified the system of Senate voting above the line, and its reliance on group voting tickets set by the political parties, as the key problem. The Committee recommended major reforms to the Senate voting system, which, as the Committee stated '…puts the power of preferencing back in the hands of the voter'.[4] . Thus was established a narrative for the Government that if there were difficulties with the new Senate, at least in part it would be because it was unrepresentative[5]. This issue was to become a very significant element in the 'perfect storm' which was to develop later in the Parliament as it fed into a view that not only might the Senate be obstructive of the Government's program, but also it was not representative.

THE GOVERNMENT BEGINS WORK

On only the second day of the 44th Parliament, the Abbott Government introduced into the House of Representatives a package of legislation to abolish the carbon tax and a bill to repeal the mining tax. The bills passed the House about a week later and were transmitted to the Senate. They were referred to a Senate committee and then the major bills in the carbon tax repeal package were considered and negatived by the Senate at the third reading on 20 March 2014. A similar fate befell the bill to

2 Prof Jack Richardson, 'Resolving Deadlocks in the Australian Parliament' Department of the Parliamentary Library, Research Paper No9, 200–04, October 2000, p. (ii).

3 Joint Committee on Electoral Matters, *Interim Report on the inquiry into the conduct of the 2013 Federal Election: Senate voting practice*s, May 2014, Foreword.

4 op. cit.

5 Of course suggestions that the Senate was not representative were not new. Infamously in 1992, the then Prime Minister Paul Keating described the Senate as 'unrepresentative swill' (House of Representative Debates, 11 November 1992, p. 2547.

repeal the minerals resource rent tax with it being negatived at the second reading on 25 March 2014.

Apart from this legislation, which the Government would have considered as core to its election promises, the Abbott Government had significant issues with the passage generally of its legislative agenda through the Senate during the course of the period to 30 June 2014. Table 1 shows the record of the Abbott Government with the passage of its legislative program through to 30 June 2014 when the composition of the Senate changed. The table also shows the results for the Gillard Government in the 43rd Parliament in a similar period when it also had the Senate from the previous Parliament.

Table 1: Passage of Government Bills

	43rd Parliament (to 30 June 2011)	44th Parliament (to 30 June 2014)
Bills passed by House	151	154
Bills Passed by both Houses	115	94
Percentage 'success' rate	76%	61%

Table 1 shows clearly that the Abbott Government was having a more difficult time with the Senate than the Gillard Government up to the time when the new Senate came into existence, despite the Gillard Government not having a majority in the Senate. After 1 July 2011, the Gillard Government had a more benign Senate (ie the Senate that was still in place during the early months of the Abbott Government) than the one that faced the Abbott Government after 1 July 2014.

Section 57 of the Constitution

It is necessary at this point to make a short diversion into the Constitution and most particularly into section 57, which concerns the resolution of deadlocks between the Houses. The relevant paragraph for our purposes is paragraph one of section 57 which provides:

> If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the GovernorGeneral may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

Section 57 was agreed ultimately during the convention debates in the late 1890s leading to the framing of the Constitution with the expectation that with a Parliament comprising two Houses with nearly equal legislative powers but composed in quite different ways, differences would occur and there would need to be a mechanism to resolve deadlocks. Like many of the key provisions of the Constitution, section 57 was a compromise thrashed out during the convention debates. It reflected a compromise between two fundamental institutional principles, that is:

> … representation of the people of a nation in a system of British parliamentary government, and equal representation of the states in a system of American-style Federation. Those two principles find their expression respectively in the House of Representatives and the Senate. They work together, in a lopsided, power-sharing arrangement, complementary but constantly in tension: an asymmetrical symmetry…[6]

Section 57 was always meant as a balancing provision given that under section 53, with the exception of laws appropriating money or imposing taxation, the Senate was given equal legislative power to the House of Representatives. As has been noted by Quick and Garran in their commentary on the Constitution, the fundamental purpose of section 57 (like the provisions in section 53 which give to the House of Representatives only the role of initiation and amendment of money bills) is 'designed to ensure that a decisive and determined majority in the national chamber [the House of Representatives] shall be able to overcome the resistance of a majority in the provincial chamber [the Senate][7].

There are a number of important features of paragraph one of section 57 for the purposes of our narrative:

- the provision only applies to bills originating in the House of Representatives;
- the Senate must first reject or fail to pass or pass with amendments to which the House of Representatives will not agree a proposed law that has originated in the House of Representatives;
- the House of Representatives may then, after three months has elapsed, pass the same bill and send it to the Senate for consideration;
- if the Senate again rejects or fails to pass the bill or passes with amendments to which the House of Representatives will not agree, the Governor-General may dissolve both Houses simultaneously for an election; and
- the dissolution cannot take place within six months of the expiration of the House of Representatives by effluxion of time.

Bills which meet the test of failing to pass the Senate twice, having met the other provisions of section 57, are often referred to as double dissolution 'triggers'. There can

6 Helen Irving, 'Pulling the Trigger: The 1914 Double Dissolution and its legacy', Senate Papers on Parliament, No 63, pp. 23–42, at pp. 23–24.

7 J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson, Sydney, 1901, p. 339.

be more than one 'trigger', and they do not have to be used immediately they arise, nor even at all as the emphasis on the word 'may' above indicates (the Governor-General may dissolve both Houses). There have been many Parliaments in which double dissolution 'triggers' have arisen, but there have not been double dissolution elections to follow.

POSSIBLE 'TRIGGERS'

In relation to the core bills of the package to repeal the carbon tax, the Government waited until the necessary three-month period had expired since the Senate's failure to pass the bills to ensure that they potentially would qualify as double dissolution triggers under section57 of the Constitution. The second package of bills was introduced in the House on 23 June 2014 and passed on 26 June. The Government had scheduled sittings for the Houses in July 2014 so that the new Senate could deal with legislation, and particularly the carbon tax repeal package, that previously had been rejected by the Senate. In the end, and with some modification, all of the carbon tax package of bills, with one exception, was passed by the Senate meaning these bills did not meet the test of double dissolution triggers.

The one exception in the original package of bills was the Clean Energy Finance Corporation (Abolition) Bill 2013. This bill was first negatived by the Senate on 10 December 2013. An identical bill was passed by the House of Representatives on 27 March 2014 and negatived at the second reading by the Senate on 18 June 2014, thus setting up this bill as a double dissolution trigger under section 57 of the Constitution. A further, very similar, bill was introduced into the House of Representatives on 23 June 2014 as part of the second package, but was separated from the other bills passed on 26 June and was not passed by the House prior to dissolution of the House on 9 May 2016. Little more was to be heard of this trigger and it was not to feature in the 'perfect storm' around the double dissolution of 2016, nor listed by the Government as one of the bills to support the case for a double dissolution.

By the end of 2014, the Abbott Government's legislative record had improved as a result of the new Senate, and particularly with the passage of the large package of carbon tax repeal bills. But it was widely recognised that the disparate nature of the Senate made it more difficult to negotiate with. Table 2 shows the legislative record as it stood at 31 December 2014 and again it is compared with the record of the Gillard Government at a similar period in the previous Parliament. As the Table shows, the Abbott Government's 'success' rate had improved significantly (from 61% to 77%) perhaps reflecting particularly the passage of the twenty or so bills that made up the carbon tax package. However, compared with the Gillard Government, it continued to face a significantly difficult Senate.

Table 2: Passage of Government Bills

	43rd Parliament (to 31 December 2011)	44th Parliament (to 31 December 2014)
Bills passed by House	249	193
Bills Passed by both Houses	222	149
Percentage 'success' rate	89%	77%

THE FIRST ELEMENT OF THE PERFECT STORM – A CHANGE IN PRIME MINISTER

Perhaps of greater significance to our story were the declining fortunes both of Prime Minister Abbott and of his Government in the opinion polls. Polls taken towards the end of December 2014 showed a continuing decline in support for both Prime Minister Abbott and for the Coalition Government. Prime Minister Abbott's personal satisfaction level had declined from –9 (41% satisfied and 52% dissatisfied) to –25 (35% satisfied and 58% dissatisfied). The support for the Government had fallen in the same period on a two party preferred basis from 49% to 46% placing the Government in a difficult position.[8] In early 2015, two members of the parliamentary Liberal Party called for a spill of leadership positions. A ballot was held on 9 February 2015 on the question of whether there should be a leadership spill. There was no alternative contender put forward in the event that a leadership spill was successful and the spill motion was defeated 61 to 39.

In the meantime the Government continued to have difficulties in the Senate with the passage of what it saw as key legislation. In particular of interest to us are the three pieces of legislation that, ultimately, were to be the three bills listed on the proclamation dissolving both Houses of Parliament on 9 May 2016 as having met the requirements of section 57 of the Constitution. The Fair Work (Registered Organisations) Amendment Bill 2014[9] was passed by the House on 15 July 2014. It was negatived at the second reading by the Senate on 2 March 2015. The House of Representatives passed an identical bill on 15 July 2015 (more than three months after the Senate's failure to pass it), and it was again negatived at the second reading in the Senate on 17 August 2015 setting up this bill as a double dissolution trigger.

Two other bills, the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 were passed by the House and subsequently were negatived at the second reading by the Senate on 17 August 2015. These bills, which legislated for the

8 The Australian Newspoll reported in *The Australian*, 15 December 2014.

9 Note relationship of this bill to a similar 2013 bill.

re-establishment of the Australian Building and Construction Commission to regulate union activity in the building and construction industry, were to become a key part of the story of the double dissolution in 2016 and were, ultimately, the other two bills listed in the proclamation of dissolution of both Houses on 9 May 2016 as having met the requirements of section 57 of the Constitution.

Later in 2015, the first key element of the 'perfect storm' emerged. Following continuing unfavourable polls and speculation about leadership, Malcolm Turnbull launched a successful leadership challenge and defeated Tony Abbott in a leadership ballot held on 14 September 2015. Opinion polls taken soon afterwards showed a turnaround in support for the Government and strong support for Mr Turnbull as Prime Minister. The polls showed that while before the leadership change the Government was trailing Labor 46% to 54% on a two party preferred basis, this turned around to 53% to 47% in the Government's favour after the leadership change.[10] While the polls began to fall again into late 2015 and early 2016 and reached about level pegging by the time the election was called, the perception that the Government was now in a position to win an earlier election was a vital element in driving the momentum of a possible double dissolution election.

THE SECOND ELEMENT OF THE PERFECT STORM – SENATE ELECTORAL REFORM

A second key element, negotiated early in 2016, was the agreement the Government was able to secure with the Greens in the Senate for the reform of the system of Senate voting which had been the subject of the report of the Joint Standing Committee on Electoral Matters referred to earlier. On 22 February 2016 the Government introduced into the House of Representatives the Commonwealth Electoral Amendment Bill 2016 and it was passed by the House of Representatives with amendments on 24 February 2016 even though it also had been referred to the Electoral Matters Committee for an advisory report by 2 March 2016. The Senate commenced a marathon consideration of the bill on 2 March 2016 and it was finally passed by the Senate with amendments on 18 March 2016 with the support of the Coalition, the Greens and Senator Xenaphon after an all night sitting. The House agreed to the Senate's amendments and the bill received Royal Assent soon after.

The significance of the passage of this bill to our story is that the way in which it was seen to alter the Senate voting system. Its significance was that it could mean that a number of the minority Senators from the 43rd Parliament were expected to have difficulty retaining their seats at a subsequent election. However, most of those minority Senators were only elected in 2013 and so would not come up for re-election for another three years with the usual half Senate election. But a double dissolution election would see all Senators up for re-election offering the possibility for a quite

10 P. Hudson, 'Coalition support up again, back to 2013 election levels' *The Australian*, 10 November 2015.

different composition for the Senate in the following Parliament. It offered to the Government the chance to deal with what it saw as the unrepresentative nature of the existing Senate. The unwritten implication was that a new Senate may be both more representative, and less obstructionist, than the existing Senate was seen to be.

As a footnote to the passage of the *Commonwealth Electoral Amendment Act 2016*, the constitutional validity of the Act was challenged in the High Court by one of the minority Senators, Senator Day. On 13 May 2016 the High Court ruled that the Act was valid clearing the way for a new voting system for the Senate.

THE THIRD ELEMENT IN THE PERFECT STORM – THE PROROGATION AND RECALL OF THE PARLIAMENT

When the Senate adjourned at 2.26 pm on Friday, 18 March 2016 after its all night sitting at which it passed the Commonwealth Electoral Amendment Bill, it did so with an amendment to the usual motion to fix the next sitting day of the Senate, which was to be Tuesday, 10 May 2016. The effect of the amendment was that an absolute majority of Senators would have to advise the President of the Senate in writing that they wished to fix an alternative meeting time. In moving the amendment, the Leader of the Opposition in the Senate, Senator Wong stated:

> …we have had a game of national kabuki over these last weeks as this government tries to make a decision on whether or not it will go to a double dissolution or early election and whether or not this will require the bringing forward of the federal budget…
>
> I want to make it very clear, from the Labor Party's perspective, that we will not be agreeing to a sitting of the Senate that is not currently scheduled simply to assist this government in an election timetable.[11]

The passage of the amendment meant that it would be difficult for the Senate to be reconvened prior to its next scheduled sitting day of Tuesday, 10 May 2016. This created issues for the Government if it was contemplating an earlier double dissolution election. If there was to be a double dissolution election there were a number of constitutional constraints around timing if the Houses were not to meet again until 10 May. As noted earlier, the latest a double dissolution election can be called under section 57 of the Constitution is not less than six months before the House of Representatives expires by effluxion of time. As the House first met on 12 November 2013, the final day on which a double dissolution election could be called was 11 May 2016, only the day after the scheduled Budget day on 10 May 2016. In addition, to keep future half Senate elections coordinated with House of Representatives elections, the election would have to be held after 1 July 2016 if the terms of the Senators elected at the double dissolution election were to be taken

11 Senate Debates, 17 March 2016, pp 2731-32

to begin on 1 July 2016 rather than on 1 July 2015 (in accordance with section 13 of the Constitution).

Although there had been speculation about a double dissolution election since the agreement between the Government and the Greens to pass the Senate electoral changes, the way forward towards that seemed unclear with the Budget not scheduled until 10 May. In addition, the Government had legislation that it regarded as vital and which had already been rejected once by the Senate. Specifically there were the two bills referred to earlier that would re-establish the Australian Building and Construction Commission to oversight the building and construction industry. With the Senate's consideration of the Senate electoral reform bill dominating the previous week of sitting there had not been sufficient time for these bills to be considered further in that week. While the Government had a double dissolution trigger, these additional bills could be seen to give substance and urgency to its view that the Senate was being disruptive of key Government legislation.

This set the scene for the next and perhaps least predicted part of our story. On 21 March 2016, only the Monday after the marathon Senate sitting had been completed on the previous Friday, the Prime Minister advised the Governor-General, under section 5 of the Constitution, to prorogue the Parliament on Friday, 15 April and summon the Parliament to sit on Monday morning, 18 April for a second session of the 44th Parliament. Section 5 provides in part:

> The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament…

In advising the Governor-General to prorogue the Parliament and summon Members and Senators to a second session earlier than that scheduled in the sitting pattern, the Prime Minister said that the purpose was to consider the two bills to re-establish the Australian Building and Construction Commission which had already been rejected once by the Senate and had again passed the House of Representatives. Reference was also made to the Fair Work (Registered Organisations) Bill 2014, which was already a double dissolution trigger, and the need for this bill also to be considered by the Senate.

Importantly, and related to the motion passed by the Senate at the conclusion of its sitting on 18 March, the supporting advice to the Governor-General from the Attorney-General emphasised the role of executive government in determining the agenda for the Parliament noting:

> Since Federation, the power of prorogation and recall of Parliament has been exercised by the Governor-General, on ministerial advice, because ministers have believed that the proposed arrangement of sessions of Parliament is the best way, in the circumstances of the time, to manage government business.[12]

12 Advice from the Attorney-General, Senator the Hon George Brandis QC to the Governor- General, His Excellency General the Honourable Sir Peter Cosgrove AK MC (Retd) dated 21 March 2016, p. 4

Thus the Senate's attempt to prevent further sittings until 10 May 2016 by the resolution it had passed on 18 March 2016 had been trumped by a provision in the Constitution not used since 1977 to prorogue the Parliament and summon Senators and Members for a second session.

Having secured the Governor-General's agreement to his advice for prorogation and a recall of the Parliament, the Prime Minister made it clear that if the legislation to restore the Australian Building and Construction Commission was not passed by the Senate in the additional sittings planned from 18 April, they would be double dissolution triggers and would be used to advise the Governor-General to dissolve both Houses under section 57 of the Constitution for an election to be held on 2 July. In addition, and to fit into a timetable for a dissolution to be on or before 11 May, the presentation of the Budget was to be brought forward by a week to 3 May. The Government was setting for itself a clear and relentless pathway towards an election.[13]

The Houses met on 18 April for the first meeting in a second session of Parliament since 1977. In accordance with the Constitution and the standing orders of both Houses, members of the House of Representatives attended in the Senate chamber to hear an address by the Governor-General in which he advised of the Government's reasons for recalling the Houses. The Governor-General referred in particular to the Senate giving full and timely consideration to the bills to provide for the re-establishment of the Australian Building and Construction Commission and the Fair Work (Registered Organisations) Bill. The Governor-General stated:

> I have, on the advice of my ministers, recalled you so that these bills can be considered again, and their fate decided without further delay.[14]

An important effect of prorogation is that all matters on the Notice Paper, including any legislation, lapses.[15] In the case of bills that had passed the House and were under consideration in the Senate, the House can, by resolution, send a message to the Senate asking for it to resume consideration of the bills. The restoration of the two ABCC bills for the Senate to resume its consideration was the first item of business in the House after the formalities of an opening day of a new session were conducted. The resolution was agreed to and the messages sent to the Senate. The Senate agreed to resume consideration of the bills, commenced its consideration, and, after a relatively brief debate, the bills were negatived at the second reading, setting up these bills as clear double dissolution triggers.

The fate of the Fair Work (Registered Organisations) Bill was a little different. It was introduced into the House but was not further debated. It appeared the Government

13 For commentary on Prime Minister Turnbull's move see Paul Kelly, 'Enemies outfoxed by strength and smarts', *The Australian*, 22 March 2016, David Crowe, 'PM pulls the trigger', *The Australian*, 22 March 2016 and Peter Hartcher, 'Hopeless ditherer to decisive leader in masterful stroke', *Sydney Morning Herald*, 22 March 2016.

14 Senate Debates, 18 April 2016, p. 2738

15 For the effects of prorogation on the business of the House see *House of Representatives Practice*, Sixth Edition, Canberra, 2012, pp. 230–231.

did not proceed further with it in the House given the fate of the two ABCC bills in the Senate. This bill was, of course, already a double dissolution trigger.

Following the Senate's rejection of the ABCC bills, the Prime Minister at Question Time the next day, in response to a question from the Leader of the Opposition, made the Government's plan very clear:

> … after the budget I will advise the Governor-General to dissolve both houses of parliament and I will advise him to call an election on 2 July. The Governor-General will consider that request and that advice and he will make a decision, and that is the constitutional fact. That is why I say I expect there to be an election on 2 July. But of course my constitutional duty is, under section 57, to advise the Governor-General ofmy wishes in that regards, and it is up to him whether to agree to dissolve both houses and issue the writs.[16]

THE FINAL ELEMENTS OF THE PERFECT STORM – SUPPLY AND THE BUDGET

In accordance with the Government's plan, both Houses met on Monday 2 May, the day before the newly proposed Budget day. Supply Bills to provide funding for the essential services of the Government and the Parliament for a period of approximately five months from 1 July 2016 were introduced and passed by the House on the same day without opposition. The next day the bills passed the Senate thus providing the necessary appropriation for the core services of government and the Parliament through the period of an election campaign, the finalisation of election results, the formation of a government, the meeting of a new Parliament and the passage of the main Appropriation Bills. This was a crucial element of the 'perfect storm'. Without the passage of the Supply Bills it would not have been possible to contemplate a 2 July election as agencies would not have had any appropriation from 1 July 2016. Following the conventions which were accepted by all sides of politics after the blocking of supply by the Senate in 1975, the Opposition said it would not seek to delay or block supply bills.

There was now only one more element to play out before what was becoming the inevitable election. The final element was the presentation by the Treasurer of the Government's Budget. Its importance had been flagged in the Governor-General's speech at the opening of the second session when he referred to the Budget to be delivered on 3 May reflecting an 'economic plan for jobs, growth, saving and investment'.[17] The presentation of the Budget enabled the Government to set out its agenda clearly for a forthcoming election campaign. The Treasurer delivered the Budget on Tuesday evening, 3 May. Interestingly the main Appropriation Bills provided for the remaining seven months of appropriation for 2016–17 not provided for in the

16 House of Representatives Debates, 19 April 2016, p. 3886

17 Senate Debates, 18 April 2016, p. 2738

Supply bills as well as any new measures announced in the Budget. The Leader of the Opposition delivered the usual reply to the Budget speech on Thursday evening, 5 May, in what was to prove the final speech in the House for the 44th Parliament. When the House rose on the evening of Thursday, 5 May, the expectation was that the House would not sit the following week as scheduled.

THE DOUBLE DISSOLUTION

The final act in the 'perfect storm' came with the well anticipated call by the Prime Minister on the Governor-General on Sunday 8 May. The Prime Minister advised the Governor-General that there were grounds for a section 57 double dissolution of the Senate and the House of Representatives in respect of the three industrial relations bills that have been referred to in this paper. He advised the Governor-General to dissolve both Houses at 9.00 am on Monday 9 May, prior to the scheduled sitting time of either House ensuring the Houses did not meet as expected that morning. The advice from the Prime Minister, which also included copies of the relevant bills certified by the Clerk of the House of Representatives, was supported by detailed advice from the Attorney-General about the passage of the three bills which demonstrated that the three bills met the requirement of section 57. The advice also referred to the availability of supply during and after the period of the election and that the Houses were to be dissolved before the restriction imposed in section 57 (ie before 11 May 2016).

The Governor-General accepted the advice and the Houses were dissolved at 9.00 am on Monday 9 May 2016 in a ceremony at the front of Parliament House. There had been nearly 30 years since the previous double dissolution (1987) and this was only the seventh double dissolution in the 115-year history of the Commonwealth.

THE PERFECT STORM IN SUMMARY

Thus the particular set of elements that preceded the double dissolution came together to create an unstoppable trajectory towards an election. It could be argued that all these elements were necessary to lead to the final outcome and without any one of them, there may not have been a double dissolution election. To summarise, these elements were:

- a change in Prime Ministership which provided the popular support for the Government to create the momentum and incentive for an earlier election;
- the passage of Senate electoral change which created a perception that a dissolution of the whole Senate could see the removal of a number of independent and minority party Senators making the Senate both more representative and more workable;
- the use of prorogation and recall of Parliament to alter the existing sitting patterns of the House and have the Senate reconvened to set up further triggers that would

create a sense of urgency as justification for a simultaneous dissolution election on the basis of a disruptive Senate;

- the passage of Supply bills to provide supply during the anticipated election period ahead of the passage of the main Appropriation bills; and
- an early presentation of the Budget to allow the Government to set its agenda for the election campaign.

It was the provisions of section 57 of the Constitution (that a simultaneous dissolution cannot occur within 6 months of the expiry of the House of Representatives by effluxion of time) and section 13 of the Constitution (that the terms of Senators after a dissolution are taken to be from 1 July preceding the date of the election) that set the timetable for the election with dissolution occurring before 11 May 2016 (on 9 May) and the election to take place after 1 July 2016 (on 2 July).

INITIAL REFLECTIONS ON THE 2016 DOUBLE DISSOLUTION

It is too early to be able to put the 2016 double dissolution election into perspective. However, it is perhaps possible to make some preliminary observations.

The quite unique circumstances that were the background to the calling of the 2016 election demonstrate that having legislative triggers for a double dissolution are a necessary, but not a sufficient, basis for a double dissolution election to be called. There have been legislative triggers in a number of the Parliaments since the last double dissolution election in 1987, but there have not been double dissolutions. This of course reflects well the provisions of section 57 that, when the necessary pre-conditions have been met, the Governor-General may dissolve both Houses. There is no requirement for an immediate, or indeed any, double dissolution. It also suggests it is the presence of other factors that will be crucial to whether a Government chooses to advise the Governor-General, when it has the necessary triggers, to proceed to dissolve both Houses. These factors, as in 2016, will be particular to the circumstances.

For these reasons, it might be expected that double dissolutions will remain the exception rather than the norm. To date, only 7 of the 45 Federal elections held since Federation have been double dissolution elections (fewer than one in six or about 15.5%). After the spate of double dissolution elections from the mid 1970s to the late 1980s (four of the seven elections), it has been nearly 30 years since the last double dissolution election (1987). This might suggest a return to the norm rather than the first of a new spate of double dissolution elections.

As was noted earlier in looking at the background to section 57, it was a constitutional provision that was designed to balance what otherwise is the near equal legislative power of the two Houses (conveyed in section 53). A former Solicitor-General, in providing advice to then Prime Minister Menzies on the 1951 double dissolution, noted in relation to section 57 that it:

> …is designed to prevent deadlocks in the legislative process, by permitting the Governor-General to give the electorate an opportunity to make a fresh choice for every seat in both Houses, when resistance by the Senate to a measure approved by the House of Representatives has been evinced in a certain manner and has proceeded to a certain point.[18]

This advice points to two key features of section 57. It is within the hands of the majority exercising power in the House of Representatives (the Government) to advise the Governor-General to dissolve both Houses when the necessary conditions have been met in respect of legislative disagreements. This is a very powerful mechanism that can be used in an attempt to resolve disagreements, and perhaps more generally to obtain a more cooperative Senate. However, once an election proceeds, then, as Quick and Garran have noted:

> …the people as the final arbiters will be the gainers of power by the liability of both Houses to dissolution.[19]

In other words, ultimately it is the democratic process that determines the fate of the various protagonists in any dispute between the Houses.

This points to the great dangers for Governments of double dissolution elections. As Professor Richardson has noted:

> From the point of view of the Government with its majority in the House of Representatives, the idea of a double dissolution may constitute a greater deterrent than for Opposition parties since a dissolution may afford the Opposition an opportunity to win government…[20]

So one danger is that the Government may not win, and governments have lost office in three of the seven double dissolution elections held so far. In the 2016 election, the Government did not lose office, but it managed to retain office with only a very slim majority.

A further danger, given that the reason for the election in the first place is disagreement with the Senate, is that the Government may well not secure either a majority in the Senate or a Senate that is any more conducive to compromise. In only one of the seven double dissolution elections to date has the Government secured a majority in the Senate at the election (1951). Even with the change to the Senate voting system introduced in 2016, governments in modern times are very unlikely to secure a Senate majority after a double dissolution election. The specific make up of the Senate after an election will determine whether a government has a more comfortable time in a new Parliament. In 2016, the presence of the new system of Senate voting seems to have been counterbalanced by the much lower quota required for election in a

18 Documents relating to the simultaneous dissolution of the Senate and the House of Representatives by His Excellency the Governor-General on 19 March 1951, Parliamentary Paper No 6, 1957-58.

19 Quick and Garran, op. cit., p. 688.

20 Richardson, op. cit., p. 16.

double dissolution election and the drift in voting away from the major political parties. Commentators generally are agreed that the Government faces a Senate that may be as difficult as the previous Senate.

As a double dissolution election arises because of a disagreement between the Houses on the passage of legislation, then a very relevant matter is the fate of the legislation that has been the subject of the disagreement. On the three occasions that the Government was not returned to office after the double dissolution election (1914, 1975 and 1983) the legislation which was the subject of the disagreement of course did not proceed. In 1951, when the Menzies Government was re-elected with a majority in the Senate, it was able to pass in the new Parliament the bill that had been the subject of disagreement. In 1987 the Hawke Government, which was re-elected at the double dissolution election, eventually decided not to proceed with the bill which was the subject of the disagreement. In the only other instance in which the Government was re-elected after the double dissolution (apart from 2016), the then Whitlam Government in 1974 proceeded with the only Joint Sitting held since Federation under section 57 of the Constitution, with the Senate having again rejected in the new Parliament the bills that were the subject of the disagreement. At the Joint Sitting all the six bills that were the subject of disagreement were passed, although subsequently one of the bills was judged by the High Court not to be valid as the High Court considered the necessary three month interval for the second passage through the House of Representatives had not been met and also that the Senate had not 'failed to pass' the bill.

The fate of the three bills, which were the subject of the disagreement between the Houses in 2016, is awaited. As of October 2016, the bills had passed the House of Representatives and had been transmitted to the Senate for consideration.

Parliaments' Reputation as the 'Pre-Eminent' Institution for Defending Rights: Do Parliamentary Committees Always Enhance this Reputation?

Laura Grenfell[1]

Dr Laura Grenfell is an Associate Professor in the Law School, University of Adelaide

INTRODUCTION

In 1610, James Whitelocke, a politician and future Justice of the Court of King's Bench, asserted that 'the Parliament is the storehouse of our liberties' and he argued on this ground that the Westminster parliament was superior to that of other nations. His son Bulstrode Whitelock later described parliaments as 'the defenders of [the people's] liberties'.[2] In line with the theme of this conference, the restoration and enhancement of parliament's reputation, this paper examines the performance of parliament as a rights defender and as 'a storehouse of our liberties'. Reputation is clearly contingent on performance and for parliament, what is at stake in terms of its reputation as a rights defender is its ability to maintain primary responsibility for defending rights. Unless parliament adequately performs its role of defending rights in a manner which is explicit, accessible and transparent to the public, bill of rights advocates in many Australian jurisdictions may generate stronger public support for their call for the courts to formally share responsibility for defending rights.

In considering parliament's performance in protecting rights, my paper focuses on parliamentary committees. The aims of these committees broadly have been set out as acting as 'parliamentary watchdogs', 'safeguards', a forum for 'unprejudiced' nonpartisan discussion and also 'a means for enhancing the standing of members of Parliament .. for their informed contribution'.[3] In this paper I do not consider how parliamentary committees enhance the reputation of individual members but how, and whether, parliamentary committees, particularly rights-scrutiny committees for bills, enhance the reputation of parliament as a whole. Through focussing on rights-scrutiny committees at the state level, in particular those of New South Wales, Victoria and Queensland, this paper argues that state parliaments can do more to enhance parliamentary reputation for rights protection[4] through increased public engagement which parliament itself must encourage and facilitate.

1 * Associate Professor in Law, University of Adelaide.

2 Quoted in Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999), 106.

3 See CS Reid and M Forrest, *Australia's Commonwealth Parliament: 1901–1988 Ten Perspectives* (1988) p373 quoting the Parliamentary Standing Committee on Broadcasting, *First Report PP* 93/1940–43, 576–7.

4 This paper takes an inclusive approach to the definition of 'rights' so as to cover common law rights, constitutional rights and international human rights.

'PERCEPTIONS OF PARLIAMENT'

In the absence of empirical research which could help shed some light on how the community perceives the reputation of parliament, I draw on John Warhust's view:

> Perceptions of parliament are mixed and often contradictory. They are often based on *ignorance* and are just as likely to be *subjective* as *objective*. They can be mere opinions, sometimes with a political purpose. In other words, they can be true or false; they can be media constructs for the purpose of selling newspapers; .. Nevertheless, they must be recognised and assessed.[5]

Warhust continues that 'perceptions can be manufactured to make a political point' and as an example he offers an analysis of parliament's reputation in relation to rights protection:

> When a [federal] Bill of Rights was mooted [in 2009/2010] .. it was suggested … that *parliament was the pre-eminent defender of rights and freedoms above any other institution*. … parliament retains an image as defender of the rights of the community. .. [This perception] relies on the belief that parliament is free of executive control.[6]

In 2010 both major parties rejected the 2009 recommendation made by the Brennan Committee to enact a federal Human Rights Act and in part this was on the premise that parliament adequately protects human rights. At the same time they agreed that parliamentary mechanisms could be strengthened through the establishment of the Parliamentary Joint Committee on Human Rights (PJCHR). At the federal level, both major parties have been involved in manufacturing the perception of parliament as the 'pre-eminent' rights defender for the community. And it is clearly in their interest to do so.

Drawing on Warhust's analysis of public perception, we need to consider various possibilities to explain how parliament has succeeded in building a reputation for being a rights defender:

- Ignorance – There is some evidence that many Australians are ill informed about rights protection in Australia: a 2006 survey indicated that over 60% of Australians believed we already had a federal bill of rights.[7]
- Subjective – Arguably many politicians would like to be seen as the pre-eminent rights defenders and possibly this motivates some to stand for election. For example, in 2011 the current Attorney-General Senator George Brandis, then in opposition, claimed: 'For us in the Liberal Party, the protection of human rights is

5 John Warhust, "Fifteen (Contradictory) Perceptions of Parliament: five good, five bad and five ugly' (2011) 26/1 *Australasian Parliamentary Review* 83, 83; emphasis added.

6 As above, 83–4; emphasis added.

7 Roy Morgan Research, *Anti-Terrorism Legislation Community Survey (paper prepared for Amnesty International Australia, Queensland,* 10 August 2006) 5. It is not clear whether the result would be the same if the survey were conducted in 2016 given the extensive national human rights consultation undertaken by the Brennan Committee.

core business. It is why we were formed. It is why we come to parliament every day. It is who we are. .. We are the human rights party.'[8]

- Objective – A factual basis for believing that the pluralistic membership of parliaments means they are best placed to systematically defend rights and that they are well informed on rights implications and regularly exercise their powers to defend rights.

Once again, Brandis is a well-known political proponent of this last view. In 2009 he asserted that 'Parliaments are the proper institutions under our system to decide what rights should be further developed or qualified by competing interests. Parliaments are the proper institutions to decide when free speech becomes pornography, the circumstances when security agencies should be able to limit an individual's liberty, or the circumstances when public assemblies jeopardise public order.'[9] Like other politicians such as Bob Carr,[10] Brandis is concerned that political decision making should not be transferred from the Parliament to the judiciary. While he describes Parliament as an 'open forum', 'elected and accountable', he does not elaborate on how this institution makes decisions that have serious rights implications or whether these decisions should always be openly justified.[11] However, it is likely that he shares the view of former Prime Minister Menzies that the doctrine of responsible government is 'the ultimate guarantee of justice and individual rights'[12] which obviates the need for any formal bill of rights.

John Uhr observes: 'Traditionally, leading politicians in systems of responsible government held that parliaments were the most reliable protectors of rights, but over recent decades this presumption has been challenged by judicial and other-extra-parliamentary authorities'.[13] In 1955 future Prime Minister Whitlam asserted that 'Parliament alone can give equality of opportunity and thereby increase liberty for all. .. The forum which Parliament provides is the best guardian of our liberties.'[14] Like Menzies, Whitlam articulated an orthodox view at the time before this view became contested in the common law world. In unpacking these views, Uhr helpfully dissects what is meant by parliament and he persuades that it is difficult to pin down what is meant by this term because parliament cannot be understood in a monolithic sense. In

8 Commonwealth, *Parliamentary Debates*, Senate, 25 November, 2011, 9661–9662, (George Brandis).

9 George Brandis, 'The Debate We Didn't Need Have to Have: The Proposal for an Australian Bill of Rights" in Julian Leeser and Ryan Hadrick (eds), *Don't Leave us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre Limited, 2009) 27.

10 Bob Carr, 'The Rights Trap' (2001) 17/2 *Policy* 4

11 As above, p19. See also, Brandis, *Submission by the Federal Opposition to the National Human Rights Consultation* (15 June 2009) (on file with author). In this 2009 submission, Brandis refers to the existing rights scrutiny committees.

12 Robert Menzies, *Central Power in the Australian Commonwealth* (1967) p54.

13 John Uhr, 'The Performance of Australian legislatures in protecting rights', in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (ed.), *Protecting Rights Without a Bill of Rights*, (Ashgate Publishing Ltd, Hampshire, England 2006) 41, 42.

14 EG Whitlam, in The Australian Institute of Political Science, *Liberty in Australia* (1955) pp177–78.

Uhr's view, the dispersed and diverse nature of parliament prevents power from being consolidated which protects against arbitrary government and this in turn, protects civil liberty. Uhr argues that 'Parliament has a key role in maintaining civil liberty' and furthermore he asserts that, 'the parliamentary contribution to a regime of civil liberty *is or should be* quite fundamental'.[15] I share his view that the parliamentary contribution to a regime of civil liberty should be fundamental and hence this paper considers how this contribution can be enhanced.

'PARLIAMENTARY RIGHTS-PROTECTORS'

At the federal level Uhr identifies two 'parliamentary rights-protectors'.[16] The first is the Senate which he believes has had some success in securing accountable government. It does this through demanding that the Lower House openly demonstrate that executive decisions and government bills are informed and justified, as opposed to being arbitrary.

The second related group of 'parliamentary rights-protectors' are the senate rights-scrutiny committees, namely the Senate Standing Committee on Regulations and Ordinances (SSCRO) founded in 1932 and the Senate Standing Committee for the Scrutiny of Bills (SSCSB) set up in 1982 with almost the same remit as the SSCRO. These mechanisms perform pre-enactment legislative scrutiny. Uhr refers to these two committees with the label 'rights watchdogs'[17] even though the remit of the SSCRO was written before the 'age of human rights', the post-World War II era, which means that neither committee has a remit that specifically refers to human rights. These remits are interpreted to cover traditional common law rights and at various times this interpretation has been expanded to cover human rights.[18] My paper looks at this second group of 'parliamentary rights-protectors' but it examines those operating in state parliaments, which receive little academic attention, in a bid to understand their connection to the reputation of parliament as a rights defender. Some of these committees are closely modelled on and influenced by the SSCSB and its remit even though none of them are upper house committees like the SSCSB. In four state/territory parliaments (Australian Capital Territory, New South Wales, Queensland and Victoria) these scrutiny committees are empowered to systematically scrutinise all bills for their rights implications but it is important to note that these mechanisms are non-existent in four Australian states/territories (South Australia, Western Australia, Tasmania and Northern Territory).

15 Uhr, 'The Performance of Australian legislatures' 47; emphasis added.

16 As above, 54.

17 As above, 48.

18 To get a sense of the unevenness and political tensions in the interpretation of this remit, see Carolyn Evans and Simon Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' (2006) *Public Law* 785, 794.

These scrutiny committees are considered to sit at the heart of our 'democratic culture of justification'.[19] Where parliament introduces laws that limit long-held and fundamental rights and freedoms, scrutiny committees are aimed at placing pressure on parliament to be transparent in its justification for such limitations and to publicly debate these justifications. Scrutiny committees contribute to parliamentary protection by scrutinising bills for their rights implications and by attempting to moderate any rights limitations through making recommendations for amendments or simply 'alerting' parliament to an issue. Critically this scrutiny process is effective when it is systematic and thus it should ideally include highly contentious bills that are likely to impact most heavily on rights and freedoms.

Uhr's work helps us to consider the multifaceted nature of parliamentary reputation and the interplay between internal and external reputation. In his scrutiny of the SSCRO, he argues that the Committee's systematic work has improved the work and reputation of the Senate, in particular in its relationship with parts of government. He explains that the SSCRO's rigorous standards have been supported by central agencies of government, such as the Attorney General's Department, which in turn have come to broadcast and defend the standards across government.[20] Thus within government the SSCRO has developed a reputation for defending rights standards, albeit ones based on common law rights, and in doing so it has enhanced the rights-defending reputation of the Senate and Parliament as a whole. In this manner the two 'parliamentary rights protectors' identified by Uhr are closely intertwined. But in itself the SSCRO enjoys a very low public profile even though it is considered the 'foundation stone' or 'pioneer'[21] of the senate committee system which, in turn, has influenced the establishment of parliamentary committee systems across Australian parliaments.

Few Australians working outside government and parliamentary circles are likely to be aware of the existence of these committees. The media shows minimal interest in these committees; even in the most recently established PJCHR.[22] Scrutiny committees rarely engage directly with the public. For some committees such as the SSCRO this lack of public engagement makes sense as it performs the highly technical task of examining regulations and ordinances. But for committees scrutinising bills for their rights implications, which are the focus in my paper, I argue that they need to reconsider the level to which they engage with the public if parliaments are to enhance their reputation as rights defenders.

19 Australian Law Reform Commission (2016), *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws,* Final Report No 129,

20 Uhr, 'The Performance of Australian legislatures', 54

21 John Uhr in Rosemary Laing and John Uhr, 'The Senate Committee System: Historical Perspectives' in Paula Waring (ed), *Senate Committees and Government Accountability Conference 2010* (Commonwealth Department of the Senate, Canberra 2010), 15.

22 George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights', (2016) 41(2) *Monash University Law Review* 469, 496–498.

PARLIAMENTARY COMMITTEES AND RIGHTS-SCRUTINY AS A MEANS OF RESTORING AND ENHANCING PARLIAMENTARY REPUTATION

While parliamentary committees, particularly scrutiny committees, enjoy a low public profile, they are often called on in times of crises when government integrity or competence comes under fire. Parliamentary committee systems are often regarded as a means of restoring the reputation of parliament because they are understood as integral to parliament's ability to keep the Executive accountable. In these situations parliaments have used the establishment or strengthening of parliamentary committees as a means of assuring the public that Parliament is in control and not a mere rubber stamp. The state of Queensland where government corruption became endemic in the 1980s offers a strong example. One of the findings of the 1987–1989 Fitzgerald Inquiry[23] was that the ad hoc parliamentary committees in Queensland's unicameral parliament had not been operating to provide an effective and independent check on the Executive (in part because they were non-statutory bodies with no resources). It recommended that a rigorous system of parliamentary committees be established though legislation, including a committee with a rights-scrutiny mandate, the Scrutiny of Legislation Committee (SLC), to oversee the pre-legislative process involving a new set of legislative standards, the Fundamental Legislative Principles (FLP), introduced in 1993. These FLPs are similar to the rights remit of the SSCSB in that they invoke common law rights and do not specifically refer to 'human rights' but at the same time they are more expansive than the SSCSB remit.

This focus on parliamentary committees as a means of restoring the reputation of parliament was also seen in South Australia after the State Bank collapse as well as Western Australia as part of the recommendations made by the WA Inc Inquiry report. However, in these two parliaments no move was made to establish a rights-scrutiny committee and to this day neither parliament has a committee that systematically scrutinises all bills for their rights implications.

DEFENDING THE RIGHTS REPUTATION OF STATE PARLIAMENTS

When the rights-reputation of parliament has come under question, some state parliaments have used rights-scrutiny committees as a means of rejecting calls for a bill of rights. This can be seen in both Queensland and NSW.

In Queensland, a 1998 Inquiry was held into a recommendation made in 1993 that the state adopt an enforceable bill of rights. The 1998 Inquiry concluded that such a path was not necessary in part because Parliament had strengthened its committee system and set up a pre-legislative process involving the FLPs. The Inquiry Report found:

23 GE Fitzgerald, *Report — Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Parliament of Queensland, 1989).

> A new pre-legislative process which ensures, among other matters, that Queensland legislation has sufficient regard to individuals' rights and liberties is now an integral part of Queensland's legislative process. Additionally, Parliament's ability to scrutinise aspects of government policy and decision-making has been bolstered with a more developed and comprehensive parliamentary committee system.[24]

The logic here is that the operation of the parliamentary scrutiny committee (here the SLC), in conjunction with the pre-legislative process, alleviates the need for any other institution to share the responsibility for defending the rights of the community. The Inquiry Report did not delve into whether there was any evidence that this scrutiny role was tangibly assisting parliament to be better informed of rights implications or whether the existence of the SLC meant that Parliament was better equipped than before to defend the rights of the community.

Queensland's pre-legislative rights-scrutiny process was again raised by non-government members this year in rejecting a call for a human rights act for Queensland as part of the 2016 Inquiry conducted by the Queensland Legal Affairs and Community Safety Committee (LACSC). In the 2016 Inquiry Report, non-government members of the LACSC described this mechanism as functioning 'well' and rated it as 'effective'[25] without offering any evidence in support. In contrast, proponents of a bill of rights described the FLP rights remit as 'relatively nebulous' and offering a 'thin' form of scrutiny in comparison to Victoria's *Charter of Rights and Responsibilities* and the ACT's *Human Right Act*.[26] In particular they argued that the FLPs are not widely understood in the community as a mechanism which assists Parliament in defending human rights because the FLPs do not specifically refer to 'human rights'.[27]

In NSW a 2001 Inquiry into whether the state should adopt a bill of rights led to the establishment of a rights-scrutiny committee, the Legislation Review Committee (LRC). The 2001 Inquiry of the Standing Committee on Law and Justice acknowledged that the NSW Parliament's reputation in defending rights was lacklustre within the community as well as with the executive:

> Parliament has a responsibility to protect human rights. This responsibility is not always exercised effectively. The NSW Parliament has at times been responsible for neglecting to address ongoing needs of disadvantaged groups and for passing legislation which breaches human rights standards. Legislation is prepared within bureaucracies without any measurement against human rights standards and then passes through parliament again without any, or at most ad hoc, discussion of such standards.

24 Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *The Preservation and Enhancement of Individuals' Rights and Freedoms in Queensland: Should Queensland Adopt a Bill of Rights? (Report No 12)* (1998) 79.

25 Parliament of Queensland, LACSC, *Inquiry into a Possible Human Rights Act for Queensland,* Report No 30, 55th Parliament (June 2016) pxix.

26 As above, p8.

27 As above, xix.

Clearly the view of the Committee was that a systematic process of rights scrutiny of all bills was the best means of enhancing parliament's reputation and also the best means of raising Parliament's awareness of its responsibility to observe and defend human rights.[28] Despite the Committee's understanding that parliamentary protection of human rights needed some enhancement in New South Wales, it recommended that the LRC be given the same common law rights remit as the federal SSCSB and thus failed to include any specific mention of 'human rights' into the new parliamentary process. Presumably the Inquiry believed that this traditional common law mandate, described by one human rights expert as 'meaningless',[29] would nevertheless spell human rights to parliamentarians, government agencies and the public.

'AN ENTRENCHED CULTURE OF IGNORING'

Given that politicians such as Bob Carr and George Brandis are generally quick to assert that parliament is the best institution to defend rights, and they are willing to set up rights-scrutiny committees to enhance or restore the rights-reputation of parliament, the question is why parliaments routinely underperform as rights-defending institutions.

The very mixed reputation of the NSW LRC as a rights defender is a good example. This reputation derives in part from the fact that both major parties, when in government, have strategically decided to fast-track certain controversial bills which have extensive rights implications. This timing has forced the LRC to perform its scrutiny *after* the bill has been enacted, undermining its moderate reputation with stakeholders and illuminating the paucity of its influence in parliament. In 2006 four bills with significant rights implications were passed without allowing time for committee scrutiny including the *Crimes (Serious Sex Offenders) Act 2006*[30] while in 2009 the Parliament fast-tracked its anti-bikie bill, the *Crimes (Criminal Organisations Control) Act 2009*.[31] Pointing to the fast-tracking of these two particular laws, the NSW Bar Association has criticised the rights-scrutiny process as being 'ineffective in influencing the amendment of legislation in a number of cases where the bill has been particularly politically contentious'.[32] While a number of controversial bills are fast-tracked, others are enacted without any acknowledgment of the concerns raised by the LRC or justification articulated on the floor of parliament for the limitation of common law rights. An example is the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009* which

28 NSW Parliament, Standing Committee on Law and Justice, *A NSW Bill of Rights*, Report 17, (October 2001) p126.

29 As above, pp127–8.

30 NSW LRC Annual Report 2005–2006, p3. Note that after this report, the LRC discontinued its practice of setting out how many bills had been fast-tracked in each parliamentary year.

31 Another example is the *Housing Amendment (Registrable Persons) Act 2009* dealing with the housing of a convicted child rapist.

32 NSW Bar Association, *Submission to the National Human Rights Consultation* (2009) p49.

extended search and entry powers initially introduced in counter-terrorism laws.[33] The former Chair of the LRC, Allan Shearan MP, commented in 2009: '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.'[34] This is supported by a study conducted by Luke McNamara and Julia Quilter which analysed the work of the LRC in regard to criminal law bills introduced from 2010 to 2012. Given the vast gulf between the LRC's reports and the paucity of parliamentary debate, they conclude that the NSW Parliament has 'an entrenched culture of ignoring and deflecting the Committee's advice'.[35] Furthermore:

> The existence and work of the Committee creates the *appearance* of genuine pre-enactment scrutiny (.. generally the Committee does engage in high-quality and apolitical analysis of bills of the sort that a law-making process with integrity requires) but the appearance of scrutiny is rendered a façade by routine parliamentary disregard for the Committee's findings and recommendations.[36]

Thus we see that the NSW Parliament routinely undermines its own reputation by failing to uphold and respect a 'culture of justification'.

In regard to the LRC's reputation with the executive government, the LRC has repeatedly acknowledged that its own effectiveness 'largely rests on the extent to which it encourages the thorough consideration of the issues under its terms of reference *in the preparation of Bills*'.[37] Unfortunately Shearan's commentary on the role of the LRC and its Digest does not shed light on whether bills continue to be 'prepared within bureaucracies without any measurement against human rights standards' or whether the executive government assists the LRC in broadcasting and defending/implementing its standards.[38] However, there is a danger that the parliamentary 'culture of ignoring' the LRC and its 'routine parliamentary disregard' for the LRC's advice may spread to executive government.

33 Andrew Byrnes, 'The Protection of Human Rights in NSW through the Parliamentary Process — A Review of the Recent Performance of the NSW Parliament's Legislation Review Committee' (2009) *University of NSW Faculty of Law Research Series* 1, 12.

34 Allan Shearan, "The Role of the Legislation Review Digest in NSW", Paper Presented at the Australia-New Zealand Scrutiny of Legislation Conference: Scrutiny and Accountability in the 21st Century, 6–8 July 2009, Canberra, Australia, p1.

35 Luke McNamara and Julia Quilter, 'Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law bills in New South Wales' (2015) 27 *Current Issues in Criminal Justice* 21, 33, 35.

36 As above, p35.

37 See for eg, NSW Parliament, Legislation Review Committee, *Annual Review July 2005- June 2006*, Report No 5 (29 August 2006) p17.

38 Shearan, "The Role of the Legislation Review Digest in NSW" p2.

PUBLIC INVOLVEMENT IN THE SCRUTINY PROCESS

For a comparison, we now turn to Victoria's Parliament which in 2006 enacted the *Charter of Rights and Responsibilities* thus expanding the remit of its bill scrutiny committee, Scrutiny of Acts and Regulations (SARC), to include human rights. The Charter also instituted a compliance system within all parts of government so that both parliament and the executive observe the same human rights standards although the Victorian Parliament is not restricted by these standards. While Ministers introducing bills are required to furnish justifications of rights limitations via a statement of compatibility, these bills can be incompatible with Charter rights. In introducing a 'parliamentary based model' of rights protection, the Victorian Parliament intended the Charter to 'strengthen [the state's] democratic institutions'[39] and thus enhance the performance and reputation of the Victorian parliament as a rights-protecting institution. SARC has had some success in developing an active dialogue with the executive government by regularly corresponding with responsible ministers in seeking further information.[40] It has also issued a consolidated Practice Note aimed at advising 'government legal and legislation officers' in the hope that, together with SARC reports, these documents will be used in the preparation of bills and Statements of Compatibility.[41]

Unfortunately, while SARC reports are high quality and generally offer apolitical analysis of bills, similar to the NSW Parliament there is a wide gulf between these reports and the level of rights debate in parliament. Recent research conducted into parliamentary debates on anti-bikie bills revealed scant reference to SARC reports or consideration of rights implications in debate, except by the Greens.[42] A former Chair of SARC, Carlo Carli, has observed that: 'Rarely do Ministers consider charter issues or SARC comments in the parliamentary debate'.[43] An examination of Hansard alone does not indicate that the Charter has enhanced the 'democratic culture of justification' within the Victorian Parliament.

A 2015 review of the Charter argues that '[m]eaningful human rights scrutiny by SARC relies on the Committee members, but also on the broader culture of the Parliament, *public involvement in the scrutiny process (so it is relevant for members of Parliament)* and the engagement and responses of the Executive government."[44] This connects to the point made by one of Australia's foremost proponents of parliamentary protection

39 Victoria, *Parliamentary Debates*, Legislative Assembly (4 May 2006), 1292 (Rob Hulls); Victoria, *Parliamentary Debates*, Legislative Assembly (4 May 2006), 1290 (Rob Hulls).

40 Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2015), 177.

41 See http://www.parliament.vic.gov.au/sarc/publications#practice_notes

42 Laura Grenfell, 'Rights Scrutiny Cultures and Anti-Bikie Bills in Australian State Parliaments: "A Bill of Rights For the Hell's Angels'' (2016) 44 *Federal Law Review* 337–372.

43 Carlo Carli MP, "Scrutiny and the Charter of Rights and responsibilities' (Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference; Scrutiny and Accountability in the 21st Century, Parliament House, Canberra 6–8 July 2009.

44 Michael Brett Young, *From Commitment to Culture,* 178, emphasis added.

of rights, Tom Campbell, to the effect that parliamentary committees should engage with external bodies. Campbell has outlined a model of a 'democratic bill of rights' which involves 'the Parliament and its committees *working in cooperation with* quasi-autonomous government bodies, human rights organisations within civil society and the operations of political parties'.[45] In his view, a human rights committee should ideally be able to 'call witnesses, receive submissions and obtain expert advice' as well as 'receive petitions and hold hearings, and have powers to require the cooperation of government departments and ministers'.[46]

An external dynamic of engaging stakeholders and the community is far from being realised in Victoria. Unlike the NSW LRC,[47] Victoria's SARC has the power to receive public submissions on bills and to hold public hearings[48] but in practice it generally shows reluctance to do either. The 2015 Charter Review noted that there was a perception among stakeholders that making a submission to SARC had 'little purpose' because SARC did not actively consider community submissions on Bills in its reports to Parliament.[49] SARC does not appear willing to engage in discussion with stakeholders about potential human rights impact of bills or less rights-restrictive alternatives.[50] This reluctance to allow and facilitate public participation in the scrutiny process has meant that stakeholders such as the Law Institute of Victoria often choose to communicate directly with the Attorney General, a channel of communication which is not public unlike submissions to SARC. Stakeholders are increasingly perceiving that they need to engage with the pre-legislative process, before a bill is introduced into parliament. This perception is supported by an observation made by Carlo Carli, a former SARC Chair, that 'SARC has had little influence over the content of legislation once the bills have been presented to Parliament. … [t]here is reluctance by the executive to amend bills once introduced.'[51] This impacts on Parliament's reputation, as the status of pre-eminent rights defender is transferred to the Executive. This is problematic as it means that the open, pluralistic and accountable forum offered by

45 Campbell, Tom (2013) 'The Rule of Law and Human Rights Judicial Review: Controversies and Alternatives' in Imer B Flores and Kenneth E Himma (eds), *Law, Liberty, and the Rule of Law* (Springer Netherlands,) 135, 148; emphasis added.

46 Tom Campbell, 'Human Rights Strategies: An Australian Alternative' in Campbell et al (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) Ch 14, pp334–5.

47 This dynamic is absent in the SSCSB model used by the NSW Parliament to shape the LRC because neither the SSCRO nor the SSCSB were, at the time of their founding, envisaged as being committees that would engage with the community, although over time the SSCSB has successful sought the power to hold public hearings. This means that when it comes to bills introduced into parliament, NSW stakeholders such as the Law Society and Bar Association choose to communicate directly with the Attorney General rather than the LRC. While up until 2010 the LRC engaged with the public by issuing discussion papers for public consultation, it is hamstrung by its lack of formal power to receive public submissions on specific bills or to hold public hearings.

48 *Parliamentary Committees Act 2003* (Vic) ss 279(1) and 28(8).

49 Michael Brett Young, *From Commitment to Culture*, 182.

50 As above, 182.

51 Carlo Carli MP, "Scrutiny and the Charter of Rights and responsibilities' (Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference; Scrutiny and Accountability in the 21st Century, Parliament House, Canberra 6–8 July 2009.

Parliament is bypassed and rights-debate takes place predominantly behind closed doors. While parliament certainly provides an open forum to debate rights implications, among the major parties there appears to be little political will to have this debate on the floor of Victoria's parliament. Strong party discipline and strong executive government mean such open debate is being muted.

The portfolio committees operating in Queensland's unicameral parliament have been more active than SARC and the NSW LRC in engaging the community in the rights-scrutiny process for bills. Like the LRC, these portfolio committees suffer from being bypassed when parliament decides that a controversial bill, such as an anti-bikie bill,[52] must be fast-tracked. However, the Queensland portfolio committees, such as the Queensland Legal Affairs and Community Safety Committee, show a willingness to hold public hearings and to receive public submissions whenever possible.[53] Thus, unlike interstate counterparts, the default practice of these Queensland portfolio committees appears to be one of public engagement, possibly in a bid to compensate for its Parliament being unicameral. Arguably, over time, stakeholders may become accustomed to work with the short timeframes placed on scrutiny committees and be willing to engage with bill scrutiny nevertheless.

CONCLUSION

In the absence of bills of rights, Parliaments need to strengthen their reputations as pre-eminent 'rights defenders'. In the parliaments of South Australia, Western Australia, the Northern Territory and Tasmania, serious consideration needs to be given to establishing mechanisms for the systematic scrutiny of all bills for their rights implications. In the parliaments of NSW and Queensland, there needs to be strong awareness that this reputation is contingent on allowing rights scrutiny committees to properly perform their scrutiny role. Bypassing these scrutiny committees whenever there is a controversial bill with rights implications clearly tarnishes the reputation of parliament as a rights defender. The 'culture of justification' to which rights-scrutiny committees aim to contribute cannot be selectively upheld and respected. The Parliaments of Victoria as well as NSW need to encourage and/or empower their scrutiny committees to engage directly with the community on bills. If state and territory parliaments want to retain and strengthen their reputations as rights defenders, they need to ensure that the parliamentary process of rights scrutiny is systematic, open and engaged with the community.

52 See eg Vicious Lawless Association Disestablishment Bill 2013 (Qld); Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013 (Qld); Tattoo Parlours Bill 2013 (Qld).

53 See, for eg, Parliament of Queensland, LACSC, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013,* Report No 46, (November 2013). See Parliament of Queensland, Standing Orders 133 and 134.

Committees of Influence: Parliamentary Committees with the Capacity to Change Australia's Counter-terrorism Laws

Sarah Moulds

Sarah Moulds is a PhD candidate at the University of Adelaide's Law School and a Senior Project Officer at the South Australian Law Reform Institute

INTRODUCTION

Parliament's reputation rests on its capacity to engage effectively with the community it represents and its ability to perform its core functions. These functions include the enactment of laws, the protection of individual rights, and holding the Executive Government to account for its actions. Parliamentary committees provide a unique opportunity for the Parliament to perform these functions, and to connect with the people and to listen to their views on both the process of lawmaking and the actions of the Executive. In this way, parliamentary committees present a vital opportunity for the Parliament to restore and enhance its reputation within the broader community, and may, as Dr Laura Grenfell explores, contribute to Parliament's reputation as the 'pre-eminent' institution for defending rights.[1]

The opportunity provided by committees to enhance and restore Parliament's reputation is particularly pronounced when the Parliament is considering proposed laws that have a deep impact on individual rights and freedoms and on the shared values of the Australian community. Counter-terrorism is one such area. Well over 50 separate counter-terrorism Acts have been passed since the fall of the Twin Trade Towers in September 2001,[2] with significant consequences for individual rights and

1 See for example, Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: 'Continuing to Lead by Example?' (2015) 26(1) Public Law Review 19–38.

2 For an overview of Australia's counter-terrorism laws see: George Williams, Nicola McGarrity and Andrew Lynch, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth Publishing, 2015); see also George Williams, 'A decade of Australian anti-terror laws' (2011) 35(3) *Melbourne University Law Review* 1136; George Williams, 'The legal assault on Australian democracy : the annual Blackburn lecture' (2015)(236) *Ethos* 18.

civil liberties;[3] the criminal justice system;[4] approaches to intelligence collection and policing;[5] and Australia's multicultural community.[6]

This paper focuses on how the Commonwealth parliamentary committee system has engaged with these laws and considers this system's role in Australia's parliamentary model of rights protection.[7] This parliamentary model of rights protection, which exists without a constitutional or statutory Bill of Rights at the Commonwealth level, has attracted much commentary and debate,[8] including recently in Queensland.[9] Chief components of this parliamentary model of rights protection include the establishment of a specific Parliamentary Joint Committee of Human Rights (PJCHR), which was established at the Commonwealth level in 2011.[10] However, instead of focusing

3 For an example of commentary on the impact of Australia's counter-terrorism laws on rights and liberties see: Michael Brett Young, 'Civil rights v national security' (2009) 83(10) *Law Institute Journal* 6; Williams, above n 2; Spencer Zifcak, 'Anti-terrorism legislation and the protection of human rights' (2006) 18(1) *Legaldate* 1; Jenny Hocking, *Terror laws : ASIO, counter- terrorism and the threat to democracy* (University of New South Wales Press 2004); Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, 'Human rights implications of the Anti-Terrorism Bill 2005', 18 October 2005 (report prepared at the request of Jon Stanhope, MLA, Chief Minister of the ACT).; P. Mathew, 'The Anti-Terrorism Bill 2005: Are We Crossing The Line?', HREOC Forum on National Security Laws and Human Rights, ACT Legislative Assembly, 31 October 2005.

4 For an example of commentary on the impact of Australia's counter-terrorism laws on the criminal justice system see Law Council of Australia, 'Anti-Terrorism Reform Project' (Paper October 2013) <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Dec2012Update-Anti-TerrorismReformProject.pdf>; Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001–2005 ' (2007) 10(1) *The Flinders Journal of Law Reform* 3; Department of the Parliamentary Library, 'Terrorism and the Law in Australia: Legislation, Commentary and Constraints' (Research Paper No 12, Department of the Parliamentary Library Information and Research Services, Commonwealth, 2001–2002).

5 For an overview of some of the challenges of policing in the context of Australia's counter-terrorism laws see Council of Australian Governments Counter-Terrorism Review Committee *Review of Counter-Terrorism Legislation* (2013) 14 May 2013. See also Sharon Pickering et al, *Counter-Terrorism Policing and Culturally Diverse Communities*, Victorian Police No (2007).

6 For example see Petro Georgiou, 'Multiculturalism and the war on terror' (Paper presented at the Castan Centre of Human Rights Law Annual Conference, Monash University, Melbourne, 18 October 2005). See also S J Mullins, 'Australian Jihad: Radicalisation and Counter-Terrorism' (2011) 140 *Analisis of the Real Instituto Elcano* 1.

7 For an evaluation of the work of the Parliamentary Joint Committee on Human Rights see: Lisa Burton and George Williams, 'Australia's exclusive parliamentary model of rights protection' (2013) 34(1) *Statute Law Review* 58; George Williamd and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469.

8 For some recent examples see Rosalind Dixon, 'An Australian (partial) bill of rights'2016 14(1) International Journal of Constitutional Law, 80–98; Claudia Geiringer, International Journal of Constitutional Law, 'What's the story? The instability of the Australasian bill of rights' 14(1) 156–174; William Philips, 'Great expectations, hard times: reflections on the Parliamentary Joint Committee on Human Rights' 2015 37(4) Bulletin (Law Society of South Australia) 28–29.

9 See for example Legal Affairs and Community Safety Committee, Report: Inquiry into a possible Human Rights Act for Queensland, (30 June 2016) Queensland Parliament available at <https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/14-HumanRights>.

10 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) Part 2. The other component of this parliamentary model of rights protection introduced by this Act was a requirement to introduce all Bills and disallowable instruments with Statements of Compatibility with human rights (see Part 3).

exclusively on the PJCHR,[11] this paper also considers other committees that have engaged in detailed scrutiny of counter-terrorism laws since 2001.

This paper does not argue that parliamentary scrutiny is a sufficient form of rights protection in the area of counter-terrorism law making. But it finds that parliamentary committees, particularly the Senate Standing Committee on Legal and Constitutional Affairs (the LCA Committee) and the Parliamentary Joint Committee on Intelligence and Security (the PJCIS), are making a rights-enhancing difference to the shape of these laws. This paper uses two case study examples, the LCA Committee's inquiry into the Anti-Terrorism (No 2) Bill 2005 (the Control Orders Bill) and the PJCIS's inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the Citizenship Bill), to highlight what this looks like in practice. It also finds that these parliamentary committees can enhance deliberative processes[12] in counter-terrorism law making, for example by giving a voice to those who may be disproportionately affected by the proposed laws.

Finally, this Paper finds that different parliamentary committees have different influences on the law making process and this has changed over time. This is illustrated by considering the influential role the LCA Committee played in the development of the first major tranches of counter-terrorism law, and comparing this to the strong legislative impact of the PJCIS in more recent years.

PART ONE: THE STORY OF TWO COMMITTEES OF INFLUENCE

This part of the paper looks at the work of the LCA Committee and its inquiry into the Control Orders Bill and the PJCIS's inquiry into the Citizenship Bill. It aims to identify some of the different features of these two committees that may correlate to stronger or weaker influence on the law making process.

11 Burton and Williams, above n 2; Williams, above n 2.

12 For a discussion of the concept of deliberative democracy and the role of parliamentary committees in enhancing deliberative democracy in Australia see John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998).; Dominique Dalla-Pozza, 'Promoting deliberative debate? The submissions and oral evidence provided to Australian parliamentary committees in the creation of counter-terrorism laws' (2008) 23(1) *Australasian Parliamentary Review* 39.

The Early Influencer: Senate Standing Committee on Legal and Constitutional Affairs

During the period from 2001 until 2013, the LCA Legislation Committee[13] undertook 33 inquiries into proposed counter-terrorism Bills.[14] Outside of the Senate Standing Committee on the Scrutiny of Bills (the SSBSC), which is required to consider all Bills, the LCA Legislation Committee emerged as the natural place for counter-terrorism Bills to be referred for inquiry and report. Committee members and the Committee Secretariat began to develop specialist skills, and interested and expert submission makers began to provide detailed submissions to inquiries, often in very large numbers.[15] The LCA Legislation Committee consistently produced detailed reports on the counter-terrorism Bills referred to it, and importantly, as explained below, the recommendations made by this Committee were often reflected in successful legislative amendments. An example of such an inquiry is the LCA Committee's November 2005 inquiry into Control Orders Bill.[16]

The Control Orders Bill

The Control Orders Bill constituted one of the most significant legislative contributions to the counter-terrorism regime in Australia. The Bill introduced preventative detention orders, control orders, and updated sedition offences into the Commonwealth criminal law. Following considerable debate through the Council of Australian Governments process,[17] the Bill was introduced into the House of Representatives on 3 November 2005 and immediately referred to the LCA Committee for inquiry and

13 The LCA Legislation Committee is part of a pair of Standing Committees: one designed to conduct inquiries into the provisions of Bills referred to it by the Senate (the Government chaired Legislation Committee) and one designed to conduct inquiries on broader matters of public interest referred to it by the Senate (the non-government chaired References Committee). The Legislation Committee has three government members, two opposition members and one independent or minor party member. The References Committee has two government members, three from the opposition and one independent or minor party member. Both Committees receive guidance from the Senate itself as to the focus of its inquiry, and how much time it has before being required to report to the Senate on the outcome of its work. The LCA Committee is established under Senate, Parliament of Australia, *Standing Order 25*.

14 ibid.

15 For example, the LCA Committee received 435 submissions to its inquiry into the *ASIO Legislation Amendment Bill 2002*, 431 submissions to its inquiry in the *Security Legislation Amendment (Terrorism) Bill No 2 2002* and 294 submissions to its inquiry into the Control Orders Bill.

16 On 3 November 2005, the Senate referred the above Bill to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 28 November 2005. Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Anti-Terrorism Bill No 2 2005,* 28 November 2005 (Commonwealth of Australia), [1.1].

17 For further background to the Control Orders Bill see Sue Harris Rimmer et al, *Bills Digest Anti-Terrorism Bill (No. 2)* of Digest No 64 of 2005, 18 November 2005. Greg Carne, 'Prevent, detain, control and order? Legislative process and executive outcomes in enacting the Anti-Terrorism Act (No 2) 2005 (Cth)' (2007) 10(1) *Flinders Journal of Law Reform* 17; Paul Fairall and Wendy Lacey, 'Preventative detention and control orders under federal law : the case for a bill of rights' (2007) 31(3) *Melbourne University Law Review* 1072; Murray McInnis, 'Anti-terrorism legislation : issues for the courts' (2006)(51) *AIAL forum* 1; Bret Walker, 'Independent National Security Legislation Monitor, Annual Report' Independent National Security Legislation Monitor, 16 December 2011) < http://www.dpmc.gov.au/publications/INSLM/index.cfm>.

report by 28 November.[18] Despite this short time frame, the LCA Committee inquiry attracted 294 submissions, included three days of public hearings and resulted in a 302 page report including 51 recommendations for change.[19]

The Control Orders Bill underwent significant legislative change from introduction to enactment, with 74 government amendments passed, and other unsuccessful amendments proposed.[20] While the unique legislative history of this Bill means that not all of these amendments can be attributed solely to the work of parliamentary committees,[21] the work of the LCA Committee had a discernible legislative impact.

For example, of the 51 recommendations made by the LCA Committee, 17 related to the proposed preventative detention order (PDO) regime, and sought to address the key concerns of submission makers.[22] These recommendations translated into over 30 successful amendments to the PDO regime in the Bill that were attributed to the work of the Committee in the Supplementary Explanatory Memorandum[23] and in the second reading speech of Senator Brandis QC, representing the Attorney General in

18 Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Anti-Terrorism Bill No 2 2005,* 28 November 2005 (Commonwealth of Australia), [1.1].

19 Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Anti-Terrorism Bill No 2 2005,* 28 November 2005 (Commonwealth of Australia), Recommendations, [1.3]-[1.5].

20 See Parliament of Australia Website, 'Anti-Terrorism Bill (No. 2) 2005 Bills homepage', <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r2469> (accessed 16 August 2016). See also Anti-Terrorism Bill (No. 2) 2005 Supplementary Explanatory Memorandum available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr2469_ems_9ae6228d-e3c5-46d9-af1e-745712d818d5%22> (accessed 16 August 2016).

21 The Bill was introduced against the backdrop of the 2005 London bombings and during a period when the Howard Government enjoyed a clear Senate majority for the first time since 1980. Many members of the Labor Opposition held strong concerns about components of the Bill that sought to criminalise certain organisations and replace and expand existing sedition offences. The proposed new preventative detention order regime (PDO) was also attracting public attention from legal groups and human rights advocates, who drew attention to the criticisms levelled against similar schemes in the United Kingdom. This was played out on the national stage in the context of the September 2005 meeting of the Council of Australian Governments (COAG) called by Prime Minister Howard. A confidential draft version of the Control Orders Bill was considered in detail by COAG and later publicly released by then ACT Chief Minister Stanhope. For further information see Department of the Parliamentary Library, 'Terrorism and the Law in Australia: Legislation, Commentary and Constraints' (Research Paper No 12, Department of the Parliamentary Library Information and Research Services, Commonwealth, 2001–2002); see also Hon. J. Howard (Prime Minister), *Counter-Terrorism Laws Strengthened*, media release, Canberra, 8 September 2005; see further Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, 'Human rights implications of the Anti-Terrorism Bill 2005', 18 October 2005 (report prepared at the request of Jon Stanhope, MLA, Chief Minister of the ACT).

22 These concerns related to: the adequacy of the procedural safeguards within the proposed PDO application and confirmation regime; access to the courts, including the right to judicial review; the conditions of detention and standards of treatment, including conditions governing detention of minors; the broad discretion to prohibit contact with the outside world, including contact between minors and their parents; and the restrictions imposed on detainees' lawyers and their discussions with their client.

23 Anti-Terrorism Bill (No. 2) 2005 Bill, Supplementary Explanatory Memorandum, Schedule 4, Items 25–64.

the Senate.[24] The changes had clear rights – enhancing impact, even if they failed to remedy the core rights concerns raised by submission makers.[25]

The LCA Committee also made a number of recommendations for changes to the proposed control order regime, aimed to address concerns raised by submission makers relating to the need to ensure access to natural justice and procedural fairness. These recommendations translated into successful government amendments that were attributed to the work of the LCA Committee[26] and improved the procedural fairness of the control order regime, for example by requiring that the person subject to the interim order be provided with notice of an application for confirmation, and relevant information supporting that application.[27]

The LCA Committee recommended that Schedule 7 (which contained the proposed new sedition offences) be removed in its entirety and be subject to detailed consideration by the Australian Law Reform Commission (the ALRC).[28] As an alternative, the majority recommended that significant changes be made to both the proposed offences.[29] While Schedule 7 was not removed from the Bill, it was amended to limit the scope

24 Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 18 (George Brandis).

25 For example, the changes: provided for special assistance to be offered to person subject to a PDO if the person has inadequate knowledge of English language or disability, ensured that the person subject to an interim PDO is given notice of application for continued preventative detention order, prescribed a set of criteria to be considered before making a prohibited contact order as part of a PDO; ensured that the Ombudsman is contacted when making an application for a PDO, meant that the person subject to an interim PDO would have an opportunity to make submissions to the AFP that the order should be revoked, meant that the person subject to an interim PDO would be provided with a summary of the grounds on which the order is made, provided a range of specific procedural safeguards for minors detained under PDO, including permitted contact with parents or support persons (albeit with new disclosure offences added), ensured that minors are not detained with adults, and set out the need to establish guidelines to provide for the special circumstances of young persons and persons who are incapable of managing their own affairs and who are detained and a Protocol governing the minimum conditions of detention and standards of treatment applicable to any person detained under a PDO. See Anti-Terrorism Bill (No. 2) 2005 Bill, Supplementary Explanatory Memorandum, Schedule 4, Items 25–64, see also Anti-Terrorism Bill (No. 2) 2005 Bill correction to the explanatory memorandum available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr2469_ems_93150d84-7c07-418c-8c65-92b69a1f7948%22> (accessed 16 August 2016).

26 Anti-Terrorism Bill (No. 2) 2005 Bill, Supplementary Explanatory Memorandum Schedule 3, Items 4–26. See also Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 18 (George Brandis).

27 Anti-Terrorism Bill (No. 2) 2005 Bill new clause 104.12A(2) and related amendments (Supplementary Explanatory Memorandum Item 13). The amendments also clarified that it is a requirement that that the person subject to the control order be provided a summary of the grounds on which the order should be made (albeit with exceptions relating to the disclosure of national security information); clarified that the interim control order be served personally on the person; provided for the Queensland Public Interest Monitor to be advised of any interim control orders issued in Queensland; and authorised the lawyer of person subject to the control order to request information and be present to represent the person at the time of confirmation. See Anti-Terrorism Bill (No. 2) 2005 Bill, Supplementary Explanatory Memorandum Schedule 3, Items 4–26.

28 Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Anti-Terrorism Bill No 2 2005,* 28 November 2005 (Commonwealth of Australia), Recommendations 27 and 28, see also Chapter 5 'Sedition and Advocacy'.

29 Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Anti-Terrorism Bill No 2 2005,* 28 November 2005 (Commonwealth of Australia), Recommendation 9, see also Chapter 5 'Sedition and Advocacy'.

of the offence, clarify the burden of proof and expand the proposed 'good faith defence' in the manner set out by the LCA Committee.[30] The Government adopted the LCA Committee's recommendation to refer both the sedition offences to the ALRC for inquiry.[31]

The LCA Committee inquiry also had an important deliberative impact on law making in this area. In a period of less than three weeks the Committee was able to attract 294 written submissions from a wide range of individuals, community organisations, legal experts, government agencies, and a diverse range of religious and ethnic groups. This highlights the value attributed to the role of the inquiry by the broader Australian community. The LCA Committee's report also quoted many submissions and, on occasion, provided a forum for those who might be disproportionately impacted by the changes proposed in the Bill.[32] In this way, the LCA Committee can be seen as tool to enhance Parliament's reputation for meaningful community engagement by acting as a conduit between the people and the Parliament. The LCA Committee's inquiry and public hearings also provided an important platform for many of these submission makers to generate media coverage and contribute to the public debate on these laws.[33]

Care must be taken not to overstate the legislative impact of the LCA Committee's report on the final content Control Orders Bill. Indeed, many of the features of the Bill that submissions makers and committee members themselves described as unfair, rights infringing or contrary to rule of law and criminal justice principles remained in

30 Anti-Terrorism Bill (No. 2) 2005 Bill, Schedule of the amendments made by the Senate, Items 68–72 available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fsched%2Fr2469_sched_561025b0-3bc7-435a-b842-3d6cf44042bc%22> (accessed 23 August 2016)

31 An On 1 March 2006, the Government issued formal Terms of Reference for an ALRC inquiry, which included consideration of whether the new offences in Schedule 7 of the Control Orders Bill 'effectively address the problem of urging the use of force or violence'.

32 For example, the Report documents the Australian Muslim Civil Rights Advocacy Network's concerns with the Bill, including that: "the broad offences and powers proposed in the Bill will create a risk that innocent people will be caught up in the system and that the laws will further alienate and radicalise disaffected people, especially Muslim youth who may be more vulnerable to the extremist ideology of terrorists." Senate Standing Committee on Legal and Constitutional Affairs, *Provisions of the Anti-Terrorism Bill No 2 2005,* 28 November 2005 (Commonwealth of Australia), Chapter 2 'Preventative Detention Orders', [2.17]; see also Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into *the Provisions of the Anti-Terrorism Bill No 2,* Public Hearing Transcript (Sydney, Thursday, 17 November 2005) http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2004-07/terrorism/hearings/171105 (accessed 16 August 2016).

33 See for example Annie Pettit and Vicki Sentas, 'Terrorism : laws for insecurity' (2005) 30(6) *Alternative Law Journal* 283; International Commission of Jurists Australia, *ICJ Australia Denounces New Counter-Terrorism Laws*, media release, 17 October 2005; Law Council of Australia *International Legal Concern Grows re Anti-terror Laws*, media release, 12 October 2005; Law Society of New South Wales, *Government Abuses Power Over Anti-Terrorism Laws*, media release, 14 October 2005; Professor Hilary Charlesworth (ANU), Professor Andrew Byrnes (UNSW), Gabrielle McKinnon (ANU), *Human Rights Implications of the Anti-Terrorism Bill 2005*, letter to the A.C.T. Chief Minister, 18 October 2005; Professor George Williams (UNSW). 'Jumping the gun on terror', The Age, 27 October 2005, p. 15; Sir Gerard Brennan 'Whitlam and jurists condemn legislation', *Sydney Morning Herald*, 25 October 2005; Professor Don Rothwell (University of Melbourne), 'Terrorism threat increases need for basic human rights protection: experts'. Lateline, 25 October 2005.

the enacted Bill.[34] The submission makers themselves, or broader public commentary on the Bill, may have also had a direct influence on key Government and Opposition decision makers responsible for negotiating the successful legislative amendments that improved the rights protections in the Bill.

It is also important to note that a number of the concerns addressed by the LCA Committee in its report were also reflected in the report of the SSCSB,[35] which, for example, included findings that some features of the Control Order Bill may abrogate common law privileges.[36]

Despite these important caveats, it is clear from the high rate of reference to the work of the LCA Committee in the Hansard debates that the Committee provided a critical forum to raise concerns and influence legislative change to this Bill.

For example, just over half of the 52 second reading speeches on the Control Orders Bill included substantive reference to, or praise for, the work of the LCA Committee.[37] The majority of this praise came from the Labor Opposition, who sought to claim credit for the LCA Committee inquiry occurring in the first place and were highly critical of the Government's attempts to rush the legislation through the House and the Senate. For example, the Hon Robert McClelland MP said that:

> In the short time available to it, the committee—once again in the area of national security—has clearly done a commendable job, as indeed has been the contribution of a number of Australians who give their evidence, often highly expert evidence, before these inquiries without cost to the Commonwealth. A number of Australians feel very strongly about this legislation. It is appropriate that there be a thorough analysis and scrutiny of legislation of this kind.[38]

34 For example see Professor Williams, Dr Lynch, Dr Saul, Gilbert and Tobin Centre of Public Law, University of New South Wales, *Submission 80*; Professor Donald Rothwell, Challis Professor of International Law, Sydney Centre for International and Global Law, The University of Sydney, *Submission 188*; Mr Simeon Beckett, *Committee Hansard* 14 November 2005, p. 42. See also Dr Ben Saul, *Committee Hansard*, 14 November 2005; Mr John North (Law Council of Australia) *Committee Hansard,* 14 November 2005; Dr Helen Watchirs, ACT Discrimination and Human Rights Commissioner, *Submission 154*; Professor Joseph and Mr Abraham, Castan Centre for Human Rights, *Submission 114*.

35 Senate Standing Committee on Scrutiny of Bills, *Alert Digest No 13 of 2005*, (9 November 2005) 8.

36 For example, the SSCSB drew attention to the control order and preventative detention order provisions and their potential to exclude the Attorney General's decisions from judicial review. On these latter matters, the SSBSC ultimately accepted the further information provided by the Attorney General, including information that pointed to the availability of administrative review Ibid, 10–16.

37 For example see Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2005, 84 (Robert McClelland); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2005, 88 (Judi Moylan); Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 13 (Joseph Ludwig).

38 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2005, 84 (Robert McClelland).

Members of the Government's backbench also praised the work of the LCA Committee[39] as did Senator Brandis, the Government's representative for the Attorney General in the Senate.[40]

The members of the LCA Committee also made reference to the inquiry and the recommendations when they spoke during the second reading debate. For example, the second reading speeches of the Chair (Senator Marise Payne) and Deputy Chair (Senator Trish Crossin) of the LCA Committee reveal the efforts undertaken by both sides of politics to garner bipartisan support for the recommendations made by the LCA Committee.[41]

These comments, and the Supplementary Explanatory Memoranda accompanying the 74 successful amendments to the Control Orders Bill, demonstrate that even when the parliamentary scrutiny process is considered flawed (for example, due to timing or politics or both)[42] the work of the LCA Committee can have a powerful impact on the way counter-terrorism law is developed and debated.

The Control Order Bill case study demonstrates that parliamentary committee system can have a longer-term impact on the development and content of Australia's counter-terrorism laws. For example, the LCA Committee's report and recommendations feature prominently in a range of significant subsequent law reform developments including the Australian Law Reform Commission's Report *Fighting Words: A Review of Sedition Laws in Australia*.[43]

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39 For example, Judi Moylan MP noted that: "This legislation has not been entered into lightly. There have been, as my colleague the member for Barton said, a number of gyrations of this legislation—something in excess of 60 drafts. This has been done in consultation with appropriate state and territory ministers and premiers. That is the correct way to proceed in a matter that, as I said, gives such unprecedented powers to our agencies. It has now been before a Senate committee. That Senate committee, I believe from the quick reading that I have made of its recommendations, has listened to the views of a number of people and has made some very sensible recommendations. I believe applying a five-year sunset clause—shortening it from the proposed 10 years—is sensible with a review. Sometimes we have to erect barriers by way of legislation, but our laws are not immutable and we need to constantly look at the appropriateness of the laws we pass in this place and make the necessary changes. I think calling for a review is an excellent recommendation." Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2005, 88 (Judi Moylan)

40 Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 18 (George Brandis).

41 See Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 125 (Patricia Crossin) and Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 6 (Marise Payne).

42 See for example, Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 13 (Joseph Ludwig); Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 58 (Simon Crean). For commentary see Pettitt and Sentas, above n 30; Andrew Lynch, 'Legislating with urgency : the enactment of the Anti-Terrorism Act (No 1) 2005' (2007) 30(3) *Melbourne University Law Review* 747; Janet L. Hiebert, 'Parliamentary Review of Terrorism Measures' (2005) 68(4) *Modern Law Review* 676; John Uhr, 'Terra infirma?: Parliament's uncertain role in the 'War on Terror'. [Paper in Thematic Issue: Counter-Terrorism Laws.]' (2004) 27(2) *University of New South Wales Law Journal* 339.

43 The key recommendations of the ALRC included that the term 'sedition' be removed from federal criminal law and the sedition related offences introduced by the Control Orders Bill changed to 'Treason and urging political or inter-group force or violence' (Recommendations 1, 2 and 3) and the ALRC also recommended changes to the advocating terrorism and sedition offences introduced by the Control Orders Bill to ensure that there was a 'bright line distinction' between offending conduct and freedom of expression (Recommendation 9). Australian Law Reform Commission, Commonwealth, Canberra *Fighting Words: A Review of Sedition Laws in Australia* (2006).

While it took some time – and a change of Government – to see these changes reflected in law, the work of the LCA Committee again featured in the parliamentary consideration of the National Security Legislation Amendment Bill 2010, which implemented a number of the ALRC recommended reforms.[44] This can be seen as evidence of the parliamentary committee system offering an opportunity to enhance Parliament's reputation as a responsive and deliberative law making body.

These developments have in turn resulted in legislative change that brings the current provisions relating to control orders, preventative detention orders, sedition and advocating terrorism related offences much closer to (but not yet in line with) the recommendations made by the LCA Committee in its 2005 inquiry.[45]

Despite this impressive track record, over the last three to five years the capacity of the LCA Legislation Committee to influence the shape of proposed counter-terrorism laws has substantially decreased, to the point where it is no longer the natural committee to inquire into these types of Bills. The newer committee, the PJCIS, has emerged as a committee of influence in the most recent tranche of counter-terrorism legislation in Australia.

The Recent high strike rate of the Parliamentary Joint Committee on Intelligence and Security

Since the election of the 44th Parliament in 2013, the work of the PJCIS[46] has included a strong focus on inquiring into proposed new counter-terrorism laws

44 The LCA Committee's report on the Control Orders Bill also featured prominently the following inquiries into counter-terrorism laws: Council of Australian Governments Counter-Terrorism Review Committee, *Review of Counter-Terrorism Legislation* (2013) Commonwealth of Australia; Bret Walker, 'Independent National Security Legislation Monitor, Annual Report' Independent National Security Legislation Monitor, 16 December 2011) <http://www.dpmc.gov.au/publications/INSLM/index.cfm>; Report of the Security Legislation Review Committee Security Legislation Review Committee, Commonwealth, *Report of the Security Legislation Review Committee* (2006) June 2006, (The Hon. Simon Sheller, AO, QC); and the Parliamentary Joint Committee on Intelligence and Security, Review of Security and Counter-Terrorism Legislation (2006).

45 Similar conclusions can be drawn from the LCA Committee's earlier reports on counter-terrorism law, such as its reports on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 which, following much parliamentary debate, ultimately resulted in the subsequent Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2] being introduced, reflecting many of the LCA Committee's recommended changes. The LCA Committee's report on the Anti-Terrorism Bill 2004, albeit much smaller in size and attracting far fewer submission makers, also had a strong legislative impact on the shape of the Bill as enacted, with many (but not all) of the LCA Committee's recommendations for legislative change reflected in legislative amendments.

46 The PJCIS is a joint committee established by the *Intelligence Services Act 2001* (Cth). Its membership, which is also statutorily prescribed, has so far been limited to Members and Senators from the major political party, and it regularly attracts parliamentarians with past experience in military, law enforcement or related fields. *Intelligence Services Act 2001* (Cth) Part 4, s28 (2) provides that "The Committee is to consist of 11 members, 5 of whom must be Senators and 6 of whom must be members of the House of Representatives."

and the Committee has reported in detail on each of the key counter-terrorism legislative reforms.[47]

In the period 2014–2015 the PJCIS made 109 recommendations for change, all of which were accepted by government, and resulted in 63 successful amendments to the bills.[48] This extensive acceptance of committee recommendations is rare and according to David Monk, such acceptance of recommendations 'is a significant achievement for a committee in most Westminster parliaments and should be recognised as such'.[49]

It is important to note that during this same period, these Bills were *not* referred to the LCA Committee for inquiry, with the exception of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.[50]

As will be discussed further below, this signals an important shift away from the LCA Committee as source of influential parliamentary scrutiny of counter-terrorism laws, towards the PJCIS as the natural home for such laws to be referred for inquiry and report.

Again, care must be taken not to overstate the impact of the PJCIS on the content of Australia's more recent tranche of counter-terrorism laws. However, it is clear that in many instances the changes attributed to the work of the PJCIS have been rights-enhancing, even if they have left in place the core rights-concerning legal mechanism sought to be introduced.[51] It is also clear that the recent PJCIS inquiries

47 These are: the National Security Legislation Amendment Bill (No. 1) 2014; the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014; the Counter-Terrorism Legislation Amendment Bill (No.1) 2014; the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014; the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015; and the Counter-Terrorism Legislation Amendment Bill (No.1) 2015.

48 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, above n 11, 3. The Bills examined during this period were the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014; National Security Legislation Amendment Bill (No 1) 2014; Counter-Terrorism Legislation Amendment Bill (No 1) 2014) and the Telecommunication (Interception and Access) Amendment (Data Retention) Bill 2014.

49 David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *The Journal of Legislative Studies* 1, 8.

50 The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 was referred to the LCA Committee, but did not result in a public inquiry with the majority of the LCA Committee instead deciding 'not to call for or accept submissions, nor hold hearings' and instead deferring to the work of the PJCIS. This notice is provided on the Parliament of Australia Website 'Senate Legal and Constitutional Affairs Committee, Completed Inquiries, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014' http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Foreign_Fighters (accessed 16 August 2016).

51 For example, in the case of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the recommendations of the PJCIS resulted in a significant narrowing of the scope of the proposed new entering a declared areas offence, but failed to remove the offence completely, meaning that the Bill continued to raise serious human rights concerns for many commentators and submission makers. For example see Gabrielle Appleby, 'The 2014 counter-terrorism reforms in review' (2015) 26(1) *Public Law Review* 4; George. Williams, 'National security reforms stage two foreign fighters' (2014); Spencer Zifcak, 'Proportionality lost' (2014)(133) *Arena Magazine* 20.

have provided a forum for the human rights implications of these laws to be considered, even if not satisfactorily resolved.[52]

The Citizenship Bill

The Citizenship Bill was introduced within the context of a broader bipartisan and politically popular 'tough on terror' policy, with a particular focus on disrupting and deterring so called 'foreign fighters' (young Australians travelling overseas to participate in or support terrorist activity and retuning to Australia radicalised and posing a serious terrorist threat). [53]

Immediately after introducing the Citizenship Bill to the Senate, the federal Attorney General referred the Bill to the PJCIS for inquiry and report.[54] An attempt by the Greens to have the Citizenship Bill referred to the LCA Committee was defeated, leaving Greens Senator Penny Wright to lament the exclusion of the minor parties and the cross bench from the scrutiny process. [55]

The two technical scrutiny committees, the SSCSB and the PJCHR also considered and reported on the Citizenship Bill, and while not the subject of focus in this Paper, their contributory role to the work of the PJCIS is relevant to the resulting legislative and other influence of that committee.

The PJCIS's inquiry into the Citizenship Bill spanned just over two months, attracted around 50 written submissions, including from legal experts, representatives of Muslim communities, human rights experts and government departments, and involved three

52 See for example, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) ch 2, where reference to 'human rights' or human rights organisations occurred over 100 times; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) ch 4 ("Matters of principle and effectiveness") particularly pp 47–62, where the PJCIS discusses Australia's international human rights obligations under the subheading "Australia's International Obligations").

53 For an overview of the key features of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 see Department of Parliamentary Services (Cth), *Bills Digest: Australian Citizenship Amendment (Allegiance to Australia) Bill 2015,* No 15 of 2015, September 2015. See also S Pillai, 'The rights and responsibilities of Australian citizenship: A legislative analysis' (2014) 37(3) *Melbourne University Law Review* 736–785.

54 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *New Parliamentary inquiry into Citizenship Bill* (2015). The parliamentary committee inquiries into the Citizenship Bill were also set against a broader public discussion about Australian citizenship, the notion of a 'common bond, involving reciprocal rights and obligations', taking place in part via the Government's public consultation on its discussion paper: Department of Immigration and Border Protection, 'Australian Citizenship, Your Right, Your Responsibility ' (Discussion Paper, Department of Immigration and Border Protection).

55 Senator Wright said "The Prime Minister indicated that this significant legislation, which will be looking at the revocation of one of the most fundamental rights in a democracy, that of citizenship, would be given a full inquiry, but that means it will only go to the Parliamentary Joint Committee on Intelligence and Security. The only members of that committee are government and opposition members, and all nine men on that committee have had past associations with the military, security and spy agencies through government. This means that those other MPs in this parliament who represent people who have voted for the Greens and Independents will not have the ability to ask and inform ourselves properly, and it will not be transparent for the public. It is a shame and it should not keep happening." Commonwealth, *Parliamentary Debates*, Senate, 25 June 2015 4600 (Penny Wright).

public hearings in addition to private briefings.[56] As discussed below, the PJCIS inquiry clearly provided an effective forum for submission makers to express concerns with the Citizenship Bill, but it did not match the LCA Committee in terms of volume or diversity of submissions and witneses.

The PJCIS report was extensive, spanning 180 pages and covering a broad range of issues in some detail.[57] The PJCIS's report also incorporated concerns articulated by a relatively diverse group of submission makers in written submissions and at the three public hearings, including by directly reflecting some of these concerns in its findings and specific recommendations for legislative reform.[58]

In a number of instances, these recommendations, implemented as successful legislative amendments and attributed in the supplementary Explanatory Memorandums to the work of the PJCIS, could be described as important rights enhancing changes to the Bill. For example, the amendments make it clear that before a dual national could have their citizenship 'renounced' by doing something terrorist-related overseas, they must at least have *intended* to engage in the particular proscribed conduct (rather than been reckless or negligent).[59] The amendments also narrow the range of conduct that can trigger the provisions,[60] set out the person's rights of review,[61] and make it clear that the laws cannot be applied to children under 14.[62] While these changes by no means remedy the full range or even the most severe intrusions into individual rights and freedoms posed by the Bill, they nevertheless constitute specific and substantive improvements.

The PJCIS's relatively high public profile and respect among submission makers and government agencies and departments also generated a consistently high level of praise from parliamentarians, particularly the two major parties. In the case of the

56 Ibid. The PJCIS received 43 submissions and 7 supplementary submissions. Public hearings were held on 4, 5 and 10 August 2015 and the PJCIS also received one private briefing and conducted one classified hearing. The PJCIS requested two extensions of time for issuing its report on the Citizenship Bill, finally issuing its Advisory Report on 4 September 2015.

57 These issues included: the constitutionality of the Bill, the compliance of the Bill with Australia's international human rights obligations, the effectiveness of the Bill as a response to the particular threat of terrorism posed by foreign fighters, the application of the Bill to children, the need for oversight and accountability in the exercise of executive power under the Bill and the question of retrospective application of the post-conviction based provisions.

58 For example, the PJCIS report includes quotations and references attributable to submission makings such as Professor George Williams, Professor Helen Irving, Dr Rayner Thwaites, Commonwealth Ombudsman, Australian Human Rights Commission, Law Council of Australia, Attorney General's Department, Federation of Ethnic Communities' Councils of Australia, Refugee Council of Australia, Professor Ben Saul, Professor Kim Rubenstein, Australian Defence Association, Department of Immigration and Border Protection, the Executive Council of Australian Jewry, Australian Lawyers for Human Rights, Refugee Council of Australia, Muslim Legal Network, and Unicef Australia.

59 *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) amended clause 33AA(3).

60 As above, amended clause 33AA(2).

61 As above amended clause 33AA(11).

62 As above amended clause 33AA(1).

Citizenship Bill, this was voiced most passionately by members of the Labor Opposition, such as Michael Danby MP:

> The evolution of this legislation, like the metadata legislation, shows the value of the committee system and the increasing influence of the PJCIS. … Committees might be seen as too slow for the 24/7 news cycle and the Twitterati, but the result is a pragmatic solution that is best for the Australian people – as in this case – and it shows that we parliamentarians are doing our job. [63]

The Citizenship Bill example demonstrates the PJCIS's capacity to work closely with government agencies and departments, and to achieve a near perfect strike rate when it comes to translating recommendations into legislative results, at a time when the LCA Committee is deliberately sidelined from participating in formal scrutiny of the Bill. This trend is also apparent with respect to the formal parliamentary scrutiny of other counter-terrorism Bills since 2013.[64]

The Citizenship Bill case study also demonstrates the ongoing importance of the technical scrutiny committees and the role they play in alerting Parliament to the key issues of concern arising from laws of this nature. This is evident both in terms of the PJCIS's reference to the findings of the SSCSB and the PJCHR in its report, and in the relationship between the key issues focussed on by both the SSCSB and the PJCHR and successful legislative amendments made to the Bill.[65] This is not to say that the core rights-offending features of the counter-terrorism Bills were removed, but it is clear that by working together, the SSCSB, the PJCHR and the PJCIS, can collectively influence rights-enhancing change.

63 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015 (Michael Danby). 13117-13118

64 For example, the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 was referred to the PJCIS for inquiry and report, and was also subject to scrutiny by the SSCSB and the PJCHR. As noted above, the Bill was also referred to the Senate Legal and Constitutional Affairs Legislation Committee, however the majority of this Committee deferred its inquiry to the PJCIS, and only a dissenting report by Australian Greens Senator Penny Wright was issued. The PJCIS made 37 recommendations for amendments to the Bill. All of these recommendations were supported by Government. The National Security Legislation Amendment Bill (No 1) 2014 was also referred to the PJCIS for inquiry and report, and was also subject to scrutiny by the SSCSB and the PJCHR. The PJCIS made 17 recommendations for amendments to the Bill, all of which were supported by the Government. Similar experiences occurred with respect to the Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (all but one of the 16 of the PJCIS recommendations were supported by Government) and the Telecommunication (Interception and Access) Amendment (Data Retention) Bill 2014 (all 39 of the PJCIS's recommendations were supported by Government). These Bills were also subject to scrutiny by the SSBSC and the PJCHR.

65 For example, in Chapter 8 (entitled "Children") of the PJCIS's report on the Citizenship Bill, the findings of the PJCHR were referred to on six occasions, including extensive quotes from the PJCHR's report. The recommendations made by the PJCIS relating to children included that the Bill be amended to limit the extent of its application to children (Recommendation 20), which also reflected the findings of the PJCHR. PJCIS Recommendations 2, 6, 8, 9 are designed to narrow the scope of offences for which the conviction-based provisions of the Bill would apply, responding to concerns raised by the SSCSB in its *Alert Digest 7/15* report at p 8. A range of other PJCIS recommendations reflect concerns raised by the SSCSB, for example those relating to concerns as to adequate judicial review, which were reflected in PJCIS Recommendation 14.

PART 2. WHAT EXPLAINS THIS SHIFT IN INFLUENCE?

There are a three key factors that may explain the particularly strong influence of the PJCIS, as both an effective mechanism for affecting legislative change: the broader political context of the more recent tranche of counter-terrorism laws, access to expert advice and the provision of a safe forum for the unprejudiced discussion of problems. Each of these factors is discussed below. However, there are also features of the PJCIS that may present challenges for its long term effectiveness, particularly as a forum for rights protection and as a facilitator of deliberative processes. These features are also discussed below.

Factor One: Political Context

The most influential factor is likely to be closely connected to the broader political and institutional content in which the latest tranche of counter-terrorism laws was introduced.

The local and global experience of terrorism has shifted in the last 15 years from horror and outrage at specific terrorist acts, to a general acceptance that home grown and international terrorism is now part of the geo-political landscape. This shift has had a deep impact on the way Australians and their elected representatives respond to proposed laws in this area. Unlike the period from 2001–2005, where it remained politically viable to question the need for specific terrorism measures in light of the existing criminal law, by 2013 almost no one in parliament was prepared to question the necessity of the heavy counter-terrorism legislative agenda of the Abbott-Turnbull Government. In this context, it is no surprise that the PJCIS (with its major party only membership and reach to both Houses of Parliament) was the committee of choice for the Abbott Turnbull Governments when faced with a diverse mix of political personalities in the Senate.

It is also possible to view the legislative influence of the PJCIS more cynically, as an example of deliberate legislative overreach with respect to a politically popular issue, followed by more moderate post-scrutiny amendments designed to ensure support from the Opposition, resulting in a legislative regime that continues to seriously abrogate individual rights.[66]

But while significant, these explanations due not fully explain why so many legislative changes were made in response to parliamentary committee work on these laws, and why so many of those changes had important rights-enhancing features.

66 See for example Jonathon Holmes, 'Tyrannical citizenship bill an attack on our liberties ', *Sydney Morning Herald* (online), 26 August 2015 < http://www.smh.com.au/comment/tyrannical-citizenship-bill-an-attack-on-our-liberties-20150824-gj6tub.html#ixzz3wF2JLt1x >. This media article explores themes previously considered by George Williams and Lisa Burton, 'Australia's Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection' (2015) *Parliaments and Human Rights: Redressing the Democratic Deficit* 258; Andrew Lynch, 'Legislating with Urgency: The Enactment of the Anti-Terrorism Act (No 1) 2005' (2007) 30(3) *Melbourne University Law Review* 747.

Perhaps another more nuanced reading of the Citizenship Bill example is to see the PJCIS as delivering on some of the broader goals of the parliamentary scrutiny system, which include providing: a forum for the provision of expert advice about the content and practical effect of proposed laws and a safe political space to discuss how to improve provisions, or to modify rights-intrusive features. As will be discussed further below, when compared with the LCA Committee, it appears that the PJCIS is competing strongly on these indicators.

Factor Two: Access to expert advice

Unlike the LCA Committee which is established under the Senate Standing Orders, the PJCIS is governed by *Intelligence Services Act 2001* (Cth), which outlines its mandate, functions, membership and powers. Members of the PJCIS are appointed with the approval of the Prime Minister and through their committee role can receive certain classified information in closed hearings.[67] The Committee's Secretariat staff are also authorised to access certain classified material. This has enabled the members of the PJCIS to establish strong and trusting relationships with key Commonwealth law enforcement and intelligence agencies. The relatively recent practice of law enforcement and intelligence agencies providing a standing secondee to support the Secretariat staff of the PJCIS [68] offers further opportunities for Committee members to clarify the implications and practical implementation of any proposed recommendations before making their views publicly known.

In contrast, the LCA Legislation Committee has no special powers to receive national security information, and no real capacity to build up long term relationships with key agencies. Its regularly changing, multiparty membership, and very heavy and diverse workload, mean that its strengths centre on its ability to shift quickly between different subject matters and to engage a broad range of Senators and submission makers in its work. These same features make it difficult to establish relationships of trust with certain agencies.

The PJCIS also has a strong track record of attracting high quality, detailed submissions from a range of individuals and organisations with the legal expertise. These submission makers regularly offer specific recommendations for legislative change or

67 The detailed procedures and information access and disclosure requirements of the PJCIS are contained in *Intelligence Services Act 2001* Schedule 1 clause 14.

68 For a discussion of the secondee arrangements to the PJCIS see Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015) 278–9.

provide operational insights to strengthen the policy case for the proposed reforms.[69] This public profile as the 'forum of choice' for articulate and high profile submission makers solidifies the political status of the PJCIS, and enhances is capacity to generate media attention. [70]

Factor Three: A safe forum for unprejudiced discussion of problems

The Citizenship Bill example also demonstrates the capacity of the PJCIS to provide a politically safe forum in which the Government can engage in negotiations with the Opposition, away from the public performance and recording of Hansard, but with the benefit of public input and the tabled reports of the SSCSB and PJCHR. The strong bipartisan support for both the broad policy objectives underpinning the counter-terrorism laws, and for achieving consensus within the PJCIS, makes the Committee the perfect place for Government to 'gauge the reaction of its backbenches to a proposal' and to discuss the types of compromises that might be required to secure bipartisan support.[71] The PJCIS also has a strong track record of meeting frequently in public and private to discuss its inquiries and to receive briefings, including classified briefings.[72]

This suggests that, while the factors leading to the willingness of the Coalition Government being open to negotiation with the Labor Opposition with respect to the detail of the Citizenship Bill may be limited to this specific case study, they could also point to broader structural factors at play at the Commonwealth level such as the

69 See for example, the following submissions to the PJCIS's inquiry into the Citizenship Bill: Law Council of Australia, Submission No 26; Professor Helen Irving, Submission No 15; Muslim Legal Network (NSW), Submission No 27; Professor Ben Saul, Submission No 2; Councils for civil liberties across Australia, Submission No 31; Dr Rayner Thwaites, Submission No 16; Professor Kim Rubenstein, Submission No 35; Ms Shipra Chordia, Ms Sangeetha Pillai, Professor George Williams, Submission No 17. A full list of submissions is available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Report> (accessed 13 June 2016).

70 See, for example, ABC Radio National, 'Security committee recommends 27 changes for citizenship laws to pass', *PM*, 4 September 2015 (Naomi Woodly) http://www.abc.net.au/news/2015-09-04/security-committee-recommends-27-changes-for/6751684; David Rowe, 'Powerful committee of MPs backs stripping citizenship, but calls for changes', *Sydney Morning Herald* (online), 4 September 2015 < http://www.smh.com.au/federal-politics/political-news/powerful-committee-of-mps-backs-stripping-citizenship-but-calls-for-changes-20150904-gjf4or.html#ixzz3wF02tQ15>. The LCA Committee once enjoyed a similar status among submission makers in the area of counter-terrorism; however, in recent years it has been surpassed by the PJCIS and its strong track record of having its recommendations implemented into legislative change.

71 David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *The Journal of Legislative Studies* 1, 7.

72 For example in the 2015 calendar year the PJCIS held a total of 50 meetings (37 private meetings, 7 public hearings, 8 classified hearings, and 8 other briefings). This suggests a much more frequent meeting schedule than some other Joint Committees, for example the PJCHR met a total of 20 times during the same period. Department of the Senate, *Work of Committees: Financial Year Statistics: 1 July 2014–30 June 2015'; Half-Year Statistics: 1 January 2015–30 June 2015*, (2015) Commonwealth of Australia 246–245; Department of the Senate, *Work of Committees: Year Statistics 2015: 1 January 2015–31 December 2015 (2016) Commonwealth of Australia*, 'Other Committees'.

presence of a hostile or difficult Senate that necessitates bipartisan support to ensure the passage of counter-terrorism Bills.

However, it is also important to have regard to the particular features of the PJCIS that, particularly when compared with the LCA Committee, may present challenges for its long term effectiveness as a form of rights protection and as a facilitator of deliberative processes.

Providing a forum for voices to be heard?

As noted above, the PJCIS inquiry into the Citizenship Bill attracted submissions from a large number of submission makers and included evidence from a diverse range of witnesses, including those who are likely to be disproportionally affected by the Bill.[73]

Despite this, there appear to be some participants in the parliamentary committee system that question the legitimacy of the PJCIS as either a forum to promote more deliberative democracy or as a mechanism to improve the effectiveness and fairness of balance in counter-terrorism law. Unsurprisingly these participants include the minor parties and independents who have so far been excluded from membership of the PJCIS,[74] but it may be that other submission makers, individuals and organisations are questioning the capacity of the PJCIS (with its major party only membership and close relationship with key agencies) to offer robust, independent and rights-based scrutiny of counter-terrorism laws. These perceptions are supported by the fact that the number and diversity of submission makers and witnesses to PJCIS inquiries during its recent period of strong legislative influence is considerably less than those to LCA Committee at its most influential period.[75]

73 Public hearings were also held as part of the inquiry, where evidence was received from a diverse range of submission makers, including Executive Council of Australian Jewry, Federation of Ethnic Communities' Councils of Australia, legal academics, Refugee Council of Australia, Amnesty International, Australian Human Rights Commission and the Australian Federal Police. For a full list of witnesses to the Public Hearings see Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) Appendix B.

74 See for example New Matilda, 'Senate Passes Foreign Fighters Bill Despite Human Rights Risk' (29 October 2014) <https://newmatilda.com/2014/10/29/senate-passes-foreign-fighters-bill-despite-human-rights-risk/>; Josh Taylor, 'Civil liberties be damned: meet the new chair of Parliament's national security committee' *Crikey* (25 February 2016) <https://www.crikey.com.au/2016/02/25/civil-liberties-be-damned-meet-the-new-ch air-of-parliaments-national-security-committee/>. It should be noted however that the *Intelligence Services Act 2001* Schedule 1, Part 3, clause 14 requires minor parties and independent Members to be consulted in the selection of members for the PJCIS (which must be approved by the Prime Minister).

75 For example, the PJCIS received 43 submissions to its inquiry into the Citizenship Bill, 46 submissions to its inquiry into the Foreign Fighters Bill, 17 submissions to its inquiry into the Counter Terrorism Amendment Bill No 1 2014 and 204 submissions to its inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014. By way of contrast, the LCA Committee received 435 submissions to its inquiry into the *ASIO Legislation Amendment Bill 2002*, 431 submissions to its inquiry in the *Security Legislation Amendment (Terrorism) Bill No 2 2002* and 294 submissions to its inquiry into the Control Orders Bill.

A (limited) mechanism to protect rights?

Despite the intimate working relationship between the PJCIS and the law enforcement and intelligence agencies, the Committee has also been keen to underscore its important oversight role and preserve its legitimacy as a scrutiny body. Many of its recommendations made in respect of the latest tranche of counter-terrorism Bills have tightened the scope of the power initially afforded to law enforcement and intelligence agencies, or strengthened the judicial or other oversight applying to the use of these powers by these agencies. The PJCIS has also successfully recommended an expansion of its own powers to review and report on the use of newly enacted counter-terrorism provisions.

While some might suggest that this is more about adjusting initial legislative overreach than improving the fairness of the law, it is also possible to conclude that even parliamentarians who have a political self interest in ignoring or diluting parliamentary scrutiny are prepared to undertake their committee role diligently and persuade their respective parties to adjust the Bills that they so publicly support.

For example, Hansard indicates that almost every one of the 60 federal parliamentarians who spoke about the Citizenship Bill talked about 'rights, liberties and freedoms', with most frequent attention being given to well-entrenched common law rights and rule of law concepts such as access to judicial review and limits on executive power.[76] This suggests that while the majority of parliamentarians may not yet attribute any political consequences to voting for laws that unduly infringe the full range of internationally protected human rights,[77] they at least want to create the public impression that scrutiny of laws against some relatively narrow set of rights is part of the legitimate role of Parliament.[78]

The Hansard debates also highlight the fact that the high strike rate and political legitimacy of the PJCIS may in part be due to the benefit the committee derives from the work of other parliamentary committees and independent oversight bodies. For example, since 2011 the PJCIS and its frequent submission makers have regularly

76 See for example Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015 13558 (Warren Entsch).; Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2015, 13326 (Lisa Chesters); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015,13117 – 13118, 9504. (Michael Danby).

77 For further discussion of the Australian Parliament's lack of engagement with international human rights law see George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136.. George Williams and Lisa Burton, "Australia's Exclusive Model of Parliamentary Rights Protection' (2013) 34 *Statute Law Review* 58–94; Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *University of New South Wales Law Journal* 1046.

78 As Labor member Terri Butler observed in her second reading speech on the Bill: 'governments should be very careful before diminishing people's civil, political and other rights in the name of security. We as a parliament should be very careful to ensure that the laws that we scrutinise and pass balance those rights, those obligations, those concerns and those imperatives. If we do not do that, we are not just failing the people affected by the bill at hand, we are failing the tradition of Western democracies, where parliaments have been at pains to ensure that the laws we make and the decisions we make, whether in times of conflict or in times of peace, continue to maintain the values we share.' Commonwealth, Parliamentary Debates, House of Representatives, 23 November 2015 (Terri Butler)13296.

drawn upon the work of the Independent National Security Legislation Monitor (INSLM), which has served as a respected, impartial and credible expert voice on counter-terrorism law, and the legal options that exist to tackle particular threats.[79]

The wealth of existing scrutiny material in this area also means that the PJCIS can adopt the type of rights discourse that resonates most strongly with the Parliament and Government of the day. In the context of the 44th Parliament, this discourse draws more heavily on common law rights or constitutionally inspired concepts, rather than direct reference to international human rights principles.[80]

This approach contrasts with that of the LCA Committee. As the Control Order Bill example shows, the LCA Committee's reports included findings and recommendation framed in explicitly 'human rights' terms, reflecting the language used by many submission makers to its inquiries. While the LCA Committee's more explicit rights-based approach may have strengthened its legitimacy in the eyes of human rights advocates and some minor parties, independents and backbenchers, it did not always resonate with the Government of the day. This may explain why the legislative strike rate of the LCA Committee (even at the height of its influence) was lower than the PJCIS, while at the same time its capacity to enhance deliberative processes remained high.

This paper has not looked in detail at the role of the SSBSC and the PJCHR, however it is clear that these committees play an important role in developing a culture of scrutiny at the Commonwealth level. While the scrutiny criteria applied by the SSCSB appears to resonate more strongly among parliamentarians (particularly of the 44th Parliament),[81] there is some evidence that the PJCIS and its submission makers are beginning to look more carefully at the work of the PJCHR to support their submissions and recommendations.[82]

79 Bret Walker SC was appointed as the first Independent National Security Legislation Monitor. His 2011 Annual Report contains an analysis of the Control Orders Bill. Bret Walker, 'Independent National Security Legislation Monitor, Annual Report' Independent National Security Legislation Monitor, 16 December 2011) <http://www.dpmc.gov.au/publications/INSLM/index.cfm>.

80 This focus on 'traditional rights and freedoms' was led by Attorney General the Hon George Brandis QC, including through a wide-reaching reference to the Australian Law Reform Commission. It is also evident through the Attorney's response to the Bill of Rights debate in Australia during the 2008–2010 period. For example see George Brandis, 'New Australian law reform inquiry to focus on freedoms' (2013) <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/11December2013-NewAustralianLawReformInquiryToFocusOnFreedoms.aspx>; George Brandis, 'The Debate we Didn't Have to Have: The Proposal for an Australian Bill of Rights' (Speech delivered at the James Cook University Law School, Townsville, 14 August 2008) <http://www.austlii.edu.au/au/journals/JCULawRw/2008/2.html>; Australian Law Reform Commission, Report 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (2 March 2016).

81 For example, of the 60 second reading speeches made with respect to the Citizenship Bill, 40 included specific reference to the scrutiny principles that form part of the SSCSB mandate, compared with 12 specific references to the notion of 'human rights' or related international law concepts.

82 For example 12 second reading speeches given with respect to the Citizenship Bill referred to human rights, with a smaller handful of these speeches engaging in relatively detailed analysis of international human rights law concepts, and one substantive reference to the work of the PJCHR.

CONCLUSION

The Citizenship Bill and Control Order Bill case studies show that particular parliamentary committees can emerge as more powerful than others, which in turn provides important insights into what committee features are most likely to enhance Parliament's reputation or facilitate rights-enhancing legislative change.

In the Citizenship Bill example, a myriad of factors led to the government and parliament conferring on the PJCIS report a high level of legitimacy. Significant amongst these factors are that the PJCIS is a committee with bipartisan membership and a strong, respected relationship with key government agencies. These features allow it to seek further justification for proposed measures, or explore the implications of alternative measures, in a politically safe environment and express these changes in a politically comfortable rights discourse.

The Control Orders example suggests that the LCA Committee's more diverse membership has the potential to increases the range and diversity of those involved in the inquiry process to promote more explicit parliamentary engagement with human rights concepts. It also highlights that parliamentary scrutiny of counter-terrorism laws can have important long term rights-enhancing results.

Both case studies suggest that providing meaningful opportunities for public participation helps to develop and entrench a broader culture of respect for the formal scrutiny process, among submission makers who begin to see their concerns or suggestions reflected in committee reports and recommendations, and parliamentarians themselves, who can begin to see a political as well as principled reason to take formal parliamentary scrutiny seriously.

The case studies also show that the legitimacy and status attributed to a particular parliamentary committee depends on both its legislative influence *and* its independence from the Executive. This may provide an important warning for the future effectiveness and legitimacy of both the PJCIS (which may be at risk of being 'too close' to law enforcement and intelligence agencies to be considered truly independent) and the LCA Committee (whose declining legislative influence in this area may result in key participants looking for other more effective forums to affect rights-enhancing change).

While the adequacy of the current model either as a form of rights protection or as facilitator of deliberative democracy may remain contested,[83] the case studies considered in this paper show that parliamentary committees can have a positive impact on the final shape of Australia's counter-terrorism laws, and on the reputation of the Commonwealth Parliament.

83 For an evaluation of Australia's parliamentary model of human rights protection see George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469; for a discussion of the role of parliamentary committees in facilitating deliberative democracy see Dominique Dalla-Pozza,, 'Promoting deliberative debate? The submissions and oral evidence provided to Australian parliamentary committees in the creation of counter-terrorism laws' (2008) 23(1) *Australasian Parliamentary Review* 39; John Uhr, 'Terra infirma?: Parliament's uncertain role in the 'War on Terror'. [Paper in Thematic Issue: Counter-Terrorism Laws.]' (2004) 27(2) *University of New South Wales Law Journal* 339.

New Kids on the Block or the Uusual Suspects? Is Public Engagement with Committees Changing or is Participation in Committee Inquires Still Dominated by a Handful of Organisations and Academics?

Pauline Painter

Pauline Painter is the Knowledge and Information Manager in the NSW Legislative Assembly.

ABSTRACT

Committees play an important role in the democratic system of government in providing opportunities for groups and individuals to engage with Parliament. Committees have traditionally provided opportunities for community engagement through submissions and public hearings. However, this has been dominated by key stakeholder groups, academics, government agencies and interest groups, all of whom can be collectively known as the 'usual suspects'.

With the changing face of technology, the new forms of participatory democracy and the rise of social change movements the article examines if this movement has had an influence on participation in committee inquiries. Movements such as Change.Org and Get Up have had success in bringing about policy change through direct petitioning of governments. But the mass petitioning of a committee inquiry presents challenges both procedurally and administratively. The article examines if this new interaction with committees has resulted in a change in the way the public engage.

INTRODUCTION

In 2004 Marc Bosc, the then Clerk Assistant of the Canadian House of Commons, wrote people's expectations of committees fell into three broad categories: 'the desire for information, the desire to be consulted and, thirdly, the desire to engage in dialogue with parliamentarians and with each other'[1] This article explores the possible changing face of committee community engagement. It will consider whether community engagement with committees is changing or if 'usual suspects' are still dominating in submissions to inquiries. The public now looks to new forms of participatory democracy and focus on single issue forms of involvement in politics. This has seen the rise of social change movements like Get Up and Change.Org, but are these really having an impact on inquires or are they just 'white noise'. The article will also consider if there are any implications for the *Defamation Act 2005*, with the increased use of social media by committees, particularly as platforms such as Twitter and Facebook were just starting when the Act became uniform.

1 Bosc, M, E-Democracy and the Work of Parliamentary Committees, *The Table, 200*4, pp. 27

TRADITIONAL ROLE OF A COMMITTEE

A modern democratic parliament attempts to provide representation for all citizens of a country[2] and a state. However, while such representation is a necessary condition for active participation in democracy, it may not be sufficient. Parliamentary committees provide opportunities for groups and individuals to be engaged with Parliament, and they play an important role in the democratic system of government (Barton, 1999). In 1978, the House of Commons Select Committee on Procedure described them as not an end in themselves, but 'a means to secure greater surveillance of the executive by Parliament'.[3] Traditionally committees have provided opportunities to groups and individuals to make contributions to the legislative process and to the discussion on public issues, as well as to scrutinise government and administrative actions.[4] Historically committees bring parliament to the people and the committee system operates as an 'interface between representative democracy and participatory democracy'.[5] But the reliance on traditional advertising methods have led to this attracting the 'usual suspects'[6] and most committee consultation with government agencies is by invitation only[7].

Marsh (2004) argues that parliamentary committees provide the forum where opinions from across the community can be voiced and where, according to him, bureaucrats, ministers, interest groups and independent experts appear 'on equal footing.'[8] In 2010 the House of Representatives Standing Committee on Procedure (HORSCOP) also concluded that the committee system was the 'interface between the Parliament and the public'[9] although the committee suggested that better use of tools such as teleconferencing, video conferencing and online surveys would enhance the experience for the community. Indeed, Dr Martin Drum (2015) believes that few 'outsiders, people not usually connected to parliamentary processes, or not usually close followers of politics, have even heard of parliamentary committees, much less the actual work they do, the submissions they receive, or the reports they produce.'[10]

Morris and Power (2009) in their study of Senate committee inquiries, found that the barriers to participation were higher for 'members of the public, or for smaller groups and voluntary organisations, than they are for larger lobby groups or the 'usual

2 Dermody, K, Holland, I and Humphery, E, Parliamentary Committees and Neglected Voices in Society, The Table 2006, pp. 45–54

3 First Report from the Select Committee on Procedure, HC (1977–78) p. 588, para 1.12

4 Bosc, M, 2004

5 House Standing Committee on Procedure, 2010, *Building a modern committee system: An inquiry into the effectiveness of the House Committee System*, House of Representatives, p. 41

6 Barton, K, 1999, '*Community Participation in Parliamentary Committees: Opportunities and Barriers*', Department of the Parliament Library Research Paper No. 10

7 Dermody, K, Holland, I and Humphery, E

8 Marsh, I, 2004, *Australia' Representation Gap: A Role for Parliamentary Committees?*, p.5

9 HORSCOP: 2010, *Building a Modern Committee System: An Inquiry into the Effectiveness of the House Committee System,* p.42

10 Drum,M, 2015, How Well do Parliamentary Committees Connect with the Public

suspects.'[11] More direct consultation with individuals in the community would be more desirable, especially for inquiries that relate to marginalised and vulnerable groups. Although their study found that individuals were just as likely to submit on 'big picture' issues that did not affect their day-to-day lives.[12] As Robyn Webber notes, for a Member of Parliament:

> …Their very jobs depend on their ability to hear, understand and interpret the views of the electorate.
>
> …Anyone can talk to the experts and the organised lobby groups but members of Parliament are especially placed to tap into the general community.[13]

Technology

This traditional approach is being challenged by the myriad of technological advances that have created what some call the 'information society'[14] which has changed the way society communicates. The use of smartphones and the increased use of the internet and social media have meant that people now expect their information instantaneously. There is now an expectation that people will be able to access information and communicate electronically with multiple institutions. Bosc (2004) believes that people expect the same connectivity and responsiveness from democratic institutions, 'this expectation has given rise to the expression 'e-democracy'' (Bosc, 2004, p.26) One writer, Howard Rheingold even went so far as to claim that the internet represented:

> a tool that could bring conviviality and understanding to our lives…the idea of a citizen-designed, citizen-controlled worldwide communications network is a version of technological utopianism.[15]

Unfortunately, Rheingold's view of utopia is probably not being fully realised. The internet is indeed citizen-designed and controlled and social media enables user generated material. It is true that the vast majority of committees now use Twitter to disseminate information and while the number of Twitter followers for the New South Wales (NSW) Legislative Assembly has been slow since we went live in September 2014 (864 followers on 15 November 2016 – @NSWParlLA) it has become a normal channel of communication for all committee inquiries. The United Kingdom has moved onto another level with regards to their use of Twitter, famously using it to generate ideas for questions that could be put to the minister Michael Gove in an inquiry. #AskGove[16] generated 3,411 questions in advance of the minister attending the hearing and then

11 Morris, J and Power, S, 2009, *Factors that Affect Participation in Senate Committee Inquiries,* Crawford School of Economics and Government Australian University, p. 3

12 Morris, J and Power, S, 2009, p. 9

13 Webber, R, quoted in Morris, J and Power, S, 2009, p.8

14 Bosc, p.26

15 Rheingold, H, *The Virtual Community: Homestead on the Electronic Frontier,* MIT Press, 1995

16 https://twitter.com/hashtag/askgove (accessed 13 January 2016)

8,101 questions during the hearing.[17] The committee then used Storify to create a unified account of proceedings that could be broadcast on YouTube.[18]

However, as Baczynski (2009) points out most committee communication is based on a 'top-down' model where end users have no means to contribute directly with the inquires on the website pages created by the committees.[19] Most committee inquiries still rely on written submissions and public hearings. But how does this sit with the general public's expectations and the preferred way of interacting, which are very different?

CHANGING FACE OF COMMUNITY ENGAGEMENT

Today's community have 24/7 access to information at the click of a button. They also have the ability to critically assess this and decide what are their own needs and interests.[20] Parvin and McHugh (2005) argue that the media, now bigger, more powerful and accessible than ever before also provide news and political analysis around the world twenty four hours a day[21]. It is very easy now for people to watch events unfold and to make a comment on media such as Twitter. Despite talk of political participation being in decline (Parvin and McHugh, 2005, Leston-Bandeira, 2014) citizens are actively speaking for themselves, expressing their views and concerns to the wider community and to those elected to represent them.[22]

Society has become more aggregated and fluid with a decline in political party membership and electoral turnout (Marsh, 1995, Parvin and McHugh, 2005). However, in Citizen Audits that were conducted in the UK, jointly by the Hansard Society and the Electoral Commission, they found a 'good deal of evidence of civic vitality'.[23] Parvin and McHugh (2005) concluded that 'it is not a polity in disintegration but one undergoing real and significant change.'[24] While many people think Parliaments are conservative bodies, constrained by traditional practices,[25] legislatures are engaging in new forms of public communication and engagement. This is symptomatic of the information age where public institutions are communicating to their constituents through multiple

17 Flinders, M, Marsh, I and Cotter, L, 2015, *Building Public Engagement: Options for Developing Select Committee Outreach – A report for the Liaison Committee*, p. 34

18 UK Parliament YouTube Channel, https://www.youtube.com/user/UKParliament/videos

19 Baczynski, J, 2009, *Opportunities for Greater Consultation? House Committee Use of Information and Communication Technology,* Crawford School of Economics and Government Australian University

20 Leston-Bandeira, C, 2014, *How public engagement amplifies parliamentary representation,* University of Hull

21 Parvin, P and McHugh, D, Defending Representative Democracy: Parties and the Future of Political Engagement in Britain: *Parliamentary Affairs*, Vol. 58, No. 3, 2005

22 Leston-Bandeira, C, 2014

23 Hansard Society and the Electoral Commission*, Audit of Political Engagement 2005,* quoted in Parvin, P and McHugh, p. 636

24 Parvin, P and McHugh, p. 636

25 Webber, R, 2001, Increasing Public Participation in the Work of Parliamentary Committees

formats and outlets.[26] Parliaments, including its committees, are taking a proactive approach through websites, social media platforms such as Twitter, Facebook, and YouTube in order to communicate with the public, including.

WHAT IS A SOCIAL CHANGE ORGANISATION?

It is important to acknowledge that the public need a mechanism that is not always part of the structured participatory process.[27] There are many informal ways affected and interested publics can create what Carson (2008) called 'insisted' or 'invited' spaces to contest issues. Traditionally, these include street protests, social media campaigns or consumer boycotts.[28] These spaces have partly been filled in the last ten years by social change organisations and the use of online petition platforms. As Marsh, Cotter and Flinders (2015) note the 'political landscape has become more complex and fluid and in response, more and more members of the public prefer to focus on single issue campaigns.'[29] The challenge for committees is to be receptive to these organisations, as its users start to send petitions to their inquiries.

Emeritus Professor John Warhurst AO, believes that the Australian community has had a growing attraction to 'participatory/direct democracy in many new social movements and to forms of involvement, like the social media group, GetUp, that are more immediate, direct and hands on.'[30] Australia's most prominent organisations in the online petition space is the Not for Profit progressive activist groups GetUp[31] and the for-profit social enterprises Change.org[32]. While both organisations' end goal is to create change by pressuring decision-makers, the way in which they operate is completely different. GetUp was launched in August 2005 and now has a membership of 1 million people. It refers to itself as 'a new independent political movement to build a progressive Australia'[33] and relies on its members to mobilise and act on initiatives such as sending emails to MPs, signing petitions or attending events. GetUp's major campaigns have included support for same-sex marriage, condemning calls for violence against Julian Assange and support for an end to mandatory detention. On the other hand, Change.org, launched in 2007 is a for-profit online petitioning platform which is free for the public to use and relies on advertising for revenue. There are many

26 Hendriks, C, & Kay A, *Connecting citizens to legislative deliberations: public engagement in committees*, paper presented at 2015 Australian Political Studies Association Annual Conference, Canberra

27 Hendriks, C, & Kay A

28 Carson, L, 2008, Creating Democratic Surplus through Citizens' Assemblies, *Journal of Public Deliberation* 4 (1) Article 5

29 Flinders, M, Marsh, I and Cotter, L, 2015, *Building Public Engagement: Options for Developing Select Committee Outreach – A report for the Liaison Committee*

30 Warhurst, J, 2011, *'What's the Matter with Parliament',* The 'Order of Australia Association' ANU Lecture, p.6

31 https://www.getup.org.au/about (accessed 7 January 2016)

32 https://www.change.org/about (accessed 7 January 2016)

33 http://www.probonoaustralia.com.au/news/2012/11/online-petitions-new-activism-tool-success# (accessed 8 January 2016)

examples of successful petitions; a notable one for NSW saw a petition by a fourteen year old victim of domestic violence bring about a change in the NSW Department of Education school syllabus.[34]

'Clicktivism'

However, cynics argue that signing an online petition is like joining a Facebook group, takes mere seconds, achieves little, and doesn't encourage 'clicktivists'[35] to engage properly with the issues concerned. Critics of online activism have defined 'clicktivism' as disposable politics.[36] It lets people click a button then sit back, feeling they have changed something when in fact they have done very little. Internet theorist Evgeny Morozov calls people engaging in online petitions 'slacktivists'[37] claiming that they encourage previously tenacious activists to become lazy and complacent.

Impact on committee inquires

The impact of online petitions from Change.org to committee inquires has been limited to one inquiry in NSW. The NSW Joint Select Committee into Companion Animal Breeding Practices received 2,200 petitions expressing concerns about 'puppy farms' in NSW.[38] These pro-forma type submissions, while supporting a particular point of view, do not provide the committee with balanced amounts of useful evidence, but unfortunately they do place an administrative strain on the department. As Morris and Power (2009) point out, while you would not want to discourage individuals from participating in inquiries in this manner, this type of evidence does not assist the committee's deliberations. Nor are large amounts of submissions an accurate reflection of public feeling on an issue, it may simply indicate the superior organisational skills of a lobby or interest group in mobilising its membership to fill in the petitions. In the future, the public will need to understand that in order for the engagement to be meaningful, they will need to provide some evidence or commentary that the committee can use. The flip side to this would be the huge administrative burden this would place on a committee secretariat.

34 https://www.change.org/p/nsw-government-educate-children-about-domestic-violence-and-how-to-seek-help [accessed 2 August 2015]

35 http://www.theguardian.com/commentisfree/2010/aug/12/clicktivism-ruining-leftist-activism (accessed 7 January 2016)

36 https://avaaz.org/en/about.php (accessed 7 January 2016)

37 http://www.npr.org/templates/story/story.php?storyId=104302141 (accessed 7 January 2016)

38 http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/760AAB0E156DDF9DCA257EAE00000B7E?open&refnavid=C05_1 (accessed 8 January 2016)

ROLE OF THIRD PARTY ORGANISATIONS

As previously mentioned lobby and interest groups mobilise their members to make submissions to committee inquiries. In recent years we have seen the use of form letters and more recently online petitions. In two recent NSW inquires, third party groups have become more directive and proactive in providing direction in what to say and encouraging members to make submissions.

Inquiry into vocational education and training in NSW

General Purpose Standing Committee No. 6 published 278 submissions on the committee website for its inquiry into vocational education and training in NSW. Of these, number 218 was a submission from the Public Service Association (PSA) of NSW, a public sector union that had sent out an email to all its members encouraging them to take action and make a submission. The email included…

'NSW Parliamentary Inquiry into TAFE
Make your voice heard
Since we commenced consultation we have received close to 100 submissions and held over 20 meetings with members and the public concerned for the future of TAFE and vocational education and training in general. Time is running out to contribute... Contribute to the PSA's submission – provide a detailed comment HERE, addressing some or all of the terms of reference
(https://www.surveymonkey.com/r/inquiryTAFE)

- Provide your own submission to the Inquiry HERE
- Encourage your friends and family to write their own submission to the Inquiry.[39]

Survey monkey is an online survey tool that provides a link to a web based survey that on completion is sent direct to the PSA. This provides the ability for the surveys to be anonymous if required. The results can then be analysed and collated. Initially the PSA had intended to send in all the submissions they received from their members, however, the decision to provide a single submission was taken in consultation with the committee secretariat, in order to reduce the administrative burden of receiving a high volume of petitions. The submission made by the PSA takes account of the consultation with its members. It could be argued that there is an inherent danger in presenting a summary of so many people's views as a single voice, even if the general opinion is the same. But in this case, as the organisation is a representative body i.e. a trade union, it is better for the inquiry to have a quality submission than a high quantity of petitions all saying the same thing. It also demonstrates that good communications and liaison with the committee's secretariat helped manage the administrative burden that could have potentially occurred if all the petitions had been submitted.[40]

39 Email provided by NSW PSA staff member

40 Interview with Madelaine Foley, Legislative Council Committee Director

Inquiry into adequacy of the regulation of short term holiday letting in NSW

The Legislative Assembly Environment and Planning Committee resolved on the 9 September 2015 to inquire into the regulation of short term holiday letting in NSW. While submissions closed on 9 November 2015, at the time of writing this paper, the committee has not resolved to publish the submissions. The committee secretariat has advised that they received a total of 210 submissions. There were two interesting aspects to the submissions in this inquiry, both from the active engagement of a third party and a third party acting as an intermediary for other parties in forwarding submissions on their behalf.

One of the interested parties to the inquiry is Airbnb, in his press release announcing the inquiry the Committee Chair, Glen Brookes MP announced:

> We are particularly interested in the growth of the sharing economy, Mr Brookes said, and how online platforms like Airbnb and Stayz are changing the way people book their holidays and rent out their homes.[41]

Airbnb, founded in August of 2008 and based in San Francisco, California, is a community marketplace for people to list and book accommodation online. It now offers accommodation in more than 34,000 cities and 190 countries.[42] For this inquiry Airbnb sent out an email to all its clients in NSW, the email included the following:

> As the outcome of this inquiry might affect you as an Airbnb host, we wanted to make you aware of this opportunity to raise your voice. After all – who better to provide feedback on the benefits of home sharing than the very people who host? If you're interested in sharing your story, simply click the "get involved" button and we'll be in touch with some information to help you submit your views to parliament.
>
> Thank you, Chris & Deb. The Airbnb community wouldn't be what it is without hosts like you!
>
> Kind regards,
>
> The Airbnb Team'[43]

On clicking the 'get involved' button clients then received an email containing a pdf document providing instructions on how to complete the submission to the inquiry. The *'How to Guide: Submitting and Effective Public Comment'* document opened with the statement:

> As an Airbnb host, its important your positive personal stories and great experiences are heard…It's also a great opportunity to dispel misunderstandings

41 Legislative Assembly Committee on Environment and Planning, Inquiry into short term holiday letting, media release, 12 September 2015

42 https://www.airbnb.com.au/about/about-us (accessed 8 January 2016)

43 Email provided by NSW staff member who is also an Airbnb host

> by providing expert testimony on what Airbnb means to you, your family and the wider community.[44]

The document provided guidance on:

- Questions your letter should be able to answer
- Effective structure of a letter
- Parliament guidelines
- Example letter.

In this example the individual hosts are encouraged to made submissions to the inquiry and submit them as individuals. This differs from the Legislative Council inquiry, as Airbnb is not a representative body and would not be making a submission 'on behalf' of its members. However it could be argued that this increased involvement by external bodies distorts the inquiry process and potentially undermines the evidence, which, when presented in the form suggested above is of limited value to the committee.

Another submission received by the secretariat involved concerns from residents sent to a council which were then forwarded to the committee. The collection of emails written by local residents had all been sent to the council initially. This could potentially raise concerns regarding the publishing of the submission, as these emails could have potentially been published before and therefore where does the legal liability reside in order to apply the protection a submission receives under parliamentary privilege? If the information contains defamatory remarks, could they claim a defence of absolute or even qualified privilege under the *Defamation Act 2005?*

Parliamentary Privilege of Freedom of Speech

The term parliamentary privilege refers to the 'special rights and immunities which belong to the Houses, their committees and their members, and which are considered essential for the proper operation of the Parliament'.[45] Under Article 9 of the Bill of Rights 1688:

> …freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.[46]

Members are absolutely privileged from suit or prosecution in respect of anything they say in the course of proceedings in Parliament, 'Provided their statements are in accord with the rules and practices of the House, Members are able to express themselves as they judge fit.' [47]

44 Airbnb, 2015, 'How to Guide: Submitting and Effective Public Comment'

45 B.C Wright, *House of Representatives Practice*, 6th Ed, 2012, p.731

46 Quoted in B.C Wright, *House of Representatives Practice*, 6th Ed, 2012, p.735

47 B.C Wright, *House of Representatives Practice*, 6th Ed, 2012, p.736

Parliamentary privilege is also important for parliamentary staff, providing them with a framework in which they can work.[48] Staff members assisting committees provide advice to the parliamentarians on the application of the immunities. Submissions to a parliamentary committee attract the protection of parliamentary privilege under the *Defamation Act 2005* and the *Parliamentary Papers (Supplementary Provisions) Act* 1975.[49] Parliamentary committees are treated as parliamentary proceedings to which privilege applies. No action can be taken against the person making the submission, and the submission cannot be used in a court or tribunal. However, any replication of the submission does not attract the same protection. As referred to earlier, with the increasing influence of third parties there may be 'many voices' within the submission, and therefore if the submission contains defamatory comments, is the current legislation too narrow and out of date? What influence does social media have on defamation? A more detailed look at *the Defamation Act 2005* is discussed later in the article.

PROACTIVE APPROACH TO ENGAGEMENT

Parliamentary committees are increasingly looking for new ways to enhance public participation. The use of technology by committees to broaden avenues for members of the public to engage with the committee process[50] has been used by the NSW Legislative Council General Purpose Standing Committee No. 6. In its Inquiry into Local Government in New South Wales the committee trialled an online questionnaire, 'providing an innovative method for gathering public feedback in relation to the matters relevant to the inquiry'.[51] The strategy to use online questionnaires for committee inquires was developed in response to the increasing number of inquires receiving high volume submissions. The majority of submissions for high volume inquiries were from individual members of the public. These, as already discussed, can be very short and often address only one or two matters of interest to the inquiry. As with the Legislative Assembly inquiry, existing administrative processes created a strain on the secretariat's time and resources.

The questionnaire did not replace the normal submission process, which was still available for individuals and organisations wanting to make more detailed responses to the inquiries terms of reference. The online questionnaire contained 31 questions, both multiple choice and open-ended questions. The committee received 795 responses to the questionnaire, although a significant number of respondents did not complete all of the questions.[52] This compared with 204 standard submissions. On reflection there were too many questions. While this was not the intent of the secretariat,

48 Wright, B, 2007 *Patterns of Change – Parliamentary Privilege*

49 Grove, *NSW Legislative Assembly Practice, Procedure and Privilege*, 2007, p. 233

50 Baczynski, J, 2009

51 GPSC No. 6, 2015, Evaluation report for the online questionnaire, Inquiry into local government in NSW

52 GPSC No. 6, 2015, Evaluation report, p. 3

not surprisingly the composition of the questionnaire reflected a heavy influence by the members of the committee, both in terms of the number and the framing of the questions.

The committee emphasised that the questionnaire was not statistically valid.[53] Respondents were considered to be self-selected, in that they chose to participate and therefore were not considered to be a representative sample of the population. All results that were included in the committee report included this caveat.

In its evaluation of the questionnaire, the committee concluded that the number of responses received indicated success in terms of reducing the administrative burden and it was 'hoped it provided an alternative means for people who otherwise may not have participated in the inquiry'.[54] This has also been found by the House of Commons, which have been using online consultations since 1998.[55] Coleman (2004) found that the e-consultations have broadened the avenues for members of the public to engage with the committee process. He found that it has also given committee members an additional mechanism to gather evidence and canvass community views among a wider group.

IS ASTROTURFING NOW A FEATURE OF AUSTRALIAN INQUIRES?

Another interesting development with regards to committee submissions is an American import. Astroturfing. It is an American coined phrase that does indeed take its name from the artificial turf, as it relates to fake 'grass roots'. Sharon Beder, an honorary professor at the University of Wollongong, has written extensively on the topic and defines it as 'front groups who try to disguise who they are and try to be something they're not'. Beder argues that what makes astroturfing different from just promoting a corporate agenda is the intention to deceive.[56]

The recent experience of a Senate inquiry has exposed the problem for secretariats in checking the veracity of a submission made to an inquiry, and a possible example of astroturfing. The Inquiry into Tax and Superannuation Laws Amendment (Better Targeting the Income Tax Transparency Laws) Bill 2015 received a submission from the Family Office Institute Australia Pty Ltd.

The submission opened:

> The Family Office Institute Australia Pty Limited (the Institute) has recently been created to represent, assist and promote Australian family owned companies. This

53 GPSC No. 6, 2015, Evaluation report, p. 3

54 GPSC No. 6, 2015, Evaluation report, p. 5

55 Coleman, S, Connecting parliament to the public via the internet: two case studies of online consultations, *Information, Communications and Society, 2004*, 7(1), pp.1–22

56 https://www.choice.com.au/shopping/packaging-labelling-and-advertising/advertising/articles/front-groups-and-astroturfing (accessed 12 January 2016)

> issue before the Senate Economics Legislation Committee is one of the drivers for the creation of the Institute. Interest in the Institute by family offices has been significant and every family office we have spoken to has expressed concern about current tax disclosure regime.[57]

The inquiry only received nine submissions. The final report quoted extensively from the submission from the Institute and the Committee supported the bill, with the backing of the crossbenches. There was a dissenting report by Labor Senators and the Australian Greens.[58]

A subsequent Fairfax Media investigation however, found that the Institute had no members and was established by 'two lawyers and a Canberra lobbyist who represent Australia's ultra-rich in disputes with the Australian Tax Office'.[59] As a result of exposure in the media, Senators Nick Xenophon and Ricky Muir reversed their previous positions. Greens Senator Peter Whish-Wilson said the 'Better Targeting the Income Tax Transparency Laws Act needed to be repealed because the Senate had been 'astroturfed' and 'conned' by the Family Office Institute'[60]. Despite the dissent in the committee report the bill passed both houses, receiving assent on 23 November 2015, with the opposition amendments being defeated.[61]

This interaction with the committee raises questions regarding how committee secretariats are able to check the veracity of submissions. It is probably true to say that most submissions are taken on face value and it is therefore difficult to say if 'astroturfing' is a big feature of NSW committee inquiries or if this recent example is indeed the first example in Australia. However technology assists in making it easier to make a submission and to disseminate the information, so care must be taken and there should be, at the very least, an awareness of the risks.

HOW DOES THIS IMPACT THE DEFAMATION ACT?

As already stated, submissions to a parliamentary committee attract the protection of parliamentary privilege under the *Defamation Act 2005*. In all state jurisdictions in Australia, since 2006 the defamation laws are uniform and the legislation is now known as the *Defamation Act 2005*. A defamatory statement may be defined as one which tends to 'lower a person in the estimation of his fellow men by making them think

57 Submission 8, Family Office Institute Australia Pty Limited, Inquiry into Tax and Superannuation Laws Amendment (Better Targeting the Income Tax Transparency Laws) Bill 2015

58 The Senate, Economics Legislation Committee, Report on the Inquiry into Tax and Superannuation Laws Amendment (Better Targeting the Income Tax Transparency Laws) Bill 2015, October 2015

59 http://www.smh.com.au/federal-politics/political-news/the-institute-with-no-members-embarrasses-senate-committee-20151029-gkm71n (accessed 12 January 2016)

60 http://www.smh.com.au/federal-politics/political-news/senate-repeals-tax-secrecy-law-after-astroturf-revelations-20151111-gkwm10.html#ixzz3wzyvKvuR (accessed 12 January 2016)

61 http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5518 (accessed 12 January 2016)

the less of him. Frequently, it takes the form of an imputation calculated to bring the plaintiff into hatred, contempt or ridicule.'[62]

The key elements of defamation are:

- The matter must be capable of bearing a defamatory meaning (tarnish reputation)
- Matter must be published
- Matter must relate to the plaintiff (cannot sue for someone else)
- Absence of lawful justification or defence.

According to the High Court in *Lange v Australian Broadcasting Corporation*:

> The purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech. It is not to be supposed that the protection of reputation is a purpose that is incompatible with the requirement of freedom of communication imposed by the Constitution. The protection of the reputation if those who take part in the government and political life of this country from false and defamatory statements is conducive to the public good.[63]

The Act has a number of defences, including absolute and qualified privilege.

Section 27 *Defamation Act 2005* provides a defence of *absolute privilege* for:

a. matter published in the course of the proceedings of a parliamentary body
b. matter published in the course of the proceedings of an Australian court or Australian tribunal
c. matter published on an occasion that, if published in another Australian jurisdiction, would be an occasion of absolute privilege in that jurisdiction, or
d. matter published by a person or body in any circumstances specific in Schedule 1 [of the Act]

The publication of defamatory statements is in some instances protected by qualified privilege. Section 30 (1) of the *Defamation Act 2005* states that there is a 'defence of qualified privilege for the publication of defamatory matter for a person (the recipient) if the defendant proves that:

a. the recipient has an interest or apparent interest in having some information on some subject, and
b. the matter is published to the recipient in the course of giving to the recipient information on that subject, and
c. the conduct of the defendant in publishing that matter is reasonable in the circumstances'.

The defence of qualified privilege allows free communication without the risk of an action for defamation – usually where the person communicating the statement has a legal, moral or social duty to make it and the recipient has an equivalent interest in

62 Parker's B definition, in Parmiter v Coupland (1840) 6 M&W 105, 108)

63 (1997) 189 CLR 520 at 568

receiving it. Government and political matters are proper subjects for public discussion and such discussion is covered by the defence of qualified privilege. To maintain the defence of qualified privilege for such publications, the publication must not be motivated by malice and in determining whether there is malice in these cases, the court will consider whether the publisher has acted reasonably.

Does the *Defamation Act 2005* have any impact on the involvement of third parties in the committee inquiry process? The submission by a local council, providing the material to the committee, but acting only as a distributor provides an interesting example. If the council made a supporting submission and the original material had been already published, would the original emails attract the defence of absolute privilege under the *Defamation Act 2005*? As already stated, a matter published in the course of the proceedings of a parliamentary body is protected. However, if the information has already been disseminated, then the protection will only apply to new part of the submission. Secretariats are already very aware and careful about redacting information from submissions before publication; however consideration may need to be given to the role of third parties in making submissions.

With regards to a third party, there is a defence under Clause 32 of the Act of innocent dissemination. Here the defendant would have to prove:

a. the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and
b. the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory, and
c. the defendant's lack of knowledge was not due to any negligence on the part of the defendant.

For the purposes of the Act, a 'subordinate distributor' is someone who was not the author or originator of the matter.[64] This defence is also used for internet providers (*Thompson v Australian Capital Television Pty Ltd*[65]). For example, the provider of an Internet email service will generally not be treated as being the first or primary distributor of defamatory matter contained in an email sent using the service. Accordingly, a service provider will be treated as being a subordinate distributor for the purposes of the defence, unless it can be shown that the service provider was the author or originator of the matter or had the capacity to exercise editorial control over the matter.[66]

64 http://www.austlii.edu.au/au/legis/qld/bill_en/db2005109/db2005109.html (accessed 14 January 2016)

65 (1996) 186 CLR 574

66 http://www.austlii.edu.au/au/legis/qld/bill_en/db2005109/db2005109.html (accessed 14 January 2016)

Defamation and social media

When uniform defamation laws were approved across Australia on 1 January 2006, Twitter did not exist and Facebook was in its infancy.[67] Social media has transformed ordinary people into publishers and as a consequence social media related defamation lawsuits are on the rise in Australia.[68] However, the courts are only just beginning to grapple with the application of defamation law to social media platforms like Twitter and Facebook. Anneka Frayne, a Solicitor with Stacks Law Firm commented that, 'Social media users must realise that by commenting on Facebook and replying to an original defamer's comment they may be causing imputations to arise in relation to somebody's reputation.'[69] People who Tweet or post a defamatory statement now face many of the same risks as the original publisher or writer. Sally Bercow (wife of the Speaker of House of Commons) had to apologise for a defamatory Tweet that she sent about Lord McAlpine. She acknowledged and apologised for her 'irresponsible use of Twitter'[70] and the matter was settled in the High Court. In some cases it can be more serious as a lot of social media goes directly to the people who have an interest in a particular matter and the information remains searchable and very difficult to delete. A good example of this is *Trkulja v Google* (2012). In this instance the Victorian Supreme Court found Google liable for online defamatory publication through the automated mechanism when its search function produced material that associated the plaintiff's name along with the names and images of high-profile criminal figures (*Trkulja v Google* (No 5) [2012] VSC 533)[71], despite his request for them to be removed.

The former Australian Treasurer Joe Hockey, won a defamation case in 2015 against Fairfax Media over a newsstand poster and Tweets, the former treasurer argued implied he was corrupt and 'for sale' to 'political donors'.[72] Justice Richard White found the poster and Tweets, published by Fairfax Media on 5 May 2014, had defamed Hockey, and were published with malice. He awarded 'the treasurer $120,000 for a Sydney Morning Herald newsstand poster, headed 'Treasurer for sale', and $80,000 for two Tweets – reading 'Treasurer Hockey for sale' – sent by the Age'.[73]

67 http://www.smh.com.au/comment/its-the-vibe-time-for-states-to-tackle-defamation-law-reform-20151216-glpkfp.html (accessed 11 January 2016)

68 http://www.abc.net.au/news/2015-08-25/social-media-defamation-cases-on-the-rise/6723328 (accessed 10 January 2016)

69 http://www.stacklaw.com.au/web/page/defamation-on-social-media-can-cost/news/3170?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original (accessed 10 January 2016)

70 See Sally Bercow (wife of the Speaker of House of Commons) defamation case, where she tweeted a defamatory remark about Lord McAlpine. She acknowledged her irresponsible use of Twitter

71 http://www.claytonutz.com/publications/edition/23_may_2013/20130523/googles_organic_search_results_defamatory-where_to_now_for_search_engines.page (accessed 14 January 2016)

72 http://www.theguardian.com/australia-news/2015/jun/30/joe-hockey-wins-200000-from-fairfax-in-treasurer-for-sale-defamation-case (accessed 9 January 2016)

73 http://www.theguardian.com/australia-news/2015/jun/30/joe-hockey-wins-200000-from-fairfax-in-treasurer-for-sale-defamation-case (accessed 9 January 2016)

How does this affect the work of committees? Bernard Wright, the former Clerk of the House of Representatives cautioned back in 2007 about the management of submissions by committees. He commented that damage can be done because of a 'false or reckless attack or the publication of personal details'[74] that are carried quickly by modern technology to a much wider audience electronically that can 'continue to live in databases and systems even if it is withdrawn or corrected.'[75] While he was not talking about defamatory material, I think the connection between how electronic information has a very different life is particularly relevant and committees need to think carefully about how they manage data and the personal information they handle. He suggests that the challenge may be more about the application of procedure rather than the procedures themselves.[76]

The use of Twitter by committees has enabled information about committee work to reach a whole new audience and allowed that information to be spread quickly and easily. However, that immediacy has its dangers. The reliance on staff to act with an element of autonomy, in order to get the information out into the Twittersphere quickly has its inherent risks. Policies and procedures can be put in place and NSW has done that with both an external policy for the public[77] and an internal policy for staff who contribute to the site.

CONCLUSIONS

Lobban (2012) states, 'committees are the vital organs of the parliament; they are the speaking, moving, living faces of the legislature and potentially form a critical connection between the community and an arm of government unlike any other that exists in our system'[78] But the challenge for parliamentary committees today is how to keep that critical connection relevant and reduce the risk of the 'same community or lobby group repeatedly appearing as key witnesses'[79] and the public no longer engaging with the committee process. The use of social change organisations shows there is a demand by the public to do things another way. Research shows a clear desire by the public to 'do politics differently' (Flinders, Marsh & Cotter, 2015, p.6) through non-traditional methods that are more agile and flexible.

74 Wright, B, 2007 *Patterns of Change – Parliamentary Privilege*

75 Wright, B, 2007 *Patterns of Change – Parliamentary Privilege*, p.25

76 Wright, B, 2007 *Patterns of Change – Parliamentary Privilege*, p.26

77 http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/LegislativeAssemblyonlineTwitterpolicy (accessed 14 February 2016)

78 Lobban, P, Who cares wins: parliamentary committees and the exectutive, *Australasian Parliamentary Review, Autumn 2012,* Vol.27(1), p.190

79 Derigo, N, The place for innovation: Can and should parliamentary committee employ new forums for public participation and new mechanisms for the collection of evidence? ANZACATT Parliamentary Law, Practice and Procedure Course, p.4

This article has found that the interventions of third parties have encouraged more people to engage with the committee process, which can be intimidating and full of formal terminology and processes. The involvement of third parties has enabled people to engage with groups they know and are familiar with, and who have provided them with the support they need to prepare their submission. However the negative side of this is that, to a degree, people are being told what they should say. In some cases, the submission is no more than a form letter process with information that people can then use when making the submission personal to them.

The challenge is that committees rely on formal submission evidence and while we have all these new interactions and activity, most of it does not generate the evidence or argument the committee needs for its inquiry and ultimately its report. Morris and Power (2009) acknowledge this, but also acknowledge the committee processes risk domination by 'cliques of witnesses comprising mainly lobby groups and a handful of organisations and academics.'[80] This does not appear to be changing, but it will be down to the committee secretariats to continue with their good work by coming up with innovative ideas, such as questionnaires to engage more with the broader community. This will ensure that other 'voices' are heard. The evolving use of social media will lead to a wider range of people being aware of the work of committees and committee staff should actively monitor what is happening in this space. They should not be afraid to try new ideas to engage the community in the committee process.

80 Morris, J and Power, S, 2009, *Factors that Affect Participation in Senate Committee Inquiries,* Crawford School of Economics and Government Australian University, p.1

Fixed Reporting Dates for Senate References Committees: Are They Effective?

Colby Hannan

Colby Hannan is a Principal Research Officer at the Department of Senate

ABSTRACT

This article studies the reporting dates of Senate references committee inquiries during the 44th Parliament to assess compliance with initial reporting deadlines. The analysis establishes that, for most inquiries, the committees did not meet the reporting date set when the inquiry was referred; instead, committees sought and received the Senate's approval to extend the reporting deadline, with some inquiries extended several times. The article discusses the implications of reporting date extensions for the conduct of inquiries and questions whether the practice of fixing reporting dates, in its current form, is necessary or desirable for references committee inquiries.

INTRODUCTION

When a senator proposes a new inquiry for a Senate references committee,[1] it is established practice, but not a requirement, that a date by which the committee is to report will be specified. In recent parliaments, but particularly during the 44th Parliament, references committees managed a heavy workload and, in so doing, it is evident they regularly failed to meet initial reporting dates. Reporting timeframes were often extended, occasionally several times. This article presents data quantifying the number of times references committee inquiries were extended during the 44th Parliament and the number of extensions received.

This article notes that, in most cases, fixed reporting dates influence decisions regarding the conduct of inquiries, such as the date set by committees for the receipt of submissions. A reporting date that a committee is unlikely to achieve, perhaps because of the committee's existing workload in relation to other inquiries or due to

1 The references committees are part of a system of paired legislative and general purpose standing committees specialised by subject. Each pair comprises a legislation committee and a references committee. Legislation committees inquire into bills, estimates, and the annual reports and performance of agencies allocated to them. References committees conduct inquiries into other matters referred to them by the Senate. These committees are part of a broader committee system that includes domestic standing committees, legislative scrutiny standing committees, select committees and joint committees. For a detailed overview of the committee system, see Harry Evans and Rosemary Laing (eds.), *Odgers' Australian Senate Practice*, 13th edition, Department of the Senate, Canberra, 2012, pp. 44376.

the complex subject matter of the new inquiry, may have negative implications for the conduct of the inquiry and stakeholder engagement in future inquiries. The article also discusses some of the potential advantages and disadvantages associated with fixed reporting dates for references committee inquiries. It concludes by presenting options for further consideration.

METHODOLOGY

The scope of this article is limited to inquiries conducted in the 44th Parliament by the Senate references committees. To compile the data for this study, the following information was reviewed for each inquiry:

- the reporting date fixed in the terms of reference;
- the date(s) set for the receipt of written submissions;
- the number of extensions the committee received; and
- the date the inquiry was completed.[2]

Select committees are not included because a final reporting date for a select committee must be fixed.[3] Given the various sources and nature of their references, nor are joint committees.[4] Legislation committees are also excluded as these committees generally examine bills and the timing of a bill inquiry report has implications for when that bill may be debated.[5]

The system of paired legislation and references committees, with most members serving on both committees, means the workload of a legislation committee is likely to have implications for the references committee. Another complication is that legislation committees can conduct inquiries that are similar in many respects to references committee inquiries and vice versa. Inquiries into private senator's bills are often similar to references committee inquiries in how they are conducted. Legislation

2 Predominantly, the data used for this paper were obtained from committee reports and webpages managed by committee secretariats. In instances where additional information was needed, the *Journals of the Senate* were used. This method is expected to have a high degree of accuracy, although there is a low risk that a small number of observations about extensions received have been overlooked or that typographical errors in committee reports or webpages affected the data.

3 Standing order 28.

4 Although joint committees conduct inquiries that are similar to references committee inquiries, they also conduct inquiries into bills, AuditorGeneral reports, proposed public works and treaties. Moreover, any issues associated with reporting date extensions appear unique to the pairs of Senate standing committees because of the significant workload they often manage.

5 Standing order 115(3) provides that the further consideration of a bill referred to a standing or select committee shall be an order of the day for the reporting date or, where no reporting date has been fixed, the sitting day after the day on which the committee reports on the bill. The rationale behind this standing order was explained by the Procedure Committee in 1991, which observed: 'Where the reporting day is known, it is reasonable that the bill may be proceeded with on that day, but where there is no fixed reporting day Senators could well be taken by surprise by a bill being proceeded with immediately after the presentation of the committee report'. Senate Standing Committee on Procedure, *Second Report of 1991*, pp. 56; cited in Rosemary Laing (ed), *Annotated Standing Orders of the Australian Senate*, Department of the Senate, Canberra, 2009, p. 376.

committees also undertake inquiries into the performance or annual report of departments and agencies that resemble references committee inquiries. In addition, bills can be referred to references committees. The last two types of inquiries are uncommon, although they did occur during the 44th Parliament. Nevertheless, rather than attempting to group similar inquiries conducted by the various types of committees, this article will consider only references committee inquiries.

In total, references committees conducted 132 inquiries in the 44th Parliament. This figure is greater than the number of completed inquiries, as 35 inquiries lapsed on 9 May 2016 when the Senate and House of Representatives were simultaneously dissolved for the 2 July 2016 general election. Many of the lapsed inquiries were well-advanced, with public hearings conducted and substantial interim reports presented. Others, however, were relatively new and had not progressed beyond receiving submissions. Some inquiries also were referred with the likely intention that they would span two parliaments, with most of the inquiry activity to occur in the next parliament.[6]

The total number of inquiries also includes inquiries that lapsed at the end of the 43rd Parliament but were re-referred at the start of the 44th Parliament with new fixed reporting dates. Following re-referral, some of the reporting dates were extended further. Other re-referred inquiries were completed in accordance with the new reporting date, although it is noteworthy that many of these had been extended several times during the previous parliament.[7]

This article targets inquiries completed in the 44th Parliament (97 inquiries) and other inquiries where the committees involved intended to, or arguably had the opportunity to conclude them, during the 44th Parliament (17 inquiries). That is, inquiries have been excluded if they lapsed at the end of the 44th Parliament unless the committee sought an extension for them. This is to distinguish inquiries that did not progress

6 For example, an inquiry was referred to a references committee on 2 December 2015 with a reporting date of 1 December 2016. The reporting date is beyond when the House of Representatives was due to expire by the effluxion of time (the final day before expiry would have been 11 November 2016). This reduces the likelihood that the committee would report after 11 November, although the committee is empowered to meet and present reports following the dissolution of the House unless the Senate has been dissolved for a double dissolution election. For a discussion of the power to meet and transact business notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives, see Evans and Laing, *Odgers' Australian Senate Practice*, 13th edition, p. 487.

7 Such as the Rural and Regional Affairs and Transport References Committee's review of the citrus industry in Australia. Although an extension was not required during the 44th Parliament, the inquiry conducted during the 43rd Parliament was extended on three occasions.

significantly before lapsing from lapsed inquiries that had progressed (for instance by the committee conducting public hearings).[8]

As the focus of the article is limited to the 44th Parliament, all inquiries rereferred from the 43rd Parliament are treated as new inquiries commencing from the date of their re-referral. This means that the data on the number of inquiries completed without an extension include a small number of inquiries that, despite being extended at least once and in some cases multiple times in the 43rd Parliament, were completed by the new reporting date fixed during the 44th Parliament. This approach is appropriate given that the article targets inquiries completed during the 44th Parliament. As a result of the small number of inquiries affected, this approach also has limited consequences for the overall results.

DATA

Following the methodology outlined above, 114 of the 132 references committee inquiries are considered. Of these 114 inquiries, 87 (around 76 per cent) received at least one extension to the reporting date initially fixed when the inquiry was referred. In total, 195 extensions were received, with inquiries extended on average approximately 1.7 times (see Table 1).[9]

The duration of extensions varied considerably. There are many examples of extensions of a few days for the likely purpose of concluding committee deliberations on the final report. Other inquiries were prolonged significantly beyond their initial reporting date, in some cases by several hundred days. Of the 72 inquiries that lasted over 200 days, only 29 of them (40 per cent) had an initial reporting timeframe of 200 days or more. The second-longest inquiry of the 44th Parliament was extended nine times and lasted 625 days, over 500 days longer than the initial reporting date suggests was envisaged (see Table 2).

8 Following the sittings of 1819 April 2016, the Prime Minister indicated that he would advise the Governor-General to call an election for 2 July 2016. Committees responded to the clearly indicated election date, with many substantial interim reports presented in the final sitting week. It can be reasoned that in instances where an interim report was not presented or a reporting date extension was not otherwise sought, the committee concerned did not intend, or was unable, to report and would have needed to seek an extension if an election was not called. It would distort the analysis if these inquiries that were highly likely to have been extended if an election was not called for 2 July were counted as inquiries that were not extended.

9 Even if the methodology outlined in the previous section is questioned, the proportion of inquiries extended remains high. For all 132 inquiries considered in the 44th Parliament, nearly 66 per cent were extended at least once. With 195 extensions received, on average this is almost 1.5 extensions per inquiry.

Table 1: Summary of key data

References Committee	No. of inquiries	No. of inquiries extended	No. of extensions	% of inquiries extended	Average no. of extensions	Average no. of days initially fixed for inquiries	Actual duration (days)*	Difference (days)
CA	10	9	28	90.0	2.8	150.3	243.2	92.9
Economics	21	19	47	90.5	2.2	200.2	341.5	141.3
EE	11	4	11	36.4	1.0	141.7	178.2	36.5
EC	14	13	23	92.9	1.6	157.1	216.6	59.5
FPA	7	4	13	57.1	1.9	95.3	212.4	117.1
FADT	16	10	13	62.5	0.8	175.9	197.1	21.2
LCA	13	9	24	69.2	1.8	100.9	203.8	102.9
RRAT	22	19	36	86.4	1.6	137.9	265.5	127.6
Total	114	87	195	76.3	1.7			

Note:

* For inquiries that lapsed when the Senate was dissolved, the date the dissolution took effect (9 May 2016) is used as the end date of the inquiry.

Key: CA = Community Affairs; EE = Education and Employment; EC = Environment and Communications; FADT = Foreign Affairs, Defence and Trade; FPA = Finance and Public Administration; LCA = Legal and Constitutional Affairs; and RRAT = Rural and Regional Affairs and Transport.

Source: Author, based on information published on Parliament of Australia, 'Senate Committees', 2016, <www.aph.gov.au/Parliamentary_Business/Committees/Senate>, accessed 1–16 June 2016.

Table 2: Examples of prolonged inquiries

Inquiry	No. of extensions	Days initially provided for inquiry	Actual duration (days)	Difference (days)
Digital currency (Economics)	1	151	306	155
Stormwater management in Australia (Environment and Communications)	3	101	261	160
Impact on service quality, efficiency and sustainability of recent Commonwealth community service tendering processes by the Department of Social Services (Community Affairs)	4	42	216	174
Ability of Australian law enforcement authorities to eliminate gun-related violence in the community (Legal and Constitutional Affairs)	3	105	294	189
Industry structures and systems governing the imposition of and disbursement of marketing and research and development levies in the agricultural sector (Rural and Regional Affairs and Transport)	1	83	301	218
Role of public transport in delivering productivity outcomes (Rural and Regional Affairs and Transport)	1	105	358	253
The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders (Education and Employment)	5	90	359	269
Commonwealth Indigenous Advancement Strategy tendering processes (Finance and Public Administration)	3	91	364	273
Comprehensive revision of the *Telecommunications (Interception and Access) Act 1979* (Legal and Constitutional Affairs)	6	90	377	287
Domestic violence in Australia (Finance and Public Administration)	3	123	420	297
Cooperative, mutual and member-owned firms (Economics)	3	73	381	308
Future of Australia's naval shipbuilding industry* (Economics)	3	371	684	313
Corporate tax avoidance* (Economics)	4	256	585	329
Forestry managed investment schemes (Economics)	9	124	625	501

Note:

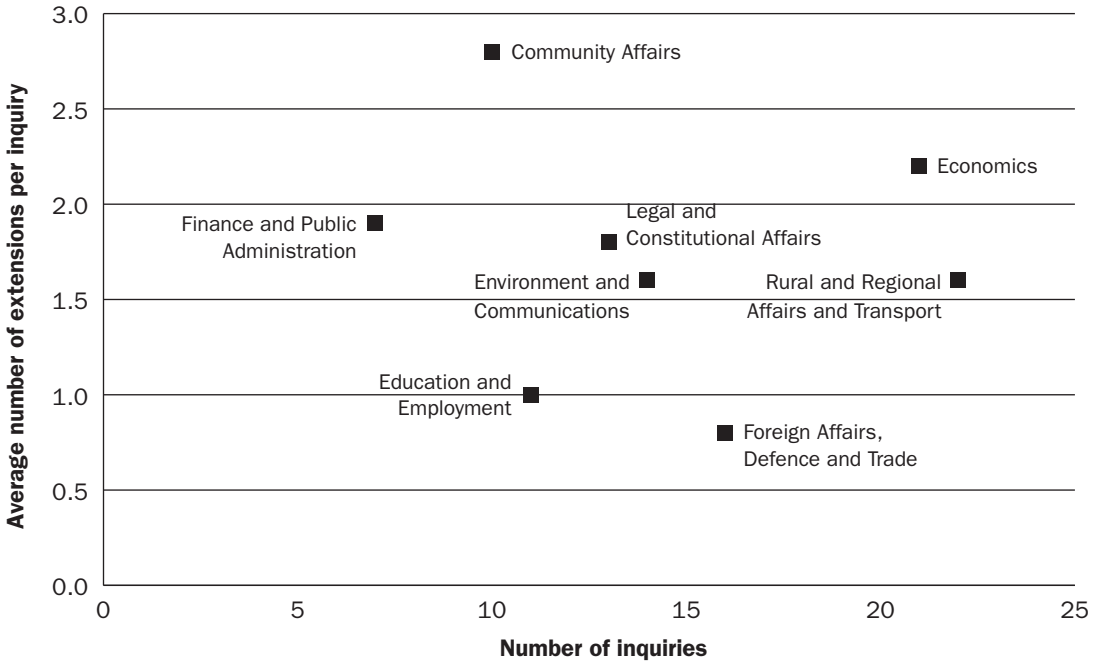
* For inquiries that lapsed when the Senate was dissolved, the date the dissolution took effect (9 May 2016) is used as the end date of the inquiry.

Source: Author, based on information published on Parliament of Australia, 'Senate Committees', 2016, <www.aph.gov.au/Parliamentary_Business/Committees/Senate>, accessed 1–16 June 2016.

ANALYSIS OF RESULTS

The clearest results from the data are the high proportion of inquiries extended (76 per cent) and the significant number of extensions that the Senate granted (195). Three of the eight committees had an extension rate of over 90 per cent; that is, only one or two of their inquiries reported by the initial deadline. Committees that managed a large number of inquiries received a high number of extensions per inquiry (such as Economics, which extended its inquiries 2.2 times on average); however, the committee with the highest number of extensions per inquiry was actually Community Affairs, which managed a smaller number of inquiries but received 2.8 extensions per inquiry on average. Overall, the data indicate a weak negative correlation between the number of inquiries referred to a committee and the number of extensions the committee seeks (see Figure 1).

Figure 1: Relationship between number of inquiries and average number of extensions received, by committee

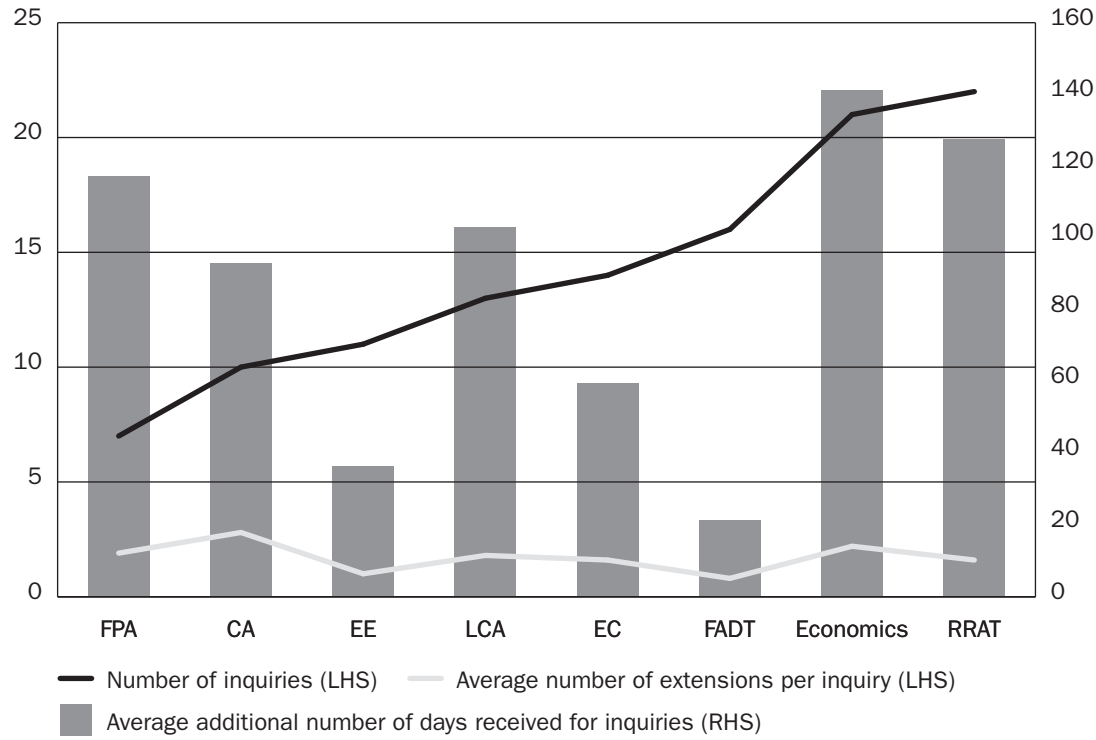


Source: Author, based on information published on Parliament of Australia, 'Senate Committees', 2016, <www.aph.gov.au/Parliamentary_Business/Committees/Senate>, accessed 1–16 June 2016.

Data on the duration of extensions yields mixed results. The two committees that managed the highest number of inquiries (Rural and Regional Affairs and Transport, and Economics) had their inquiries extended by the most number of days on average (approximately 128 days and 141 days respectively). The committee with the fewest inquiries, the Finance and Public Administration References Committee, extended the lowest proportion of inquiries (57.1 per cent), but when it did extend them, their duration increased considerably. On average, the length of that committee's inquiries

more than doubled: inquiries lasted around 212 days, or 117 days longer than the 95 days initially envisaged. On the other hand, the Foreign Affairs, Defence and Trade References Committee, which also extended a comparatively low proportion of its inquiries (62.5 per cent), only increased the duration of its inquiries by around 21 days on average.

Figure 2: Key information on extensions, by committee



Key: CA = Community Affairs; EE = Education and Employment; EC = Environment and Communications; FADT = Foreign Affairs, Defence and Trade; FPA = Finance and Public Administration; LCA = Legal and Constitutional Affairs; and RRAT = Rural and Regional Affairs and Transport.

Source: Author, based on information published on Parliament of Australia, 'Senate Committees', 2016, <www.aph.gov.au/Parliamentary_Business/Committees/Senate>, accessed 1–16 June 2016.

Whether the initial intended duration of committee inquiries influenced the need for an extension is less clear. Continuing with the example of the Foreign Affairs, Defence and Trade References Committee, the average length of its initial reporting dates was around 175 days, which was second in length only to the Economics References Committee (200 days). From the short extensions that were generally sought by Foreign Affairs, Defence and Trade, it can be inferred that the committee needed a limited amount of additional time to finalise its report. The Economics References Committee, on the other hand, extended its inquiries multiple times and, on average, by around 141 days. The nature of the extensions sought by the Economics References Committee perhaps indicates the burden of the committee's overall workload, but also

there appears to have been a desire to present detailed interim reports and continue certain inquiries that were highprofile and influencing public policy debate.

From the data collected, it is possible to analyse whether inquiries with short reporting dates are more likely to be extended than other inquiries. For this purpose, inquiries intended to be completed within 90 days are used.[10] These include inquiries that were extended significantly, perhaps indicating the inquiries were not given suitable reporting dates for the scope of the terms of reference and/or type of inquiry desired. For example, a comprehensive revision of the *Telecommunications (Interception and Access) Act 1979*, was initially given 90 days to report but, following six extensions, actually required 377 days.[11] Overall, 52 per cent of inquiries intended to last for 90 days or less were extended, which compares favourably to the figure of 76 per cent across all inquiries considered for this article. Yet the duration of the inquiries increased considerably: on average, 53 days were initially provided for these short inquiries, but following extensions the inquiries lasted 147 days on average.

The data collected also enable an analysis of submission receipt dates.[12] Across the committees, the average number of days provided for submissions ranged from a lower limit of 32.5 days (Finance and Public Administration) to an upper limit of 106 days (Economics).

Submission receipt dates are of interest because these committee decisions are informed by the fixed reporting date. For the significant number of inquiries extended beyond their initial reporting dates, the timeframes advertised for submissions were perhaps shorter than necessary. For example, after allowing 32.5 days on average for the receipt of submissions, inquiries conducted by the Finance and Public Administration References Committee, following extensions, lasted for another 216 days on average. For that committee's inquiry into domestic violence in Australia, the initial timeframe for the inquiry was 123 days, with submissions invited for the first 35 days. The inquiry, however, was extended three times, with the inquiry ultimately lasting for 420 days. A consequence of this is that the inquiry reported over a year after it sought written submissions. Whether this has implications for the utility of this evidence and how stakeholders respond to submission invitations is discussed later.

Interestingly, the data collected on submission receipt dates suggest that, in a few instances, committees were aware that the initial reporting date was unachievable,

10 As Table 1 indicates, an inquiry of 90 days is below average duration for all committees.

11 Inquiries such as this can be extended to respond to developments beyond the control of the committee; for example, the final extension of the Interception and Access Act inquiry enabled the committee to consider the government's recently finalised data retention policy and the report of another committee on the legislation needed to enact it. See Senate Legal and Constitutional Affairs References Committee, *Comprehensive Revision of the Telecommunications (Interception and Access) Act 1979*, Parliament of Australia, Canberra, 2015, p. 3.

12 Inquiries re-referred at the start of the 44th Parliament often had sought submissions in the 43rd Parliament and did not advertise for submissions again. These inquiries are excluded from this analysis. In addition, the data on submission closing dates for the Legal and Constitutional Affairs References Committee are not complete: for two inquiries, information on submission closing dates is no longer published on the inquiry webpages and was not included in the reports.

perhaps because of competing priorities or the subject matter demanding a longer timeframe. For these inquiries, committees set a date for receipt of submissions that signalled an extension would be sought and then promptly obtained the extension. An example is the Community Affairs References Committee's inquiry into Commonwealth community service tendering processes by the Department of Social Services. This inquiry was referred on 12 February 2015 with an initial reporting date of 26 March 2015. The date for receipt of submissions, however, was set at 20 March, which indicates that the committee did not intend to meet the reporting date. The committee obtained its first extension on 2 March, and ultimately reported in September 2015.

DISCUSSION

Overall, the success rate for committees meeting their initial reporting deadlines is low. In addition, the Senate refused none of the 195 requests for extensions. This is not unusual: *Odgers' Australian Senate Practice* notes that the Senate 'seldom refuses an application for an extension of time, particularly when a reasonable explanation is given for the delay'.[13] On the rare occasion when a proposed extension is refused, it is generally for an inquiry by a legislation committee into a government bill. The last time the Senate refused a proposed extension for a references committee inquiry was in 2005.[14]

The Senate committee system has operated effectively for decades with reporting dates fixed at the outset of an inquiry.[15] In addition, the inclusion of a reporting date in the terms of reference for an inquiry is relatively common outside of the Senate. In state and territory parliaments, inquiries referred by a legislative chamber are frequently given a reporting date, although inquiries initiated by the committees themselves generally are not. Reporting dates are also common for inquiries conducted by government advisory bodies, such as the Australian Law Reform Commission and the Productivity Commission. An exception is the standing committees of the House

13 Evans and Laing, *Odgers' Australian Senate Practice*, 13th edition, p. 491.

14 On 13 October 2005, the chair of the Employment, Workplace Relations and Education References Committee moved a motion to extend the reporting date of that committee's inquiry into industrial agreements from 31 October 2005 to 30 November 2005. After a division was called for, the motion was defeated. The final report, which was presented on 31 October 2005, noted that 'there have been only four occasions over the past 20 years where committees that have sought an extension of time to report have been denied it by the Senate'. Senate Employment, Workplace Relations and Education References Committee, *Workplace Agreements*, Parliament of Australia, Canberra, 2005, pp. xxi.

15 In the years following the introduction in 1970 of a system of legislative and general purpose standing committee, terms of reference were brief and did not include reporting dates. For example, the first report by a legislative and general purpose standing committee was the Standing Committee on Health and Welfare's report *Mentally and Physically Handicapped Persons in Australia*. The terms of reference for that inquiry were simply 'the problems of, and the provisions for assistance to, mentally and physically handicapped persons in Australia'. Reporting dates are common from the 1990s onwards.

of Representatives; during the 44th Parliament, the inquiries conducted by those committees generally did not have fixed reporting dates.[16]

There are, however, key differences distinguishing Senate committees from House of Representatives committees and state and territory parliamentary committees. It is evident that the initial reporting deadlines agreed to by the Senate for inquiries by its references committees are, overall, significantly shorter than those given to equivalent committees elsewhere.[17] Parliamentary committees in other Australian jurisdictions also do not manage the number of wide-ranging and resource-intensive inquiries that some Senate committees are tasked with. In recent parliaments, but particularly during the 44th Parliament, Senate committees managed a heavy workload. An instructive example is the workload managed by the pair of Economics legislation and references committees, which in September 2015 was managing 18 inquiries concurrently.[18] The data presented in this paper indicate that during the 44th Parliament the majority of references committee inquiries did not report within the specified deadline. Given this, it is appropriate to question whether fixed reporting dates for Senate references committee inquiries are desirable and if they can have negative consequences for the conduct of inquiries.

Following the referral of an inquiry to a committee, the conduct of the inquiry is a matter for the committee members, with the committee accountable to the Senate. Committee members and committees will differ on how inquiries should be conducted and whether initial reporting dates are achievable. Proceeding with inquiries based on their initial reporting dates may reflect a desire to attempt to manage the allocated workload within the deadlines specified. While the conscientious and multipartisan approach to how inquiries are managed that references committees often adopt is commendable, it is not clear to what extent drafters of terms of reference take into account committee workload when considering proposed reporting dates. In several cases, there appears to have been an overly optimistic view taken of the capacity of a committee to pursue a new inquiry or the time the subject matter would require.[19]

16 A small number of inquiries referred by ministers did have fixed reporting dates.

17 In state and territory parliaments, reporting timeframes of six to 12 months are common. By contrast, of the 132 inquiries conducted by Senate references committees in the 44th Parliament, only 45 had an initial reporting timeframe that was greater than six months.

18 Department of the Senate, *Report to the Finance and Public Administration Legislation Committee on Senate Committee Activities—Supplementary Budget Estimates (October 2015)—Recent Trends*, 12 October 2015, <www.aph.gov.au/~/media/Committees/fapa_ctte/estimates/sup_1516/parliamentary/senate_activity_report.pdf>, accessed 16 June 2016.

19 Some of the inquiries referred to the Legal and Constitutional Affairs References Committee, which is part of one of the busiest pairs of standing committees, support this reasoning. Examples include the inquiry into the work undertaken by the Australian Federal Police's Oil for Food Taskforce (referred with a reporting timeframe of 70 days—the inquiry actually took 271 days); a comprehensive revision of the *Telecommunications (Interception and Access) Act 1979* (referred with a reporting timeframe of 90 days—the inquiry actually took 377 days); the inquiry into the ability of Australian law enforcement authorities to eliminate gun-related violence in the community (referred with a reporting timeframe of 105 days, but took 294 days); and the inquiry into the payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats (referred with a reporting timeframe of 83 days, but lapsed after 320 days when the Senate was dissolved).

The management of a references committee inquiry is also subject to external factors. As committee members serve on multiple committees, a reporting date based only on an assessment of one committee's workload may still not be achievable due to the workload of other committees. In particular, committees can find themselves unable to conduct public hearings because committee members are already committed to attending other committees' public hearings. Another external factor is committee membership changes. Changes to a committee's membership can have significant consequences for an inquiry, particularly if senators involved in an inquiry can no longer participate because they have been appointed to the ministry or retire from the Senate. A reporting date extension may be necessary to assist new senators to consider the subject matter and evidence received by the committee.[20]

In evaluating the effectiveness of reporting dates, it is also useful to consider how they affect the planning of business in the Senate chamber. Although inquiries conducted by Senate standing committees generally have reporting dates, these committees can present unscheduled reports. Standing committees are not restricted to final reports: they may present interim reports where appropriate and are required to make regular reports on the progress of its proceedings.[21] As only the presentation of a final report is listed on the *Notice Paper* as business for future consideration, programmers of Senate business will encounter and take into account unexpected interim reports. Similarly, certain legislation committee and joint committee inquiries may not be subject to a reporting deadline and, therefore, the timing of the presentation of their reports may be unclear until the reports are finalised.

Advantages of fixed reporting dates

A request for an extension is not a sign of failure. It is inevitable that some extensions will be necessary or otherwise widely regarded as appropriate. Despite the committee's best endeavours, some inquiries may be more complex and time-consuming than first envisaged. The system of paired standing committees is also relevant: the overall workload of a pair of committees may be manageable when a references inquiry is referred, however, the introduction and referral of government bills may force committee members to re-prioritise their tasks.

A fixed reporting date has some apparent advantages. A reporting date indicates to the Senate, people who gave evidence, journalists and other interested parties when a report can be expected. An impending reporting date may encourage witnesses to provide supplementary evidence and to clarify or correct their evidence in a timely manner. Of course, these benefits may not be realised if committees report earlier than the fixed reporting date indicates.

20 Although committee membership changes also affect legislation committees, following significant membership changes it is likely that inquiries into bills, particularly government bills, can be progressed more easily than most references committee inquiries.

21 Standing order 25(18).

Fixing a reporting date at the outset of an inquiry is also understandable as an attempt by the senator(s) who sponsored the inquiry to, with the backing of the Senate, influence committee decisions regarding how the committee manages its workload. Looming deadlines may also prompt committees and their secretariats to ensure draft reports and other aspects of inquiry business are finalised in a timely manner. Nevertheless, the decisions taken by the committee and the Senate will always ultimately determine whether the reporting date initially agreed to will be met.[22]

There are also likely benefits from consistency. As noted above, it is useful for bill inquiries to have a reporting date and select committees are required to have one. Fixing reporting dates for some inquiries, but not others, could cause confusion. Interested parties already struggle with differences between the types of committees, as any secretariat officer who has been asked 'where are the terms of reference' for a bill inquiry can attest. Additional distinctions may be unhelpful, although differences between references committees and self-referred inquiries conducted by legislation or joint committees will nevertheless remain.

Finally, the interim report often accompanying a request for an extension provides committees with an opportunity to detail and comment on developments that affected the conduct of their inquiries. An instructive example is the Economics References Committee's inquiry into the performance of the Australian Securities and Investments Commission (ASIC). In its interim report, the committee revealed that when it was 'well advanced in preparing its report' for presentation on 30 May 2014, correspondence from ASIC and the Commonwealth Bank of Australia was received on 16 May correcting evidence they gave throughout the inquiry. As a result of what the committee described as 'surprise developments' regarding a 'matter of central importance to the committee's inquiry and report', the committee sought further information and clarification from ASIC and the Bank and requested an extension of the final reporting date to 'assess the significance the new evidence coming to light'.[23]

Potential disadvantages from fixed reporting dates

Despite the advantages associated with reporting dates, negative consequences potentially arise if initial reporting dates are not being met on a regular basis. Stakeholder engagement with Senate committees may particularly be affected. Senate committees rely on informed stakeholders taking the time to prepare and provide evidence, with written submissions from those stakeholders forming a key part of the evidence committees gather. As noted above, decisions regarding the due date for submissions are informed by the reporting date. The data indicate that reporting

22 This applies to other matters a senator may seek to prescribe in the motion referring a matter to a committee. For example, a motion may instruct a committee to conduct hearings in specific locations, although there are examples of committees deciding against doing so and advising the Senate accordingly. For an example of such a decision, see Senate Economics References Committee, *The Asset Insurance Arrangements of Australian State Governments*, Parliament of Australia, Canberra, 2011, p. 7.

23 Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission: Interim Report*, Parliament of Australia, Canberra, 2014.

dates will, however, likely be extended at least once. A high number of extensions to reporting dates may have various implications for how stakeholders engage with Senate committees, including the following:

- A committee that has been asked to complete an inquiry within a relatively short timeframe is likely to set a tight deadline for submissions. Consequently, some stakeholder groups that engage in many parliamentary and government inquiries may decide they have insufficient resources to prepare a submission within the time available, or can only provide a submission based on key points with scant detail. This is unfortunate if the inquiry is subsequently extended and, on reflection, submissions could have been invited over a longer period.
- There are instances where a committee receives an extension to the reporting date and subsequently decides to extend the date for receipt of submissions beyond that initially advertised.[24] Although the revised submissions deadline reflects the additional time available for the inquiry, there is a risk that this could disillusion submitters who complied with the original deadline, perhaps with consequences for how they approach future inquiries.
- Submitters who are familiar with Senate inquiries and who have experienced many extended inquiries may form their own judgements as to whether the committee will report 'on time'. As a result, they may be more willing to make a late submission (with or without requesting to do so beforehand). This could make an extension more likely, particularly if the committee receives a large number of late submissions from key stakeholders.
- Some submission lodgement timeframes make it difficult for state governments and their departments and agencies to participate, particularly if their submission needs to be cleared by a minister or the cabinet. Although this may be unavoidable for inquiries completed in a short timeframe, again it would be unfortunate if an inquiry's reporting date is extended and, consequently, a more generous date for receipt of submissions could have accommodated greater state government participation.

Whether the process for facilitating requests for reporting date extensions is a sensible use of senators' time should also be considered, particularly as during the 44th Parliament none of the 195 requests made for references committees were refused. The following points demonstrate some of the ways facilitating routine extensions uses the time and resources of senators and their offices.

- Obtaining extensions takes up the time of the Senate and Senate officeholders. The Senate has to consider requests for extensions, although for extensions sought on sitting days the process was streamlined considerably following a 2014 report

24 The Senate Economics References Committee took this approach for its inquiries into forestry managed investment schemes and the foreign investment review framework.

of the Procedure Committee.[25] For interim reports presented when the Senate is not sitting, the President of the Senate, Deputy President or one of the Temporary Chairs of Committees also needs to be available to receive the report.[26]

- The process for seeking an extension when the Senate is not sitting generates interim reports of limited use that the committee needs to adopt. As noted previously, there can be instances where short interim reports provide information on developments affecting the conduct of the inquiry. Most, however, are one-page pro forma documents that do not provide such insights.[27]
- The process for obtaining a committee decision to seek a revised reporting date can involve a private meeting of the committee with the only agenda item being the proposed extension. For senators who serve on many committees or have various other commitments, this may present challenges in managing their diaries and ensuring they can attend the various meetings of interest to them.
- Following the private meeting outlined above, the committee chair needs to be available to sign documentation seeking the extension. This administrative task is an additional burden on the chair's time.
- Even if the overall workload of a committee is manageable, the specific reporting date for an inquiry could nevertheless inconvenience the committee. For example, meeting a reporting date could require the chair or committee to consider a report during a week of estimates hearings or when the committee had planned hearings for another inquiry. If reporting dates for inquiries are not staggered, the chair and committee would need to consider several draft reports at the same time, while at other times of the year no reports are planned.

A more general drawback of fixed reporting dates is that sometimes they are imprecise or appear odd. When an inquiry is to report in the following year but the days of meeting for the Senate for that year have not been determined, reporting dates can be based on inaccurate guesses. For example, an inquiry into Australia's Innovation System was initially to report by 'the first sitting day of July 2015'; however, the Senate did not meet in July 2015. Reporting dates also cause confusion when mistakenly set for nonbusiness days. Not fixing a reporting date in these instances would avoid such outcomes.

There is also the possibility that a reporting date could be appropriate when a notice of motion proposing an inquiry is lodged; however, a delay in the motion being moved

25 In 2015, standing order 67 was amended so that, instead of individual notices of motions being required for a reporting date to be extended, written notifications of postponements are read by the Clerk together and taken as postponed unless a senator requests that a question for postponement be put to the Senate for determination. See Senate Standing Committee on Procedure, *Second Report of 2014: Routine of Business—Proposals for Discussion* Parliament of Australia, Canberra, 2014, pp. 34; and Australian Senate, *Journals of the Senate*, 201315, No. 101, 24 June 2015, Parliament of Australia, Canberra, 2015, pp. 281113.

26 See standing order 38(7).

27 Although evidence on this has not been gathered for this paper, the influence of substantial interim reports could potentially be reduced if people familiar with Senate processes assume that interim reports are always onepage documents with no subject matter-related findings or recommendations.

without a corresponding change to the reporting date can condense the timeframe beyond what is manageable. A possible example of this is the notice of motion proposing an inquiry relating to cooperative, mutual and member-owned firms. The notice of motion was given on 9 February 2015 to be moved on the next day of sitting (10 February) with a reporting date for the inquiry of 14 May 2015. The matter was postponed for several sitting days, with the inquiry ultimately referred on 2 March 2015 without amendment to the reporting date. Although the extensions subsequently received indicate that the proposed duration of the inquiry would not have been adequate, the delay in referral nevertheless decreased the time available to conduct the inquiry from 93 days to 73 days, a significant amount of time lost for a planned short inquiry.

POTENTIAL OPTIONS FOR CONSIDERATION

In light of the findings and discussion outlined above, several options are identified for further consideration. The list is not exhaustive and a preferred option is not specified. The most suitable option would likely depend on whether reporting dates are judged fundamentally necessary. Other factors to consider include:

- whether the high workload recently managed by Senate committees will continue;
- whether committees receive short, unrealistic reporting timeframes for particular inquiries that do not account for either the committee's workload or the complexity of the subject matter, and if so, how frequently; and
- whether committees are better judges of when they are able to report, rather than the individual senators who propose inquiries.

The first option identified is the status quo, which has all of the advantages and disadvantages outlined above.

The second option is senators could be encouraged to consult with the committee chair or committee prior to lodging a notice of motion proposing a new inquiry.

The third option is to encourage senators not to include reporting dates in notices of motion unless there is an apparent need to do so. In the absence of a reporting date fixed by the Senate, committees could decide on a planned reporting date and publicise it themselves. Safeguards would remain; for instance, committees are required by standing order 25(18) to make regular reports on the progress of their proceedings. In addition, once an inquiry referred without a reporting date is underway, the Senate could subsequently impose a reporting date if considered necessary. Fixed reporting dates could be retained for politically sensitive inquiries.

The fourth option is to retain a fixed reporting date when inquiries are referred, but if a committee cannot meet the reporting deadline and is uncertain about precisely when it will be able to report, it could seek authority from the Senate for an extension

with the final reporting date to be determined by the committee.[28] This maintains some degree of active oversight of the committee's activities but eliminates the need for multiple short extensions when the committee requires additional time to finalise its deliberations.

The fifth option is reporting dates could be less precise. Rather than specifying a day of a month as the final date for a committee to report, the reporting deadline could be restricted to a month or a period of sittings, to be interpreted as the last day of the month or period of sittings. This would provide committees with greater flexibility in scheduling when to deliberate on their various draft reports. In some instances, this change could eliminate the need for short extensions required only for the committee to finalise its report and could allow committees to postpone deliberating on a report for a short period if a more urgent priority arises. To realise these benefits, however, committees would need to avoid planning their inquiries and scheduling their deliberations as if the final date permitted for reporting is effectively the reporting date.

Option six is, following the referral of a new inquiry, committees could be encouraged to discuss whether they are likely to meet the reporting date. If a committee considers it will not be able to meet the reporting deadline, it could seek an extension at the outset of the inquiry and make decisions regarding the receipt of submissions and scheduling of public hearings on that basis.

The seventh option is senators could be required to provide a statement of reasons if an inquiry needs to be completed within an identified short period (such as three months or six months). This may be difficult to implement and ensure compliance with, particularly as there may be occasions where inquiries are referred at short notice.

The final option is radically different to the preceding proposals. In most instances, inquiries into bills conducted by the legislation committees are referred by the Senate on sitting Thursdays based on the recommendations of a standing domestic committee, the Standing Committee for Selection of Bills. A similar process could be implemented for references committee inquiries. Senators would lodge proposals for inquiries to a new domestic committee or an existing committee given this additional responsibility. Among other matters, the domestic committee could consider whether proposed inquiries are directed to the most appropriate committee and if their reporting dates are suitable, taking into account the subject matter of the new inquiry and relative workloads of committees.[29] The recommendations of the committee would be put to the Senate for determination once every sitting week. In addition to benefits from proposals for inquiries being subjected to scrutiny before determination by the Senate,

28 The Parliamentary Joint Committee on Corporations and Financial Services essentially pursued this option for its inquiry into the impairment of customer loans. An initial reporting date was set by the House of Representatives and the committee obtained its first extension from that House. After the parliament was prorogued on 15 April 2016, the committee resolved to readopt the inquiry using the same terms of reference but with a reporting date to be determined by the committee.

29 Should the committee comprise senators who are experienced in committee work, the benefits arising from this option could increase significantly.

this process would introduce greater predictability as to when new inquiries will be referred and, by limiting referrals of new inquiries to one sitting day a week, more time will be available on other sitting days for other business. This proposal, however, could detract from the ability of senators to present matters to the Senate for consideration in a timely manner.

CONCLUSION

This article has studied the reporting dates of inquiries by the Senate references committees during the 44th Parliament and demonstrated that, of the 114 inquiries considered, around 76 per cent of them received at least one extension to their initial reporting date. In total, 195 extensions were received.

The article suggests that the high rate of extensions might have negative implications for how stakeholders engage with committee inquiries and may unnecessarily increase the workload of committee chairs, committees and the Senate chamber. The current arrangements do not appear to be unsustainable; nevertheless, given that the large workload for Senate committees is likely to continue and requests for extensions are generally not refused, it appears worthwhile to consider the effectiveness of and need for reporting dates, and whether an acceptable alternative to the current arrangements exists.

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Budget Scrutiny in Australian State Parliaments

Kylie Coulson

Kylie Coulson is an Adjunct Professor, Curtin University

ABSTRACT

The role of Parliament in the context of the Westminster legacy is well understood at a rhetorical level. However, the pragmatic realities of politics combined with the naturally pragmatic nature of the Australian polity introduce an important question as to the extent that parliamentary form overrides substance in practice. This includes the conduct of the oversight role of the parliament.

This paper responds to the 2016 APSG conference question *"Are parliaments little more than a stage for a ritual but symbolic battle, or are they a genuine actor in the policy process?"* through examination of the operation of budget estimates committees in Australia. Are these annual or semi-annual estimates hearings used to critically examine the estimated and actual expenditures and operations of government, as intended? Or are they more often used for political point-scoring by parliamentarians, and considered irrelevant to policy development and implementation by senior officials?

These questions are examined via a close analysis of Hansard in the context of scrutiny of public finances. Annual scrutiny by parliament of budget documentation, particularly by budget estimates committees, is one of the ways in which governments are held to account for budget management and public expenditure. In Australia to date, the existing research literature has focussed on the federal parliament, and the Senate budget estimates process in particular.

This paper contributes to the existing literature by examining three state-level parliamentary budget estimates committees over a five year period, and considers the nature of the questions asked by the parliamentary members. It was found that although there was an expected focus in the questions asked regarding specific budget decisions and fiscal targets, there was also a considerable focus on operational and other matters unrelated to the budget documents being examined. Variances were also apparent between jurisdictions, with different committee structures likely contributing to these differences.

Key words: Budget estimates; Australian state government; estimates committee; parliamentary scrutiny

INTRODUCTION

The role of Parliament in the context of the Westminster legacy is well understood at a rhetorical level. However, the pragmatic realities of politics combined with the naturally pragmatic nature of the Australian polity introduce an important question as to the extent that parliamentary form overrides substance in practice. This includes the conduct of the oversight role of the parliament.

With regard to financial and program performance, there are several ways in which federal and state Ministers and senior public servants in Australia are held accountable, with similar processes found in other Westminster-based parliaments. Government agencies are required to produce and publish annual reports and audited financial statements, and table these in parliament to allow scrutiny of past program and financial performance by parliamentarians, the media and general public.

Annual budget documents, including the Appropriations Bill, are also subject to scrutiny by the parliament. These documents outline the proposed revenue and expenditure measures for the upcoming budget year, along with estimates for the following three years, known as the forward estimates. Importantly, budget papers provide information about what the government intends to buy, variously expressed in terms of outcomes, outputs, and to a decreasing extent, inputs. The latter category in the budget papers is often the focus of media scrutiny, with headlines frequently describing major expenditure changes in the context of specific numbers of police, nurses or teachers, for example, rather than the outcomes government wants to achieve.

The scrutiny of the budget documents usually occurs both in the parliamentary chambers during the debate of the Appropriation Bill, and also in separate deliberations by smaller groups of politicians known as budget estimates committees, often in the upper house of parliament. It is here that individual budget decisions can be scrutinised in detail on an individual government department or agency level, with reference to the latest budget documents.

The estimates committee process allows external scrutiny of the government's proposed budget before it is voted on by the parliament, contributing to transparency and accountability regarding public expenditures and revenues, focussing on value for money outcomes and minimising waste of public funds (Thomas 2009). It is a forum to hold the government of the day accountable for its spending and program decisions, and allow people to understand the details contained within the budget documents (Hogg 2010).

This paper examines the operation of budget estimates committees in Australia in order to respond to the 2016 APSG conference question *"Are parliaments little more than a stage for a ritual but symbolic battle, or are they a genuine actor in the policy process?"*. Are these annual or semi-annual estimates hearings used to critically examine the estimated and actual expenditures and operations of government, as intended? Or are they more often used for political point-scoring by parliamentarians, and considered irrelevant to policy development and implementation by senior officials?

SCOPE AND ACTIVITIES OF ESTIMATE COMMITTEES

In the Australian federal parliament, the approach to budget scrutiny has emerged over time, with Senate Estimates Committees generally regarded as a powerful and effective forum that achieves accountability to the parliament (Halligan et al 2007, Ray 2010).

Changes to the format and content of budget papers have developed and improved over time, with an increasing trend to provide more comprehensive information regarding public expenditure, contributing to improved transparency (Halligan et al 2007). These changes include allowing the structure of budget documents to more usefully highlight programs and desired government outcomes, rather than encouraging parliamentary scrutiny of 'tea ladies, indoor plants and paperclips' (Baume 1991).

Regardless of the format of the budget papers, the scope of questioning in estimates committees can and does vary from a narrow focus on the current budget year and forward estimates. Past spending is often of interest to parliamentarians, too, both for political reasons and as a measure of prior performance (Halligan et al 2007, Thomas 2009, Uhr 1990). It is noted that evaluation of performance is not easy to define or measure, and can be affected by an individual's values as well as partisan views. Therefore, not all disagreements on past performance can be necessarily viewed as political point scoring (Thomas 2009).

With more detailed and transparent information available in the budget documents, parliamentarians will naturally be inclined to inquire into matters of policy and program implementation. Unlike other countries such as the United States, Australian governance arrangements provide that government departments are generally not required to seek legislative authority for individual programs. The budget estimates process provides an opportunity to examine the performance of the executive government and departments (Uhr 1991).

BENEFITS AND IMPACT OF ESTIMATES COMMITTEES

In the context of examining the Australian Parliament's Senate estimates committees, Thomas (2009, p.382) identifies several potential benefits of budget estimates committees, including providing members of parliament an opportunity to question ministers regarding their agencies and programs, senior public servants and program managers can be questioned directly, access to budget documents assists with understanding the administration of programs, and agencies other than only government departments (for example, statutory authorities) are within scope.

One of the difficulties in assessing whether or not these benefits of estimates committees are indeed realised lies in the relatively small number of research studies that have assessed the actual content and impact of the parliamentary scrutiny, rather than providing contextual and historical descriptions of how the process is intended to work. There have been attempts in the literature to develop formal frameworks for evaluating committees in Westminster parliaments (eg. Monk 2010). But, as noted by

Uhr (1990) regarding estimates committees, 'Australian political science provides too many confident statements about committee ineffectiveness, and too few explanations of what committees actually do'.

AUSTRALIAN SENATE ESTIMATES STUDIES

Senate estimates committees are a focus of existing literature regarding parliamentary committees in Australia, as they provide clear evidence of attempts to ensure parliamentary accountability of the executive (Rodrigues 2010). There are two recent Australian examples of where the content of parliamentary scrutiny of budget estimates has been examined through content analysis of Hansard records; the official, publicly available transcript of parliamentary debates, including estimates committee meetings.

Mulgan (2008) examined the Hansard from Senate (federal upper house of parliament) estimates committees examining six Commonwealth government departments: Treasury; Foreign Affairs and Trade; Defence; Family and Community Services plus Centrelink; Agriculture, Fisheries and Forestry; and Industry, Tourism and Resources. This selection covers two policy focussed agencies, two major expenditure agencies and two with a mix of policy and administration.

Hansard records were examined for 1986, 1992 and 2003, which allowed comparative analysis at a similar time in the election cycle, but at different stages in federal financial management reform. Mulgan (2008) explored whether the focus of the questioning in the estimates committees was on results, processes or inputs, and whether the focus had changed over time following financial management reforms. He found significantly more attention was given to outputs at the expense of inputs over time. Despite this, explicit references in questioning to budget documentation decreased as these documents began to rely more on the outcomes and outputs frameworks.

Bowrey et.al (2015) also considered Senate estimates hearings, but focused instead on a single federal government agency over the period from 2001–02 to 2007–08. The Great Barrier Reef Marine Park Authority was chosen as an example of an agency with a diversity of government funded programs, and relatively stable management over the period examined. The results showed that the majority (52%) of topics discussed were concerned with budget measures, 47% on policy issues, with the remainder classified as general discussion.

Opportunities identified for future research identified by Bowrey et.al. (2015) included the application of a similar methodology to different government entities, particularly those operating under different legislative frameworks. This aim of this paper is to contribute to the existing body of knowledge regarding budget estimates committees by exploring the conduct of these committees at the Australian state government level. By doing so, it addresses a gap in the existing literature, and identifies characteristics and behaviours of estimates committees that may be useful in future evaluations of estimates committee impact and effectiveness, and potential reforms of estimates committees in state parliaments.

RESEARCH METHOD AND DESIGN

Consistent with the two studies described above (Mulgan 2008 and Bowrey et.al. 2015), this paper explores the priorities of parliamentarians during the budget estimates process. The number and nature of topics raised at budget estimates committee meetings is examined using content analysis.

Content analysis has been applied to Hansard records of three Australian state parliament budget estimates committees. Content analysis is a research method that classifies the content of text into a meaningful number of categories, thus allowing inferences to be drawn. The analysis should be conducted in such a way that the procedure is reliable, and would produce the same results if conducted by a different person, or more than once by the same person (Weber 1990).

Content analysis can be approached in a variety of ways. There are five common steps to the technique that have been applied in this paper (Krippendorf 1989). Firstly, it was necessary to design the study, including defining the topic to be explored, identify the data sources that may contribute to this exploration, and develop a framework for the analysis. Next, the units to be measured were identified; in this case, recording of the instances of individual topics and corresponding references to budget documentation. Sampling was undertaken by identifying comparable government agencies i.e. police services in three states with different parliamentary committee structures or compositions, over the same five year period. The coding of the samples of Hansard text was done manually by identifying individual topics raised and classifying them into one of four pre-determined categories. Inferences were then drawn to identify the main content and thus the priorities of the parliamentarians involved in the estimates hearings. A sixth stage commonly applied is validation. Future research such as interviews with individual parliamentarians could be conducted to address this final stage.

Some limitations of content analysis are acknowledged. As manual content analysis has been applied, it is possible that the results may not be replicated exactly if the analysis were undertaken by applying computer content analysis (Weber 1990). Also, the categories used for coding of content were derived from the text being analysed, and comparable to those used in previous research. This may have limited the identification of other useful categories that may contribute further richness to the research findings. (Krippendorf 1989).

Data

The source documents used in this content analysis are the official Hansard transcripts of the budget estimates hearings for police agencies in three Australian states for five budget years, namely 2011–12 to 2015–16. The time period and states involved were selected to provide a recent sample of estimates hearings that cover more than one election cycle, and include changes of government in each of the three states during this timeframe. There have been no significant changes to the estimates committee structures during this time, nor significant changes to the broad structure and focus of

budget documentation. For example, there is a common focus on describing outcomes and outputs in budget papers from 2003 onwards, and thus budget papers from prior to 2003 would look materially different (Mulgan 2008).

Police agencies were chosen due to the comparability in activities undertaken and services delivered. Policing activities are common across all jurisdictions, although some states combine police and emergency services within one department or agency in some years, such as in Queensland and Victoria. Therefore, any questions and answers in Hansard transcripts relating to services other than police have been excluded from the analysis.

Instead of focussing on one jurisdiction for this study, as in the case of Mulgan (2008) and Bowrey et.al. (2015), three states have been selected to provide a variety of parliamentary models and estimates committee structure and composition. The key features of each committee are described below.

Queensland

As outlined in Queensland Parliament (n.d.), Queensland is unique among the Australian states, as it is the only example of a unicameral parliament, with other states having two parliamentary chambers. Queensland's parliamentary committee system has evolved over time, and eight portfolio-based committees were implemented in 2011 to oversee all aspects of government activity, including scrutiny of budget estimates. This change occurred prior to the timeframe of Hansard records considered in this paper, and therefore no comparison between pre and post-change structures is required. Each portfolio committee comprises three government and three non-government members, and is chaired by a government member. When considering budget estimates, each portfolio committee can ask questions of Ministers and senior public servants from the relevant departments. With the permission of the committee, members of parliament who are not committee members can also ask questions. Once the hearings are completed, a final report is prepared and tabled in parliament.

South Australia

In contrast to budget scrutiny by one of eight ongoing portfolio-based committees, South Australia's two estimates committees are convened each year, after the Appropriation Bill has been introduced to parliament (Parliament SA 2014). As in Queensland, each committee has seven members split between government and non-government members, and is chaired by a government member. Only members of the House of Assembly (lower house) are able to ask questions, usually three at a time. Ministers who are members of the Legislative Council (upper house) can be examined by the estimates committees. It is common practice for the responsible Minister and opposition spokesperson to make an opening statement before questioning by the committee commences.

Victoria

Victoria's budget scrutiny is undertaken by the Public Accounts and Estimates Committee (PAEC), as outlined in Parliament of Victoria (2016). It is a joint committee (i.e. members from both houses of parliament) with eight members, including three government members plus the chair. The PAEC publishes and tables two reports on the budget estimates each year, along with the government response, usually in June and September. In addition to the annual budget estimates, the PAEC's scope includes any matter regarding public sector finances, including audit matters. Each year, it examines the previous year's financial and performance outcomes, as well as the budget estimates. It is common practice for a comprehensive presentation to be given by the Minister at the beginning of each estimates hearing. It should also be noted that general questionnaires are issued to all departments prior to the hearings, some with additional specific questionnaires (see Parliament of Victoria (2014) for examples).

Coding

The purpose of coding and subsequent analysis of Hansard records is to determine the scope and nature of topics raised in budget estimates hearings, and how closely the topics raised relate to the budget estimates being examined.

The coding categories used in this analysis draws mainly on the approach used by Bowrey et.al. (2015), who coded content using three categories: measures and budget, policy and general. This is in contrast to Mulgan (2008) who categorised topics into three main groups: results (outputs and outcomes), processes (internal procedures and contracting) and inputs (expenditure, personnel, consultants, equipment and property).

In this paper regarding police-related agency budget estimates, four categories are used to code the topics raised in Hansard records: *Budget measures, Policy, Operational* and *Other*. Brief descriptions and examples are provided below for each category.

Budget measures are those topics directly related to the budget appropriations, and can include both recurrent and capital expenditure, as well as revenue measures that form part of the budget papers.

> Ms Garrett: I refer to budget paper 4, page 41, and the [$]5.24 million that has been allocated to PSO black spot radio funding. Could the minister please explain how many black spot areas across Melbourne and Victoria this funding will address and whether there are PSOs currently assigned to stations where black spots exist? (Hansard 2014a).

Topics classified as *Policy* are related to explicit policy decisions of government, and can include implementation of election commitments.

> Mr D. O'Brien: Thank you, Minister. My question is relating to employee expenses – budget paper 5, page 117, if you would like a page. Can you outline the wages policy of the government and how this will relate to the Victoria Police EBA negotiations later this year? (Hansard 2015).

Operational questions relate to internal activities of the individual police services, and tend to be directed to or answered by the Police Commissioner rather than the Minister.

> Mr van Holst Pellekaan: Thank you commissioner. Can the minister confirm that SAPOL no longer fill community constable vacancies with sworn officers?
>
> The Hon. M.F. O'Brien: Again, this is operational, and I will pass that across to the commissioner. (Hansard 2013a).

Topics coded as *Other* are those considered by the researcher to be unrelated the budget forward estimates, not clearly falling within the first three categories, and tend to be political in nature.

> Mr Byrne: Thanks Minister, I refer to page 1 of the Queensland Police Service SDS [Service Delivery Statements], the section that deals with ministerial responsibilities. I ask: do you recall travelling to Far North Queensland on Friday, 25 May and Saturday, 26 May last year? What was the purpose of the visit? That would have been your first trip to Cairns as the minister. (Hansard 2013b).

In cases where one or more follow-up questions were asked without an additional topic being introduced, it has been treated as one topic only, such as the following example regarding attrition rates.

> Mr Gardner: How much attrition took place in sworn officers in each category – cadets, community constables and what I think everybody would see as the standard sworn officers – in 2013–14?
>
> The Hon. A. Piccolo: I am advised it is 131.
>
> Mr Gardner: Are any of those either cadets or community constables?
>
> The Hon A. Piccolo: No, 131 are all sworn officers.
>
> Mr Gardner: Are you able to provide the anticipated attrition rate for all of the years in the forward estimates? (Hansard 2014b).

RESULTS

The results for each of the three jurisdictions are presented in separate tables below, followed by a table showing the average (mean) of the three states. Firstly, contextual information regarding the date of the estimates hearing for the police appropriations and the total number of pages of Hansard are shown.

The page length of Hansard transcripts is noted next, as a proxy for the total time for the examinations. As all hearing start and finish times of the scrutiny of the police appropriations are not recorded in Hansard for each of the three states in all years, the total time is not shown. Due to formatting and text size differences, it is not possible nor intended to meaningfully compare the page length of the hearings between

jurisdictions. It does, however, provide a useful indication of the changes in the intensity of scrutiny between years within a single jurisdiction.

Next, the total number of topics raised is noted, and then coded as described in the preceding section. Lastly, the explicit references to budget documentation for each topic are also noted.

Table 1: Queensland

Year examined	2011–12		2012–13		2013–14		2014–15		2015–16	
Date of estimates hearing	19/7/2011		11/10/2012		18/7/2013		17/7/2014		20/8/2015	
Total pages of Hansard	21		20		22		64		12	
No. of topics raised	36		23		24		43		19	
Topic categories	No.	%	No.	%	No.	%	No.	%	No.	%
Budget measures	8	22	10	43	10	42	17	40	5	26
Policy	1	3	4	17	2	8	2	5	1	5
Operational matters	13	36	6	26	6	25	11	26	9	47
Other	14	39	3	13	6	25	13	30	4	21
Topics referencing budget documents	2	6	9	39	12	50	19	44	14	74

Table 2: South Australia

Year examined	2011–12		2012–13		2013–14		2014–15		2015–16	
Date of estimates hearing	1/7/2011		21/6/2012		28/6/2013		21/7/2014		27/7/2015	
Total pages of Hansard	26		21		19		24		22	
No. of topics raised	54		33		37		51		62	
Topic categories	No.	%	No.	%	No.	%	No.	%	No.	%
Budget measures	22	41	24	73	18	49	20	39	15	24
Policy	1	2	0	0	1	3	3	6	5	8
Operational matters	8	15	0	0	10	27	13	25	21	34
Other	23	43	9	27	8	22	15	29	21	34
Topics referencing budget documents	28	52	32	97	21	57	19	37	19	31

Table 3: Victoria

Year examined	2011–12		2012–13		2013–14		2014–15		2015–16	
Date of estimates hearing	12/5/2011		10/5/2012		16/5/2013		14/5/2014		12/5/2015	
Total pages of Hansard	16		17.5		18.5		7.5		22	
No. of topics raised	19		21		16		11		26	
Topic categories	No.	%	No.	%	No.	%	No.	%	No.	%
Budget measures	8	42	13	62	13	81	7	64	15	58
Policy	3	16	2	10	1	6	3	27	3	12
Operational matters	3	16	1	5	1	6	0	0	7	27
Other	5	26	5	24	1	6	1	9	1	4
Topics referencing budget documents	14	74	12	57	12	75	6	55	17	65

Table 4: Average (mean) scores

Year examined	2011–12		2012–13		2013–14		2014–15		2015–16	
Date of estimates hearing	-		-		-		-		-	
Total pages of Hansard	21		19.5		19.8		31.8		18.7	
No. of topics raised	36.3		25.7		25.7		35		35.7	
Topic categories	No.	%	No.	%	No.	%	No.	%	No.	%
Budget measures	13	35	16	59	14	57	15	48	12	36
Policy	2	7	2	9	1	6	3	13	3	8
Operational matters	8	22	2	10	6	19	8	17	12	36
Other	14	14	36	6	21	5	18	10	23	20
Topics referencing budget documents	15	44	18	64	15	61	15	45	17	57

DISCUSSION

Date of estimates hearing

In contrast to the other states considered, Victoria is the only jurisdiction to routinely hold budget estimates hearings in May, prior to the new budget year commencing on 1 July. South Australia held hearings in June in two of the five years considered, with the remainder in July, and Queensland held all hearings after the relevant financial year had commenced, once as late as October, following the 24 March 2012 state

election. It could be argued that scrutiny of budget estimates after the relevant budget period has commenced reduces the perceived ability of parliament to hold executive governments accountable for public expenditure.

Pages of Hansard

The total average pages of Hansard for each of the three states is approximately 19 to 21 pages for four of the five budget years, noting the limitations outlined in the methodology section of this paper regarding variations in font size and formatting of the transcripts. This suggests that on average, the same amount of time and level of scrutiny is applied to police-related budget documents each year in these three states.

The exception is for the 2014–15 budget, with the primary driver of the higher average being Queensland's total of 64 pages. This was the last estimates committee hearing prior to the 31 January 2015 Queensland state election, indicating heightened budget scrutiny in the lead up to an election.

This lengthy transcript, however, is offset by the shortest transcript of approximately 7.5 pages for the 2014–15 budget in Victoria. This was also the last estimates committee hearing prior to the next state election on 29 November 2014, suggesting that an upcoming election does not necessarily translate into more or less budget scrutiny. The timing of state elections does not appear to have materially altered the average length of Hansard transcripts in South Australia.

More generally, the relatively short transcripts for Victoria may be explained by the utilisation of standardised questionnaires and comprehensive presentations at the beginning of each hearing. These documents may address key topics in advance, potentially reducing the need for specific questions from estimates committee members.

Total topics, and references to budget documents

On average, a total of 26 to 36 separate topics were raised in the estimates committees. Victoria had the lowest number of topics in all years (with the only exception in relation to 2015–16) which may reflect both the shorter transcripts, and information provided in the form of opening presentations and questionnaires. As noted above, this pre-prepared information would be expected to reduce the number of additional questions asked during committee meetings. South Australia raised the most topics in each year, but the focus of these questions and the direct relationship to the budget documentation varied considerably between years, as will be discussed further below.

Of the total average number of topics raised, between 44% and 64% had explicit references to the budget documentation, with an average of 54%. The greatest variance in these results was in Queensland, ranging from 6% to 74% (43% average), followed by South Australia with 31% to 97% (55% average). Victoria was the most consistent state with 55% to 75%, with an average of 65%.

It was found that not all topics generally, nor all questions that contained a reference to the budget documents were in fact questions about the budget measures. This will be further explored when considering the four topic categories in the following sections.

Topic 1 – Budget measures

Given the role and focus of the budget estimates committees, it would be expected that a significant majority of the topics raised would fall within this category. Perhaps surprisingly, only between 35% and 59% of topics raised related to budget measures, with an average of 47%. Victoria had the greatest focus on budget measures, with an average of 61% (ranging from 42% to 81%) of the topics raised. Queensland had an average of 35% (22% to 43%) and South Australia with 45% (18% to 49%). The lesser focus on budget measures in Queensland and South Australia may reflect the portfolio-based nature of the estimates committees, and that they are not ongoing standing committees, as opposed to the more specialised PAEC in Victoria where the focus is on public finance matters.

Topic 2 – Policy

On average, 9% of topics raised related to government policy (ranging from 6% to 13%). Again, Victoria had the highest average of 14% (from 6% to 27%), with the highest incidence occurring in the lead up to the 2014 state election. This increase prior to an election was not replicated in Queensland with an average of 8%, and South Australia had a very low number of topics in this category, ranging from nil to 8% of topics raised, with an average of 4%. As discussed earlier, questions regarding policy as opposed to strictly budget measures are commonly expected in estimates committees. It is acknowledged that some of the questions categorised as budget measures may also fall in the category of policy, so this category may appear smaller than expected if multiple topics had been assigned to individual questions.

Topic 3 – Operational matters

Of those topics categorised as operational matters, they comprised between 10% and 36% (average of 21%) of the total raised. Queensland had the greatest focus on this topic with an average of 26%, followed by South Australia with 20% and Victoria with 11%. Similar to the observation regarding the budget measures topic above, the higher focus on operational matters in Queensland and South Australia may be related to the portfolio-based nature of the estimates committees, as opposed to the public finance focussed PAEC in Victoria, along with the previously mentioned presentations and questionnaires.

Topic 4 – Other

Finally, between 5% and 20% (average of 11%) of the total topics raised were considered to fall outside the previous three categories, and were classified as *Other*. South Australia averaged 31%, Queensland 26% and Victoria 14%.

CONCLUSIONS AND FUTURE RESEARCH

Consistent with the recent study by Bowrey et al (2015), approximately half of the topics raised by parliamentarians in the Hansard documents considered were in reference to the budget documents being examined, and questions focussed more on budget measures than government policy or operational matters.

Interestingly, the stage in the election cycle did not always have a significant or predictable impact on the average number of topics, or the focus of those questions. Future research involving consideration of estimates committee records over a longer time period may produce different results, as political priorities, associated budget commitments and the political parties forming government would differ over time.

This paper also highlights that any evaluations of the impact or performance of estimates committees at the state level in Australia needs to recognise that the committees are structured and behave to varying degrees of similarity to the portfolio-based Senate Estimates Committees.

Differences between the three jurisdictions were apparent. The PAEC in Victoria tended to focus less on operational matters than the portfolio based committees in Queensland and South Australia. This may inform future reforms of estimates committee systems in Australian and other jurisdictions, with standing committees appearing to provide more comprehensive scrutiny of the budget estimates. Additional information gathered through interviews with members of both select and standing estimates committees could explore this further. Similarly, future research could examine if the additional information contained in Victoria's premeeting questionnaires would alter these results if those topics were also included in the analysis.

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A Parliamentary Budget Office in Fiji: Scope and Possibility

Usman Chohan and Kerry Jacobs

Usman Chohan is a PhD Candidate in International Financial Management at UNSW Canberra.

Professor Kerry Jacobs is Professor of Accounting at UNSW Canberra

ABSTRACT

This article assess the merits of establishing a Parliamentary Budget Office (PBO) in Fiji by examining how such an institution would fulfil two important roles: first, by assisting in the oversight of the budget process; and second, by supporting coordination among key accountability institutions such as the Public Accounts Committee (PAC) and the Auditor General (AG) in their fiscal oversight roles, which is a role specific to Fiji's accountability ecosystem and which stems from the uniqueness of the Fijian context itself. The article thereby shows that a PBO fits very well into Fiji's new constitutional commitment to enhancing accountability, by strengthening institutions that are enshrined within the new constitution.

INTRODUCTION

The aim of this article is to assess the merits of establishing a Parliamentary Budget Office (PBO) in Fiji by examining how such an institution would fulfil two important roles: first, by assisting in the oversight of the budget process, which is a typical role for such an office; and second, by supporting coordination among key accountability institutions such as the Public Accounts Committee (PAC) and the Auditor General (AG) in their fiscal oversight roles, which is a role specific to Fiji's accountability ecosystem and which stems from the uniqueness of the Fijian context itself.

The article begins by identifying a budget transparency problem, while considering the distinct evolution of accountability institutions given the republic's historical circumstances. This includes a focus on the Auditor General's Office and the Public Accounts Committee, as well as the interaction between these two institutions, as they have emerged in Fiji.

The article then examines why a PBO's role in the Fijian context would involve harmonisation of the oversight function between parliament (broadly), the PAC, the AG, as well as certain other institutions. In doing so, the paper identifies how a PBO would help fulfil the desire for better transparency and accountability as enshrined in Fiji's new constitution (2013).

It is important to note, therefore, that part of the value of this paper will lie in its raising and putting forth an idea that is not explicitly mentioned in the new constitution (i.e. the PBO), but which would assist greatly those institutions that *are* explicitly nominated in the constitution.

The article will draw upon important documentation produced (at times intermittently) by core Fijian institutions such as the Auditor General and the Public Accounts Committee, as well as the new constitution itself. Furthermore, it will turn to previous work that studies the relationship between Public Accounts Committees and Auditors-General in the Australasian context, as well as the leading international budget transparency index (Open Budget Index). This article argues that in the consolidation of these seemingly disparate trends in accountability and transparency within Fiji lies the unique dual-purpose of a Fijian Parliamentary Budget Office.

PARLIAMENTARY BUDGET OFFICES

For the purposes of definition, the Parliamentary Budget Office is defined here as an independent office, which produces non-partisan and impartial analysis on matters and policies pertaining to budgeting and finance, including the budget itself, for the consumption of legislators who then use the PBO's analysis to inform their legislative budgetary duties including debate, legislation, and fiscal oversight (Chohan and Jacobs 2016).

The PBO model has received growing attention worldwide, with nearly 60 countries presently possessing the equivalent of an 'Independent Fiscal Institution' (IFI) attached to their legislatures (von Trapp et al 2016), but the scant literature on the subject (see literature reviews by (Kopits 2013); and (Wehner 2014)) point to a great deal of ambiguity on what precisely the PBO model should do (Chohan 2016). Despite the lack of clarity on the role of the institution, the PBO model has proliferated to such an extent that they now participate in joint global fora such as the Global Network of Parliamentary Budget Offices (Chohan 2013c).

The Parliamentary Budget Office is considered a 'tool for legislative oversight' (Stapenhurst and Pelizzo 2008), in the same vein as Public Accounts Committees (PACs) and Supreme Audit Institutions (SAIs) are; both of which exist in Fiji but which do not have a fully coordinated mechanism for joint execution of accountability and oversight functions. Public Accounts Committees are an omnipresent accountability institution among Australasian jurisdictions (Jacobs, Jones, and Smith 2006; Jones and Jacobs 2005; Stapenhurst et al. 2005), although they can vary greatly by jurisdiction in terms of the oversight duties they fulfil and oversight powers they employ. This is why they diverge in the level of independence they can exert. Irrespective of these idiosyncratic regional differences, the practical oversight benefits of PACs are widely recognised, thanks to a series of important works over the previous decade dating back to McGee (2002), Stapenhurst (2005), and Jacobs and Jones (2005); which is why PACs are thought of as a core institution of oversight both in Australasia and beyond.

Numerous scholars have highlighted the merits of Parliamentary Budget Offices (Stapenhurst and Pelizzo 2002, 2008; Von Hagen 2007; Rivlin 2013; Kopits; Chohan 2013; Chohan 2013b; Chohan and Jacobs 2016; Wehner 2014), and their arguments generally center on the nonpartisan and independent nature of the PBO, as a source for unbiased and apolitical budget work that is premised on analytical rigor. The independent and economics-focused nature of the PBO allows for a more long-term and dispassionate approach to budgeting, distanced from the often highly partisan dictates of legislative decision-making.

As shall be examined in this paper, there are merits for instituting such a nonpartisan institution in the Fijian legislative space, to assist in the provision of timely, independent, unbiased analysis on matters pertaining to Fiji's budget. This budget analysis would *prima facie* be the main objective of the PBO in Fiji, because there is ample room to improve the level of budgetary transparency, particularly in terms of legislative contribution to Fiji's budget process.

The Budget Transparency Problem

The most prominent international budget transparency index is known as the *Open Budget Index,* produced by the International Budget Partnership (International Budget Partnership 2015a). It is formulated through extensive analysis of the budget process of nearly 100 countries based on a peer-review system of a richly detailed questionnaire that covers five overarching fiscal themes (including legislative participation) across more than 100 questions.

From this questionnaire resource, the Open Budget Index accords a score ranging from 1–100, with 100 reflecting perfect budget transparency. According to the 2015 assessment of Fiji's budget, its score was a paltry 15/100, equating to a 'scant' provision of information on budgeting (International Budget Partnership 2015b). This would put Fiji's budget transparency among the very lowest of the measured 100 countries, a fact that seems particularly striking given its explicit constitutional commitment to transparency and accountability, as set out in the very first article (1) of the 2013 Constitution of Fiji.

By comparison, another Australasian country holds the very highest score on the index: New Zealand (88/100); while Papua New Guinea and Indonesia rank 55/100 and 59/100 respectively (Australia is not ranked by the index due to a peculiarity of the IBP not finding a national partner for survey purposes). Fiji's low-scoring trend has typified the past decade of its budget process, but should not come as a surprise given the exceptional governance circumstances (including military rule) during this period: in 2008 Fiji garnered 13/100 points, which fell to 0/100 during 2010 (as there was no parliamentary-equivalent institution at that time), followed by a rise to 6/100, and now to 15/100 in 2015 (International Budget Partnership 2015c). This low score masks a more glaring disparity: the overall 15/100 score disaggregated represents a 25/100 for transparency by the Auditor General that is 'weak', while the legislative role is relegated to 0/100 and 'nonexistent'. It should be noted that the 0/100 is an

exceptional figure as parliament was not operating under normal conditions around the survey date. Nonetheless, legislative involvement in the budget process in Fiji is a low-scoring metric.

The Open Budget Index notes that out of their eight metrics of content, only two are delivered transparently in Fiji, one of which is the Auditor General's Report (International Budget Partnership 2015c). The absence of a legislative oversight role in Fiji's budget process leads the IBP to explicitly suggest that the country 'establish a specialised budget research office for the legislature' i.e. a PBO (International Budget Partnership 2015c). To put this low budget score into context, however, it is important to first examine the historical backdrop of budgeting in Fiji to understand the evolution of its accountability institutions.

ACCOUNTABILITY INSTITUTIONS IN FIJI

The uniqueness of budget oversight institutions in Fiji is attributable to a multiplicity of factors, including: a bicultural demography; a colonial Westminster political heritage; a legislature made unicameral in 2013; a series of tussles between civilian and military regimes; and a large population compared with other Australasian island republics.

These layers of complexity notwithstanding, it can be said that the oversight role in Fiji suffers from an inherent fragmentation. Although it has had core oversight institutions in place since (and even before) independence, these institutions have not devised a coordinated effort to oversee policy more broadly and budgets specifically. The key agents examined in this paper are (1) the Public Accounts Committee, and (2) The Auditor General; although the new constitution of Fiji (2013) envisages other institutions in the future, including an Accountability and Transparency Commission (ATC) which although constitutionally nominated, did not exist at the time of writing (2016).

Stating that the interaction between the Public Accounts Committee and Auditor General is fragmented does not mean that they have not engaged together in oversight duties; far from it, the Auditor General and the Public Accounts Committee have a longstanding history, preceding in fact the independence of the Fijian republic, of a joint auditing role wherein the Auditor General submitted special audits to the Public Accounts Committee (Nath, Van Perseum, and Lowe 2006).

However, their work does not equate to a consistent and stable accountability and oversight mechanism, certainly not with respect to budget scrutiny and oversight. Rather, it represents ad-hoc initiatives driven more by individuals than by systems. This is where the discussion of coordinating the oversight role of accountability in institutions in Fiji really begins. It is important, therefore, to examine the positioning of the Public Accounts Committee and Auditor General both in theory and then in Fijian praxis in more detail.

Public Accounts Committees and Auditors-General

Jacobs and Jones (2005) describe the place of Public Accounts Committees as paradoxical, in that the global trend to move accountability towards a more private sector outlook does not prevent the PAC, one of the oldest extant accountability institutions, from remaining relevant and 'a constant presence'. They describe the relationship between a Public Accounts Committee and the Auditor General as a 'critical part of public sector accountability' (Jones and Jacobs 2005; Stapenhurst et al. 2008). It has been pointed out by accountability scholars that part of a PAC's theoretical role is to enhance the effectiveness of the Auditor General (McGee 2002), and that 'historically PACs were created to ensure parliamentary follow-up on Auditor General's reports, and because the jurisdiction of PACs has more in common with Auditor General's remits than does that of other committees' (McGee, 2002:81). Wehner describes the PAC as the 'principal audience' of the AG's work. Generally, PACs are the only committees with explicit mandates to study the AG's reports, although in some jurisdictions other committees can also examine these reports if there is a crossover between the AG's report and the committee's area of interest (Jones and Jacobs 2005). Coghill (2004) has noted that there is a balancing act to strike between the Public Accounts Committee and Auditor General, whereby the relationship should not be too 'cosy', which is to say that the Auditor General should listen to the views of the Public Accounts Committee but not be held captive by those views. Instead, the PAC-AG relationship should be one of trust based on impartiality. Of extreme import, Stapenhurst et al (2005) find that, among other things, the PAC's relationship with the Auditor General determines the very success of the Public Accounts Committee institution itself.

In sum, the literature argues for a positive and collegial relationship between the Public Accounts Committee and the Auditor General such that they can more easily coordinate their oversight duties. In Fiji, although the Public Accounts Committee and the Auditor General do have a history of working together, the process has been more personality-driven and event-driven, rather than a stable and continuous relationship that coordinates their oversight efforts, not least in the budget ambit.

The Auditor General occupies a preeminent position in the accountability field in Fiji. It was noted earlier that the Open Budget Index actually scores the Auditor General at 25/100, and that the AG's audit documentation is one of the few pieces transparently delivered (International Budget Partnership 2015b). In the period immediately preceding Fiji's independence (1956–1969), the Auditor General was made independent through colonial laws including the *Audit Ordinance of 1956* and the *Finance Ordinance of 1965.* The 1965 ordinance specified that the 'Director of Audits' acted on behalf of the 'Legislative Council' when carrying out inquiry into the public accounts. Following independence in 1970, the Auditor General's oversight role grew, and on various occasions it had special audits conducted, and it transmitted special reports to parliament on certain public organisations, while maintaining some contact (a relationship that was positive but not regularized) with the Public Accounts Committee (Nath, Van Perseum, and Lowe 2006).

However, the role of the Auditor General in Fiji was not without resistance from executive agency. A lack of resources, restricted staff recruitment process (Public Service Commission), conflicting traditional native laws, and a dependence on the Ministry of Finance for appropriations are just some of the obstacles that the Auditor General has faced in the post-independence era, making his work statutorily independent but constrained in practice (Nath 2006). Exogenous factors have also exerted pressure on the AG's work in the past. The 1987 military coup, for example, led to a mass exodus of its talent pool, with the Fijian Audit Office losing important staff members. The coup also created an environment of government austerity which cut spending (Appana 2003). The AG's work was also stalled because the Public Accounts Committee was suspended until 1992, which led to a severe backlog in audit and oversight work. The 2000 military coup also created similar challenges, including a two year backlog in the PAC's scrutiny work. In the decades since independence, therefore, it can be said that there have been several costly interruptions in the work of the Auditor General and the Public Accounts Committee that is largely attributable to political shocks, as well the accompanying budget constraints, brain drain, delays/ backlog, and institutional shut downs.APR

The New Constitution (2013)

A new constitution was adopted in 2013 to breathe new life into the Fijian governance ecosystem. Aiyaz Sayed-Khaiyum, the current (34th) Attorney-General, as well as Minister of Finance, unveiled a constitution that was notable for several reasons, including its vocal support for increased 'transparency and accountability' and 'good governance' in the Fijian system, as enshrined in the very first article of the document. The new constitution assures the independence of the Auditor General and makes very strong provisions for the Auditor General to play an active role. For example, its provisions include appointment "by the President on the advice of the Constitutional Offices Commission, following consultation with the Minister responsible for finance". In Chapter 8, Articles 51–52, the constitution declares that:

> At least once in every year, the Auditor General shall inspect, audit and report to Parliament on— (a) the public accounts of the State; (b) the control of public money and public property of the State; and (c) all transactions with or concerning the public money or public property of the State.

This provision is supported by sub-clauses allowing for complete accessibility of the Auditor General to all required documentation, as well granting him provisions for enhancing future functions and powers through additional written laws. Whereas the Auditor General was historically constrained in the hiring of staff by Public Service Commission rules, the Auditor General now has the fullest hiring, appointment, salary, and dismissal discretion. Meanwhile, the funding requirements of the Auditor General are no longer subject to the Ministry of Finance but instead to the Parliament itself, enabling greater practical independence. The Auditor General must offer his opinion to parliament on whether public money is being applied to the purpose for which it was

authorised. As such, these constitutional reforms bolster the oversight powers of the Auditor General and thus help foster a better oversight climate and support the Public Accounts Committee.

With respect to the PAC, despite exogenous setbacks in the past, such as the suspension for five years after the military coup of 1987 or the two-year suspension after the 2000 military coup, the Public Accounts Committee has generally played a constructive and active role in oversight, adjusting for its limited resources and an overarching climate that has perhaps not always been amenable to transparency. In the new constitution, the Public Accounts Committee is justified by Article 70, Chapter 3, as follows:

> Parliament must, under its rules and orders, establish committees with the functions of scrutinising Government administration and examining Bills and subordinate legislation and such other functions as are specified from time to time in the rules and orders of Parliament.

The Public Accounts Committee has increased its oversight activity in the past 18 months. In May, 2015 the Public Accounts Committee released a report titled 'No More Repeats' that represented a studied compilation of three previous reports by the Auditor General (PAC 2015). It analysed the backlog from 2007–09, citing the necessary efforts to provide 'value for money' in public services and to take 'a step forward for good governance' (PAC 2015). In February, 2016 there were two important changes made to the Standing Orders [S.O.] that affected the PAC (S.O. 109(2)(d)). First, the earlier requirement that PAC may only be chaired by a member of the Opposition was removed. Second, whereas the earlier scrutiny of the PAC was limited to how public money had been dealt with and accounted for in terms of written law, now the PAC is allowed to examine and consider the merits of the underlying policy that informs public spending (S.O. 109(2)(d)).

In addition to the constitutional recognition for a stronger Auditor General and Public Accounts Committee, the new 2013 constitution is important in that it makes provisions for new institutions that could help support the oversight and accountability ecosystem in Fiji. Primary among these is the Accountability and Transparency Commission, which is provided for by Chapter 5, Article 121 of the constitution (The Republic of Fiji 2013). It is expected to be an independent commission with funding determined by parliament and powers to appoint its own staff. The mandate of the ATC is to assist and advise parliament in carrying out its accountability work – broad and imprecise as this may *prima facie* seem. However, as of this writing (2016), the institution has not yet been functionally established, as noted by the PAC, which urged the establishment of the ATC 'as a matter of urgency in Fiji' (PAC 2015).

ROLE 1: A COORDINATOR

Figure 1: PBO at the accountability juncture

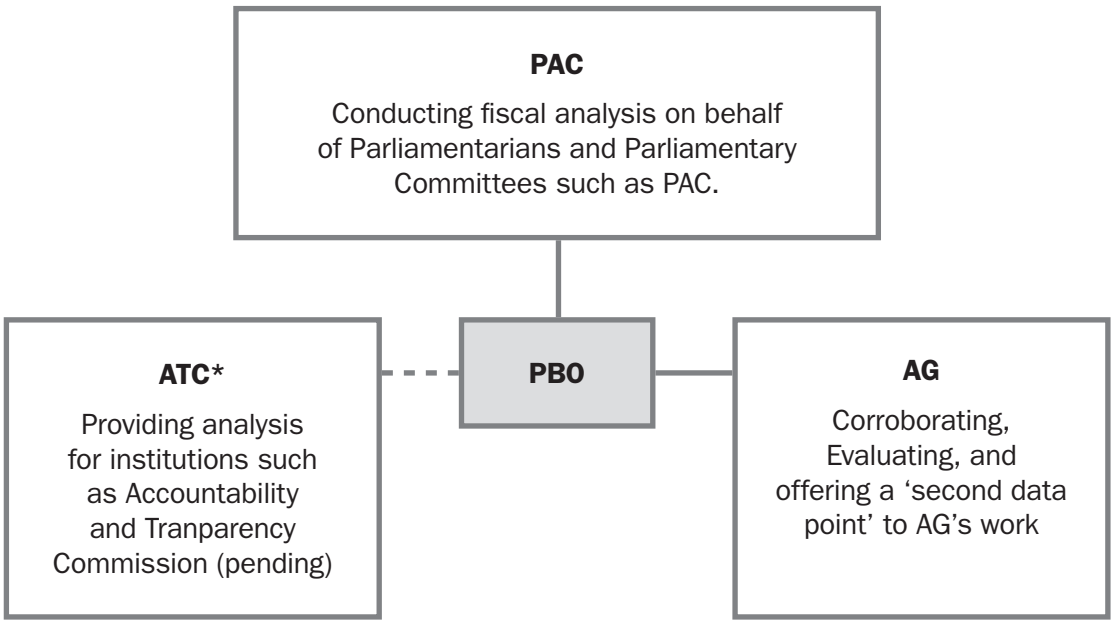

Figure 1 – A Simplified Relationship between the Parliamentary Budget Office (PBO) and the major accountability institutions: Public Accounts Committee (PAC), The Auditor General (AG) and other institutions such as the Accountability and Transparency Commission (ATC*: constitutionally mandated but yet to be established)

The landscape of accountability, particularly with respect to budget oversight, thus appears to be a disjointed arena, with the Auditor General and Public Accounts Committee working in generally unsynchronised trajectories – at least to the extent that the IBP accords Fiji a 15/100 in budget transparency, with the legislative role 0/100 and the AG's work 25/100 (International Budget Partnership 2015c). What is required, therefore, is a mechanism for the coordination of the budget oversight initiatives of these accountability institutions. This is where a Fijian PBO can fulfil a unique purpose.

A PBO in Fiji can act as a coordinator of budget oversight activities by providing the Public Accounts Committee, the Auditor General, and the Accountability and Transparency Commission, with impartial and non-partisan budget analysis pertaining to fiscal oversight. From the Public Accounts Committee perspective, as members of the PAC do not themselves necessarily possess the fiscal acumen to scrutinise a complex document such as the national budget, which approximates $2.5Bn Fijian ($1.2Bn USD) in total operating receipts (KPMG 2014), the PBO can serve as a legislative tool to enable long-term oriented, unbiased, detailed budget analysis. As a matter of best practice (Chohan 2013b), the PBO should not provide analysis only to the PAC, but share its findings in an 'open publishing' format that is accessible to all parliamentarians, to the media, and to the general public.

From the Auditor General's perspective, the PBO would serve as a second data point of comparison with the AG's analysis, and muster a position of *ex ante* oversight that complements the *ex post* oversight role of the AG. Having two unbiased and separate analyses on a key issue adds analytical rigor to its study (Chohan 2013c). This AG-PBO link does have several Westminster precedents. The F-35 parliamentary debate in Canada serves as a good example (Chohan 2013c; Lee 2013). In July, 2010 the Canadian Defense Minister Peter Mackay stated that the procurement of 65 advanced F-35 fighter jets would cost the Canadian taxpayer '$9 billion', but the opposition asked the Canadian PBO to provide an impartial and detailed analysis on the costs of procuring this air fleet (Lee 2013). In its analysis, the PBO found the number to be closer to $30 billion dollars, more than triple what the defense minister had claimed and large enough to cause an uproar in parliament (Chohan 2013c). The government vehemently rejected the PBO's analysis. Then, the Auditor General Michael Ferguson, undertook an equally detailed study into the F-35 costs, and found that his figure of $25 billion was much closer to the PBO estimates, thereby corroborating the office's work (Lee 2013). The aforementioned example shows that the PBO and Auditor General can lend credibility to each other's analysis; thereby enhancing transparency by bringing more accurate figures to the parliament's and public's attention; as well as promoting accountability by bringing government departments to account for the claims they make to the broader public.

From the Accountability and Transparency Commission's perspective, once it is established, the PBO could help the commission in the same manner as it would either the PAC, the AG, or both. This is to say, the PBO could help the ATC as it would the Public Accounts Committee, with fiscal analysis pertaining to the accountability of budget matters; or it could serve as a second data point corroborating the work of the ATC, as it would the Auditor General. It could even serve both purposes, but since the ATC has not yet been functionally established, assessing the precise relationship between the three institutions is speculative at this juncture.

The notion of ascribing a role to a PBO as 'a coordinator' of accountability mechanisms would be unique among PBOs; but it is apt given the unique present circumstances of Fiji: whereas the republic possesses the necessary accountability institutions and has capable and astute leaders at their helm, there is insufficient fiscal oversight coordination between them. The new constitution reflects this quandary: although there are numerous laudable instruments (extant and forthcoming) for enhancing fiscal transparency and accountability, there is no article that binds their efforts in a consolidated or coordinated manner. This is a shortcoming that the PBO can address, by synchronising the budget oversight apparatus and initiatives of various accountability institutions.

ROLE 2: A BUDGET ANALYST

The unique Fijian coordination role for a PBO notwithstanding, if mere coordination were the sole task of the PBO, then it would no longer be a budget office; but rather be some sort of 'Accountability Coordination Bureau'. This would not help Fiji address its budget transparency shortcomings as manifested in its Open Budget Survey Ranking of 15/100 (International Budget Partnership 2015c). Rather, there is also a genuine budget analysis role for the PBO to play; one that is in line with international and Australasian practices of independent fiscal institutions.

The budgetary advantages to Fiji of an independent PBO are manifold (see Table 1). A PBO would improve the quality of data gathered for legislative scrutiny, particularly for major accounts such as national accounts, GDP by expenditure, household/corporate debt, and unemployment. It would help to infuse the legislative role in budgeting with a long-term orientation premised on sustainable budgeting.

The PBO would also bring a measure of dispassionate budget analysis to politically charged issues, such as the impact on government budgets of wage increases for civil servants. It could conduct various types of financial analysis such as scenario analysis, revenue analysis, expenditure analysis, sector-specific analysis, and social program analysis (see Table 1).

It may be observed from this discussion that the PBO does have a very important budget role to play, and it has a niche to fill in advising Parliament on complex fiscal issues that require a long-term orientation and a sustainable growth trajectory. Fiji is undergoing a phase of economic transition wherein many core items in the national budget are in adjustment, ranging from tax regimes, to infrastructure investment, to privatisation (IMF 2014). Therefore, a purely budgetary mandate is enough to warrant the establishment of a PBO in Fiji, although as discussed earlier, the unique oversight circumstances, as well as the need for accountability institution inter-linkages allow for a PBO to be something even more.

Table 1: The 'Budget' Function of a PBO in Fiji

	Budget Function	Description
1	Data Gathering & Improving Statistics	Improve quality of data gathered for legislative scrutiny, particularly for major accounts such as national accounts, GDP by expenditure, household/corporate debt, and unemployment.
2	Long-Term Horizon	Preserve institutional memory and budgeting best practices. Look beyond one-offs and exceptional items.
3	Sustainability	Manage debt/deficit and other similar variables at sustainable levels

	Budget Function	Description
4	Analysing Politically Sensitive Decisions	Certain budget decisions court more controversy than others, e.g. wage bill increase by 20% for public servants. Providing unbiased and nonpartisan analysis about the budgetary merits of such decisions is a cornerstone of a PBO's success.
5	Scenario Analysis	Planning for shocks: from climate change to commodities.
6	Revenue Analysis	Various types of taxes and duties, as well as tax-holidays and tax incentives.
7	Expenditure Analysis	Capital and Operating expenditures. In capital expenditures, being mindful of capacity issues while addressing large backlog.
8	Sector Analysis	State-Owned Enterprise (SOE) Reform: some are profitable but others require subsidies. Timing of divestiture, privatization, de-regulation etc.
9	Social Safety Net	The social safety net payments tend to be the largest (and most non-negotiable) portion of government spending, e.g. in the U.S. In Fiji, social safety net is new, so budgeting for its steady but inclusive growth is necessary.

CONCLUSION

The unique circumstances within which institutions have evolved in Fiji mean that its accountability mechanisms, although they do exist, have not been able to coordinate their accountability function vis-à-vis budget oversight. Fiji does possess a strong and active Auditor General's Office, as well as a long-standing culture of public accounts oversight through parliamentary committees (PAC), and is even looking to introduce new commissions to facilitate accountability engagement, such as the Accountability and Transparency Commission, although this has not been established yet despite being enshrined in the new constitution.

From a budgetary standpoint, oversight would be better coordinated if there were a budget office stationed at the juncture between these disparate but highly capable offices. A PBO can fill that role in Fiji, by corroborating the analysis of the AG, providing the Public Accounts Committee with fiscal analysis, and assisting the future accountability commissions in their mandates. This role is unique to the proposed PBO of Fiji, and represents a form of interesting innovation in PBO design; given that, to many scholars and practitioners, there is no definite template on what a PBO should do and how it should do it (Chohan 2016). Given the trend towards establishing small PBOs across the world, this innovation as a coordinating mechanism for other accountability institutions, can serve as an important and useful template in countries where institutions are also capable but not coordinated.

Aside from this role as a coordinator, there is a purely budget analysis role for the PBO to play as well. Fiji is in a state of economic transition wherein budget analysis is prone to a measure of uncertainty, which is attributable to exogenous factors such as alterations in commodity prices, currencies, export revenues, investor appetite for privatisation, cost of borrowing, among other variables (IMF 2014); but also to endogenous factors such as a more stable political climate, successful completion of infrastructure projects, investment in the social safety net, programs to subsidise or deregulate SOEs, among other variables. The PBO can bring a long-term orientation to budget analysis and foster greater reliability in legislative decision-making through superior data collection.

This paper has demonstrated that Fiji allows for the study of a dual role for Parliamentary Budget Offices: one as a force for coordinating oversight among accountability institutions such as the Public Accounts Committee and Auditor General; another as a budget analysis office that provides legislatures with analytical rigor to deliberate on complex budgetary decisions. As a final point, although it was not constitutionally enshrined, the PBO fits very well into the new constitutional commitment to enhancing accountability and transparency in Fiji, by strengthening those institutions that are enshrined within the constitution.

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Dual Language Legislation: What Can New Zealand Learn From the Canadian Model

Helena Strange

Helena Strange is a former Parliamentary Officer (Clerk of Committee), New Zealand House of Representatives.

ABSTRACT

At the time of writing this paper, dual language legislation was becoming more common in New Zealand's House of Representatives. Despite this, no systems were in place to deal with drafting an entire Act in two languages. This paper compares how dual language drafting has evolved in both New Zealand and Canada and what key features of the Canadian model could be implemented in New Zealand. Jurilinguists and concurrent drafting are key features of the Canadian drafting model that could work well in New Zealand as they ensure consistency between the two language versions. But drafting all legislation in two languages could be problematic in New Zealand due to the costs involved, lack of trained drafters skilled in both English and Te Reo Māori, and because English is now the first language of most New Zealanders. Both languages having equal status within the legislation could also create difficulties in New Zealand if an inconsistency in meaning arose between the two language versions. This is more likely in New Zealand than Canada as Te Reo Māori and English are linguistically more different than English and French.

INTRODUCTION

Dual language legislation is in its infancy in modern day New Zealand, with only one Act being passed in both English and Te Reo Māori[1] in recent times in the House of Representatives.[2] However it is becoming increasingly common for bills to include Te Reo Māori words, phrases, and sections. With another complete dual language act possibly being drafted shortly, it seems that dual language legislation is gaining acceptance within both Government and Parliament.

Canada has been drafting its federal legislation in two languages (English and French) for some time.[3] What can New Zealand learn from the Canadian model as it moves towards normalisation of dual language legislation?

1 Māori language

2 Mokomoko (Restoration of Character, Mana and Reputation) Act 2013

3 Constitution Act 1867, s133

This paper looks at how dual language legislation has evolved in both New Zealand and Canada, and investigates key points of each country's drafting model. In doing so it addresses the following questions.

What aspects of the Canadian model would work in New Zealand?

Going forward, does New Zealand have the resources and infrastructure in place to be able to easily draft dual language legislation?

Other countries draft legislation in two different languages. Is the Canadian model the best one to follow?

EVOLUTION OF DUAL LANGUAGE LEGISLATION IN NEW ZEALAND

19th Century legislation

Māori people have long been involved in the political process in New Zealand, as can be seen with the Treaty of Waitangi in 1840 and the introduction of Māori seats in the House of Representatives in 1867. It is not surprising then that translation of legislation into Te Reo Māori is not a recent event in the history of the House of Representatives. As early as 1858 some legislation was translated into Te Reo Māori[4], and in 1868 the Standing Orders were revised so that bills affecting Māori should be translated and printed in Te Reo Māori[5]. However, as Phil Parkinson notes:

> Over the next few decades after 1868 there was only an irregular compliance with the standing orders of the House of Representatives and the Legislative Council that Bills and Acts be prepared in both Ma¯ori ? and English for the better information of "Her Majesty's subjects of the Native Race"[6]

It is interesting to note that no legislation appears to have been enacted which has a full translation in Te Reo Māori included in the Act. Rather the practice has been to have legislation subsequently translated, published, and circulated in Te Reo Māori after enactment.

The practice of translating legislation into Te Reo Māori, while sporadic, died away in the 20th Century as English became the common language of most Māori people.

Māori Language Act 1987

Māori people had been actively discouraged from speaking their own language in the 20th Century, and there was a real danger that the language would die out. The *Māori Language Act* 1987 was the result of a renaissance of the Māori language in the late

4 Native Districts Regulation Act 1858 and Native Circuit Courts Act 1858

5 *Māori Language – selected events 1800 – 2014*, Parliamentary Library Research Paper, 15 July 2014

6 Parkinson, Phil, ""Strangers in the House": The Māori Language in Government and the Māori Language in Parliament 1865 – 1900", Victoria University of Wellington Law Review 2001, p 1

20th Century. Amongst other things it declared Te Reo Māori to be an official language of New Zealand, but it was only enacted in the English language. A Te Reo Māori translation was printed at the direction of the Attorney-General after the Act received Royal Assent with the following statement:

> NOTE: This translation, which was not enacted by Parliament, is published by direction of the Attorney-General

It was the first Act to be officially translated into Te Reo Māori at the direction of the Government since the 19th Century.

21st Century legislation

Since the introduction of Māori seats in 1868, New Zealand's House of Representatives has always had Māori members. While at times they have made up only four per cent of members,[7] presently over 20 per cent of members identify as being Māori,[8] and seven out of eight members of the current Māori Affairs Select Committee are Māori. Currently members of the House of Representatives may speak in either English or Te Reo Māori in the House or at select committee meetings,[9] but legislation has been slow to follow the dual language path. Large portions of Treaty of Waitangi settlement Acts are written in Te Reo Māori, particularly the historical accounts, acknowledgements, and apologies. Translating the legal provisions of legislation continues to cause concern, though, as the question might arise as to which version of the bill takes precedence in the event of inconsistency between the two versions.

The only Act that has been translated and enacted in both English and Te Reo Māori in recent times is the *Mokomoko (Restoration of Character, Mana, and Reputation) Act 201*3. Mokomoko, a Māori chief who lived in the 19th century, was convicted in the Supreme Court at Auckland of the murder of Carl Sylvius Volkner (a missionary), sentenced to death, and subsequently executed. He was later found to be innocent of the crime of which he was accused. The *Mokomoko (Restoration of Character, Mana, and Reputation) Act* 2013 gives effect to the agreement between the Crown and the Mokomoko family relating to statutory recognition of the free pardon dated 15 June 1992, granted historically to Mokomoko by the Governor-General. The legislation itself was drafted in English. However, the Mokomoko whānau[10] requested, during the Māori Affairs Select Committee's consideration of the bill, that the bill be amended by inserting a Te Reo Māori translation into it. This was because they felt the Act would have more meaning for the descendants of Mokomoko if they could read it

7 Barg, Maria, Editor, Māori *and Parliament: Diverse Strategies and Compromise*s, 2010, p. 260

8 Statistics New Zealand, *NZ social indicators, representation of ethnic groups in government*, http://www.stats.govt.nz/browse_for_stats/snapshots-of-nz/nz-social-indicators/Home/Trust%20and%20participation%20in%20government/rep-ethnic-grps-govt.aspx.

9 Standing Orders of the House of Representatives 2014, SO 108

10 Mokomoko family

in their own language. Members of the committee consulted their caucuses and the government members also consulted the Attorney-General to seek agreement for the translation to be done. Concern was raised about which version of the bill would take precedence in the event of an inconsistency between the two versions. Nevertheless, agreement was given due to the special nature of the bill and because an amended bill would not create any substantive legal rights or obligations. The Māori Affairs Select Committee therefore agreed to amend the bill by inserting a Te Reo Māori translation into it, and the bill was enacted in both English and Te Reo Māori. The committee chose not to include a provision stating which language would take precedence in the event of an inconsistency between them, saying instead:

> We are advised that translating this legislation before enactment would have the legal impact that the English and Te Reo Māori versions would be considered equal and any inconsistencies between them would have to be resolved in a court of law. [11]

Another bill, currently before the Māori Affairs Committee, also seems likely to be amended through the insertion of a Te Reo Māori translation. Significantly, Hon Te Ururoa Flavell, the Minister for Māori Development, made the following statement about the Māori Language (Te Reo Māori) Bill in a press release on 22 October 2015:

> Cabinet approves Māori Language Bill amendments
>
> Māori Development Minister Te Ururoa Flavell says "Cabinet has approved amendments be made to the Māori Language (Te Reo Māori) Bill."
>
> "I am pleased that Cabinet has agreed to the landmark decision to enact the Bill in dual languages and that will mean the te reo Māori text will prevail in law", he says.[12]

While the *Mokomoko (Restoration of Character, Mana, and Reputation) Act* 2013 did not contain any substantive legal rights or obligations, this is not true of the Māori Language (Te Reo Māori) Bill which is much more complex and contains many legal provisions. This can be seen as a clear progression of the complexity surrounding legislation bring translated.

The issue of precedence between the two versions of legislation is discussed in more detail later in this paper.

Dual language legislation is becoming more common within the House of Representatives. In the last 30 years it has moved from translations post-enactment, to portions of acts containing Te Reo Māori, to enactments of entire pieces of legislation in both English and Te Reo Māori. It has evolved over time and is not enshrined in the country's constitution or current Standing Order, rather it is an ad hoc event that the Government has agreed to from time to time. This has meant that no structures have

11 Mokomoko (Restoration of Character, Mana, and Reputation) Bill, 343–2, Commentary as reported by the Māori Affairs Committee.

12 Beehive.govt.nz, *Cabinet approves Māori Language Bill amendments,* http://www.beehive.govt.nz/release/cabinet-approves-m%C4%81ori-language-bill-amendments

been put in place to deal with drafting dual language legislation, and new processes have had to be developed to make the dual language legislation possible, especially with the move to having entire pieces of legislation in both Te Reo Māori and English.

KEY POINTS OF NEW ZEALAND DRAFTING INFRASTRUCTURE RELATING TO DUAL LANGUAGE LEGISLATION

Background Of New Zealanders, 14.9 per cent identify as being Māori[13], and of these only 21 per cent are able to hold a conversation in Te Reo Māori.[14] While the *Māori Language Act* 1987 declares that Te Reo Māori is an official language of New Zealand and gives people the right to speak in Te Reo Māori in legal proceedings, it does not make any requirement for legislation to be enacted in both English and Te Reo Māori. Likewise no requirement for legislation to be enacted in both English and Te Reo Māori is specified in the Standing Orders or Speakers' Rulings. This means that the majority of legislation in New Zealand is drafted in English only, and the current team of drafters (Parliamentary Counsel) for Government bills are not fluent in Te Reo Māori (or able to draft in that language) as it has not been necessary thus far.

Some Acts (notably Treaty of Waitangi Settlement legislation) do contain large portions of Te Reo Māori, particularly the historical accounts, acknowledgements, and apologies. However this text has been supplied by the Government department responsible for the legislation, and is not generally a key legal provision of the legislation. It does not require the Parliamentary Counsel to be fluent in Te Reo Māori or to be able to draft those sections of the legislation.

This has also been seen in the Acts that contain a complete translation of English into Te Reo Māori and have been (or will be) enacted in both languages. The translation in both cases has been done by amending the bill at the select committee stage. To date the translation has been provided by advisers (the Government department responsible for the legislation) as the Government has overall responsibility for the legislation. Parliamentary Counsel has then inserted the translation provided by the advisers into the bill on the instruction of the select committee.

Preparing the translation

The process for preparing the translation had to be created during the select committee consideration of the legislation, as there was no process already in place for this to be done. As the Government department was responsible for the legislation, and for providing the translation, they have also been responsible for finding a translator, checking the integrity of the translation (peer review), and also paying for the translation

13 Statistics New Zealand, *Ethnic groups in New Zealand*, http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/quickstats-about-a-subject/culture-and-identity/ethnic-groups-in-new-zealand.aspx

14 Statistics New Zealand, *Speakers of te reo Māori*, http://www.stats.govt.nz/browse_for_stats/snapshots-of-nz/nz-progress-indicators/home/social/speakers-of-te-reo-maori.aspx

to be done. The select committee was not involved in this process as it was seen as an administrative issue and hence the responsibility of the Government department. The translator and peer reviewer were chosen from the list of Māori Translators Licence holders certified under Section 15(2) c of the *Māori Language Act* 1987.

Accuracy of the translation presents potential problems. At least once in the past, with the Māori Television Service Bill in 2002, the translation provided by the Government department did not accurately reflect the amendments requested by the select committee. In that case the preamble to the bill was translated into Te Reo Māori at the direction of the Māori Affairs Select Committee. An issue arose because the Government department amended the translation of the preamble without authorisation from the committee. The committee was unhappy about this situation and wrote about it in its commentary on the bill. It was subsequently reported back to the House.[15]

Consideration has also needed to be given to the amount of time required for the translation. As the translations have been done during the select committee consideration phase, the amount of time available for this process is limited by the date for report-back to the House. Advisers, Parliamentary Counsel and committee staff had to work together to ensure that the timetabling of the legislation allowed time for the translation to take place. Timetabling is something that will need to be considered in the future. Will the provision of dual language legislation slow down the preparation of bills and regulations? And, in the case of Treaty of Waitangi Claims settlement legislation, will it conflict with the Government's desire to speed up the Treaty of Waitangi Claims process generally?

Another issue that has arisen is the technical challenge of how to create a document containing the bill for translation that all parties can access on a secure and confidential basis. This issue would not occur if all drafting and translation were done by the Parliamentary Counsel Office as any drafting and translation would be done by the same organisation. However, because the translation is being undertaken by a separate Government department, a new kind of inter-agency document-sharing arrangement has been established. This was facilitated by the Department of Internal Affairs, which set up a secure platform for both the Government department and Parliamentary Counsel Office to share access to the document in a confidential environment.

Confidentiality of committee proceedings

Associated to this issue is the further challenge of maintaining confidentiality of committee proceedings as required by Standing Orders:

> The proceedings of a select committee or a subcommittee other than during the hearing of evidence are not open to the public and remain strictly confidential to the committee until it reports to the House.[16]

15 Māori Television Service Bill, 171–2, Commentary as reported by the Māori Affairs Committee

16 Standing Orders of the House of Representatives 2014, 239(1)

Concern was raised by Parliamentary Counsel over whether this Standing Order was being breached by having an outside person, such as the contracted translator, view the amendments to the bill while it was still before the select committee. In the end it was decided that as the translators were contracted to the Government department, which had been appointed as advisers to the select committee, they were essentially employees of the Government department and therefore by extension also advisers to the committee and also bound by privilege. This meant translators would have the same access to committee proceedings as the Parliamentary Counsel and advisers and would not be breaching confidentiality rules.

Which language takes precedence?

Aside from practical issues, there also remains the major legal question of which version of the Act would take precedence should an inconsistency between versions occur. This is something that is not legislated for in New Zealand and would need to be tested in a court of law. This issue was considered by the Māori Affairs Select Committee in their consideration of the Mokomoko (Restoration of Character, Mana, and Reputation) Bill. The committee decided not to specify which language version would take precedence in this piece of legislation, instead deciding that both would have equal value:

> We are advised that translating this legislation before enactment would have the legal impact that the English and Te Reo Māori versions would be considered equal and any inconsistencies between them would have to be resolved in a court of law.[17]

This could be an issue if the Māori Language (Te Reo Māori) Bill, currently before the Māori Affairs Committee, is also translated and enacted in both English and Te Reo Māori. As noted previously in this paper, Hon Te Ururoa Flavell, the Minister for Māori Development, stated that Cabinet has approved the Te Reo Māori language taking precedence should an inconsistency arise between the two languages.[18] This could potentially cause issues for the courts, as the number of fluent Te Reo Māori speakers with appropriate legal training is small A shortage of skilled people to aid in interpretation of the legislation might have an impact on the interpretation of legislation.

Resourcing

Currently there is no special budget set aside for providing dual language legislation in New Zealand. Any costs for translation and peer review have to be accommodated from within existing budget base-lines. This is less of a problem while dual language Acts are in their infancy, as any costs will be sporadic and infrequent. However should dual

17 Mokomoko (Restoration of Character, Mana, and Reputation) Bill, 343–2, Commentary as reported by the Māori Affairs Committee.

18 Beehive.govt.nz, *Cabinet approves Māori Language Bill amendments*, http://www.beehive.govt.nz/release/cabinet-approves-m%C4%81ori-language-bill-amendments

language legislation become more common, more pressure will be put on the budgets for Government departments and the Parliamentary Counsel Office. Consequently, additional budgetary provisions may need to be made. It should be noted that the cost of a quality translation can be very expensive.

Another resourcing issue is that of human resources. The pool of translators in New Zealand who are fluent in Te Reo Māori and have legal expertise and the necessary parliamentary vocabulary is very small. There are currently no drafters at the Parliamentary Counsel Office who are fluent in Te Reo Māori and therefore capable of drafting legislation in both languages.[19]

EVOLUTION OF DUAL LANGUAGE LEGISLATION IN CANADA

19th Century legislation

Drafting of dual language legislation is not a new process for Canada. Federal Acts are drafted in are English and French, the languages of the two main colonial immigrants of that country. This differs from New Zealand where one of the languages is that of the indigenous people and the other that of the main colonial immigrants.

The move to dual language legislation in Canada came about as a result of section 133 of the *Constitution Act* 1867. This act created the federal dominion of Canada and set out the framework for its government. It does not give official language status to English or French, but does make those languages the ones that may be used in the parliament and courts of Canada:

> Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.[20]

Since this Act came in to force, all legislation in Canada has been enacted in both English and French. Until the late 1970s, this was done by drafting legislation in one language and then translating into the other.

19 Dr Briar Gordon, Parliamentary Counsel, personal communication, 2015/16

20 Constitution Act 1867, s133

Official Languages Act 1969

The status of English and French in the Canadian Parliament and in legislation was reinforced by the *Official Languages Act* 1969. This Act gave official language status to both languages and recognised the equal status of both languages in Canada.

> Any journal, record, Act of Parliament, instrument, document, rule, order, regulation, treaty, convention, agreement, notice, advertisement or other matter referred to in this Part that is made, enacted, printed, published or tabled in both official languages shall be made, enacted, printed, published or tabled simultaneously in both languages, and both language versions are equally authoritative.[21]

Review of 1976

In 1976 a special study by the Commissioner of Official Languages criticised the state of bi-lingualism in Canada.[22] The report stated that French speakers were disadvantaged and that French-language versions of laws still did not enjoy equal treatment.

In response, the Federal Government decided to change the way it drafted legislation moving from a translation model to simultaneous dual language drafting.

> The object of co-drafting is to produce two original and authentic versions through the close and constant cooperation of the two drafters. Each version should fully reflect the departmental instructions while respecting the nature of each language as well as Canada's twin legal systems (common law and civil law).[23]

Since this time, all federal legislation in Canada has been drafted concurrently in both English and French, using a co-drafting approach with two drafters.

Canadian Charter of Rights and Freedoms

This is a 'bill of rights' that was included as the first part of the *Constitution Act* 1982. It further reinforces drafting federal legislation in English and French and states that:

> Parliamentary statutes and records
>
> 18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative

21 Official Languages Act 1969, s13

22 Office of the Commissioner of Official Languages, Special Study Branch, Special Study: Department of Justice, December 1976, p. 9.

23 Privy Council Office, *What is the object of co-drafting,* http://www.pco.gc.ca/index.asp?doc=legislation/chap2.3-eng.htm&lang=eng&page=information&sub=publications

KEY POINTS OF THE CANADIAN DUAL LANGUAGE LEGISLATION MODEL

Background

Of the Canadian population, 22 per cent speak French as their mother tongue, which equates to about 7.3 million Canadians.[24] Unlike New Zealand, Canadian statute requires that all federal legislation must be enacted in both English and French. This is seen in both the Constitution Act of 1867 and, the Official Languages Act of 1969, and in the Canadian Charter of Rights and Freedoms.

Drafting the dual language legislation

Drafting of dual language legislation in the Canadian federal parliament is undertaken by two drafters, both bi-lingual, but one an expert in English drafting, the other in French. The drafting in each language is done concurrently and from the inception of the legislation. This differs from New Zealand where one language version has been created first and then a translation has been inserted before or after enactment.

> The two drafters are expected to consult and to cooperate with one another to the fullest extent, and no decision is to be taken in isolation on any aspect of the file. If both drafters cannot agree on any given aspect of the bill they are drafting, they must seek advice from more senior drafters… We rapidly drew the conclusion that it is virtually impossible for any person to be fluent enough in a language other than his or her mother tongue to be completely comfortable in drafting, with all the necessary nuances, a bill in that language.[25]

This system requires that both drafters be present at every meeting that a drafter would be required to attend for the lifespan of the legislation. This way both drafters have the same information and one is never disadvantaged. Usually one drafter takes responsibility for maintaining the file for the legislation and is the main point of contact for the instructing department.

Initially the legislation is drafted in one language, then it is sent to the other drafter for comment and agreement before that drafter begins their own language version. Once both the initial drafts have been completed, the two language versions are then compared and edited in tandem before being married together and presented as one piece of legislation with two language versions.

24 Statistics Canada , *French and the francophonie in Canada*, http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-314-x/98-314-x2011003_1-eng.cfm

25 Levert, Lionel, *"Bilingual drafting in Canada", The Loophole*, 1995

Jurilinguists

When dual language drafting was introduced to Canada in the late 1970s, so too was the role of the jurilinguist. Specialists in legal language in either French or English, their role is to make sure both language versions of legislation have the same meaning.

> The first jurilinguists were employed… because the French version of federal Acts had been neglected for decades… The jurilinguists were given the mandate of ensuring that in future the French version of legislation would be true to that language and its idiom.[26]

Jurilinguists have moved on from their initial mandate, and are now an important part of the drafting process. They ensure consistency between the two language versions through systematic checking and assist with any specific queries drafters may have with finding the correct legal terminology in both languages.

Confidentiality of proceedings

Because both drafters are working for the same organisation, and are presumably able to access the same document management system, the issue of file sharing and confidentiality encountered in New Zealand is not a problem.

Which language takes precedence?

In Canada, the *Official Language Act* of 1969 and the Canadian Charter of Rights and Freedoms stipulate that both English and French versions of legislation are equally authoritative. We can extrapolate from this that neither language version takes precedence in the event of an inconsistency and it would be up to the courts to decide and interpret what the intent of the legislation is should an inconsistency between the versions occur.

OTHER COUNTRIES THAT DRAFT DUAL LANGUAGE LEGISLATION

Other countries besides New Zealand and Canada also draft legislation in more than one language. They include Finland (Finnish and Swedish), Hong Kong (Chinese and English), India (English and Hindi), Ireland (English and Irish) and Wales (English and Welsh).

All of these countries choose to draft legislation in one language initially, and then insert a translation of the second language into it later. Some of the countries choose to have one language version of the legislation taking precedence in the event of an inconsistency (India and Ireland), while the others give equal status to both language versions, with neither version being subordinated to the other.

26 Privy Council Office, *What is the object of co-drafting,* http://www.pco.gc.ca/index.asp?doc=legislation/chap2.3-eng.htm&lang=eng&page=information&sub=publications

WHAT ASPECTS OF THE CANADIAN MODEL COULD WORK FOR NEW ZEALAND?

All legislation drafted in two languages?

In Canada, while they are still a minority of the population, millions of people speak French as their mother tongue. This makes it much more necessary to draft legislation in two languages so that the Francophones are not discriminated against or disadvantaged in any way.

While Te Reo Māori is an official language of New Zealand there is no statutory obligation to draft legislation in two languages. Historically all Māori people spoke Te Reo Māori, but as mentioned previously, this is no longer the case. Only a small percentage of New Zealanders speak Te Reo Māori, and in most cases those who do speak Te Reo Māori speak English as their first language.

Another issue to take into account is the effect on existing Treaty of Waitangi claims settlement legislation. If all future legislation were drafted in both English and Te Reo Māori, would existing Treaty of Waitangi settlement legislation need to be rewritten for the sake of promoting equality between different claimant groups? Those claimant groups that have already had their claims settled and settlement legislation enacted in English, may wish to have their legislation amended to insert a Te Reo Māori translation so their settlements are not seen as being of lesser value than those that could contain a Te Reo Māori translation.

These issues suggest it is not necessary to draft all legislation in New Zealand in both English and Te Reo Māori. Rather this could be done on a more ad hoc basis, as determined by the Government and as appropriate to the legislation, which is the system currently in operation. The Canadian model of drafting all legislation in two languages does not seem appropriate for New Zealand.

Concurrent drafting in both languages?

As said before, Canada drafts both language versions of federal legislation concurrently.

This does not seem practical for New Zealand as there are currently no drafters in the Parliamentary Counsel Office who are fluent in Te Reo Māori and therefore able to draft in that language. Indeed, there is a limited pool of people in New Zealand who fulfil all the necessary requirements of being fluent in Te Reo Māori, being a lawyer, and having the requisite vocabulary for drafting legislation in Te Reo Māori.

A further complication arises with tax legislation, which in New Zealand is prepared by legal drafters in the Inland Revenue Department. This is done because drafters in the Parliamentary Counsel Office do not have the necessary technical knowledge of tax law. To require tax bills also to be drafted in Te Reo Māori would entail considerable extra training for translators.

The most practical way to draft legislation in New Zealand therefore seems to be the one currently undertaken, by inserting a Te Reo Māori translation (provided by a contractor) after the English version has been created.

Again, the Canadian model does not seem appropriate for New Zealand because of the shortage of skilled Te Reo Māori drafters.

However, should the pool of skilled Te Reo Māori drafters be developed and their numbers increase, concurrent dual language drafting should be something that New Zealand considers implementing in the future. At the moment, adoption of the Canadian model is not the best way to develop two genuine language versions of the same legislation.

However, it would reduce the risk of maintaining confidentiality of proceedings, as the second language version would also be developed by the Parliamentary Counsel Office and therefore would not need to be shared with outside organisations or contractors. It could also save time in the drafting process by drafting both versions of the legislation at the same time, rather than waiting for a translation to be done after the initial version was drafted.

Jurilinguists?

One feature of the Canadian model which could work well for New Zealand is the promotion of jurilinguist. This is particularly important in the New Zealand context as there is a much larger difference linguistically between English and Te Reo Māori than there is between English and French. Many English words are the same in French or have their origins in the French language, which is not the case with Te Reo Māori.

The Parliamentary Counsel Office could source or train staff with the requisite skills, and perhaps employ some people full-time or hire them on an ad hoc contractual basis as required.

Which version of the legislation takes precedence?

The Parliamentary Counsel Office has made its view clear on this matter in advice to the Māori Affairs Committee during its consideration of the Mokomoko (Restoration of Character, Mana, and Reputation) Bill.[27] The Parliamentary Counsel Office's preference is for one version of legislation to take precedence in the event of an inconsistency between the two versions. This is because of the legal risk arising from a conflict in meaning between the two versions.

The fact that English and Te Reo Māori are very different linguistically makes the potential for a divergence in meaning between two versions a real risk. This is illustrated by the issues that have arisen in the past in New Zealand with

27 Parliamentary Counsel Office, advice to the Māori Affairs Committee on the translation of the Mokomoko (Restoration of Character, Mana, and Reputation) Bill into te reo Māori, 11 March 2013

inconsistencies between the English and Te Reo Ma¯ori versions of the Treaty of Waitangi.

Because of this, it would be preferable if New Zealand did not give both languages equal status under the law, as is the case in Canada, but rather decided to give one language precedence. It would not matter which language prevailed, as long as one was specified. This could be achieved by amending the *Māori Language Act* 1987 to insert a clause about dual language legislation to ensure one version takes precedence.

Resourcing

Canada has dual language drafting for federal legislation included in its budget and staffing requirements. This is not the case in New Zealand as any dual language drafting has needed to be covered by existing budget baselines.

If dual language legislation does become more common, then a separate budget item for drafting in Te Reo Māori would be necessary. Training existing staff or finding new skilled staff to assist with drafting in Te Reo Māori would also be necessary.

CONCLUSION

Canada and New Zealand respectively enshrine French and Te Reo Māori as official languages. Although there are larger numbers of French speakers in Canada as a percentage of the population than there are Te Reo Māori speakers in New Zealand, the Canadian model of legislative drafting is a relevant one for New Zealand to consider.

The Canadian model for dual language drafting is very different to that currently being developed and used in New Zealand. However, there are some aspects of the Canadian model that New Zealand could use in the future, providing appropriate resourcing were made available to enable this. Concurrent drafting in the English and Te Reo Māori languages and the use of jurilinguists to ensure consistency between the two language versions are both key aspects of the Canadian model that could work well in New Zealand and should be given close attention by policy makers.

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The Political Consequences of Hansard Editorial Policies: The Case for Greater Transparency

Cecilia Edwards

Cecilia Edwards is a Hansard editor in the Office of the Clerk, House of Representatives, New Zealand[1]

ABSTRACT

In Westminster-style parliaments the official report of debates, or Hansard, has come to be regarded as the definitive account of parliamentary proceedings. But the process by which speeches given in the House are crafted into Hansard reports is not widely known or understood. When discrepancies are spotted between spoken speeches and reported speeches, it is often assumed that a member has altered the record—a practice that can have serious consequences because it raises the question of whether there has been an attempt to deliberately mislead the House.

Focusing on specific examples drawn from Hansard for the House of Commons, the Commonwealth Parliament of Australia, and the New Zealand House of Representatives, this paper shows how such claims can have political consequences, and notes that any changes are usually made by Hansard, not members, in line with standard editorial policies. The paper describes those policies at a generic level and suggests that there is a need for greater transparency about them.

INTRODUCTION

Hansard is the official written report of debates, question time, and ministerial statements made in Parliament. It is an edited transcript of what is said in the Parliaments of many countries. Indeed, it has been described as "the ultimate 'no spin zone' when it comes to reporting on parliamentary events".[2] But how can Hansard be the ultimate "no spin" zone when the words that members speak in the House are transformed into written text that is edited by Hansard staff and subject to correction by members of Parliament? To what extent are those changes apparent to those who read and use Hansard, and what are the political consequences of making

1 This article is based on a research paper submitted for the 2015 ANZACATT Parliamentary Law, Practice, and Procedure course. Many thanks to Professor Richard Herr, who supervised the research. I am also grateful for the encouragement from Hansard colleagues, House Services staff, and the Clerk of the House, who read various drafts of the research paper or the article that emerged from it.

2 Lorraine Sutherland, open lecture on the history, workings and future challenges of Hansard, Commonwealth Hansard Editors Association, 11 December 2013, http://www.commonwealth-hansard.org/about-hansard.html. *Accessed 14 January 2016*

such changes? To answer these questions, this paper focuses on specific examples where members have complained about differences between the Hansard record and speeches given in the House of Commons, the Commonwealth Parliament of Australia, and the New Zealand House of Representatives.

The examples in this article show that the reasons for such discrepancies are generally not understood and that this lack of understanding may give rise to allegations that a member has attempted to deliberately mislead the House by saying one thing in the House and later correcting the Hansard version of it, without giving a personal explanation in the House. Such allegations, if proven, would be considered a serious misdemeanour. Even unproven, such allegations can lead to unwanted political fallout. Although there is nothing new about such complaints, the advent of digital recordings, which enables Hansard reports to be compared with video clips of speeches as delivered, means that any discrepancies are now easily spotted.

This article begins by locating Hansard's role as an important instrument in making parliamentary proceedings transparent. It then examines the changes that occur when language spoken in Parliament is transformed into text, and considers what happens when members complain about these changes, why this is an issue, and why it is a particular issue now. It concludes that more transparency about Hansard editorial policies would reduce the vulnerability of members in the face of misinformed allegations of attempting to mislead the House, and help safeguard Hansard's reputation for accurate reporting on the proceedings in Parliament.

HANSARD'S ROLE IN MAKING PARLIAMENTARY PROCEEDINGS TRANSPARENT

In New Zealand Hansard staff are officers of the House, employed by the Clerk of the House and, therefore, independent of the Executive. This arrangement reinforces, as do similar arrangements in the House of Commons and other Westminster-style Parliaments, the fact that Hansard is responsible to Parliament, not the government of the day. This independence was hard won over time in the United Kingdom and achieved as late as 1907 on the recommendation of a select committee of the House of Commons. Up to this point Commons members had the freedom to alter and polish the draft Hansard transcripts produced by shorthand reporters, and sometimes to even substitute their written speeches for the version that was reported from the House.[3]

In recommending a particular reporting style, the select committee considered three options: condensed reports of speeches, strictly verbatim (word for word) reports, and substantially verbatim reports. By "substantially verbatim" the committee meant

3 This history is traversed in William Law, *Our Hansard or The True Mirror of Parliament, A Full Account of the official reporting of the debates in the House of Commons*, Pitman, London, 1950, 11–19, and Kezia Ralphs, Recording Parliamentary Debates: A Brief History with Reference to England and New Zealand, *Australasian Parliamentary Review*, Spring 2009, Vol. 24(2), 151–163

"with repetitions and redundancies omitted, and with obvious mistakes corrected, but which on the other hand leaves out nothing that adds to the meaning of the speech or illustrates the argument".[4] Effectively, the decision of the House of Commons to adopt the committee's recommendation for a substantially verbatim style of report laid down a blueprint for reporting on parliamentary debates that has survived relatively unchanged for over a hundred years, not only in the House of Commons and the House of Lords but also in Westminster-style Parliaments—Canada, Australia, New Zealand, and other jurisdictions. In summary, Hansard's ethical underpinnings are impartiality and accuracy, although readability is important too.

Today Hansard reports of debates and events in the House may not be as influential in shaping public opinion about political events as they once were,[5] but they remain an important tool for transparency in parliamentary proceedings.[6] Members often seek to "put things on the record" to ensure that an important point or rationale is recorded for current or future generations of researchers and historians. Opposition members compare responses given by the Prime Minister or Ministers to similar questions over time and call them out on wording that, they claim, exposes inconsistencies and flawed logic. Officials, media, and interest groups turn to Hansard to monitor the development of issues or political stories. Under certain circumstances courts may use Hansard reports as evidence, especially where the responsible Minister's second reading speech can throw light on a particular intention.[7]

For Hansard, the challenge in transforming a verbal performance into a reliable written record, is about conveying accuracy of meaning not utterance, especially bearing in mind its role as a historic record.[8]

POLITICAL CONSEQUENCES OF HANSARD EDITORIAL POLICIES

In seeking to understand the political consequences of Hansard editorial policies, the research for this paper focused on relatively high profile cases in the last 25 years where a Hansard report had allegedly been altered. There were surprisingly few cases, but where such claims arose, they did so in a politically charged environment. Notably, every single case involved an allegation that a member had altered or doctored the record, and it was intimated that the member in question had attempted to mislead the House.

4 *Report of the Select Committee on Parliamentary Debates*, House of Commons, Westminster, 4 July 1907, http://www.hansard.ca/uk1907html *Accessed 10 November 2015.*

5 A point made by G.S. Reid and Martyn Forrest in G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901–1988: ten perspectives*, Melbourne University Press, 1989, 437

6 June Verrier, Benchmarking Parliamentary Administration: The United Kingdom, Canada, New Zealand and Australia, *Australasian Parliamentary Review*, Autumn 2007, Vol. 22(1), 48

7 On how courts use Hansard see Allan Bracegirdle, The Courts and Parliament: Further Cases and Other Developments in New Zealand, *Australasian Parliamentary Review*, Spring 2006, Vol. 21 (2), 132–82

8 Kezia Ralphs, Recording Parliamentary Debates: A Brief History with Reference to England and New Zealand, *Australasian Parliamentary Review*, Spring 2009, Vol. 24(2), 161–162

The idea that a member has a right to check their draft transcript acknowledges that the member owns their own words and that in editing those words Hansard staff may have misheard or misrepresented them. This practice seems to be widely understood. Perhaps not so well understood are the constraints placed on the changes that members may seek to make. The scope of such amendments is usually prescribed in the Standing Orders of a Parliament and confined to changes of a minor and technical matter.

In New Zealand, members "may make only minor or grammatical alterations" and cannot alter the meaning or substance of what was said.[9] In the United Kingdom, as in New Zealand, it is the Hansard editor who has the final say: "Corrections are allowed … but only if, in the opinion of the Editor, they do not alter substantially the meaning of anything that was said in the House."[10] Similarly, in the Commonwealth Parliament of Australia although members have a right to correct their draft Hansard, they may not make any changes that "alter the sense of words used in debate or introduce new matters".[11]

Underlying these constraints is the convention that a member is obliged to exercise the privilege of free speech in the House responsibly and not deliberately mislead the House. The House has the ability to punish a member for contempt if they are found to have deliberately misled it. If a member says something in the House that they later realise is wrong, they can make a personal explanation or statement to the House to correct the record.

The technical penalty for a member who is found to have misled the House by having substantive changes made to Hansard may not be significant in one sense. At worst, a finding of contempt or breach of privilege might result in censure. The more damaging penalty occurs if there is adverse publicity following a claim being made in the House that a draft Hansard has been altered by a member. Indeed, members who make such claims are unable to tell whether a member has had the record altered or whether they are simply seeing the result of Hansard editing. In such circumstances Hansard edits can have political consequences, as the examples in this section show.

Editing out redundancies: Tony Blair, 1998

On 18 June 1998 the member for Belfast East, Peter Robinson, accused the then British Prime Minister, Tony Blair, of "doctoring" the Hansard report of his response to a question about the government's intentions for the early release of prisoners who were serving sentences in connection with paramilitary activities. This occurred in the context of the agreement leading to the restoration of peace in Northern Ireland.

9 David McGee, *Parliamentary Practice in New Zealand*, 3rd ed., Dunmore Publishing Limited, Wellington, 2005, 62

10 *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, Malcom Jack (ed), 24th ed., Lexis Nexis, 2011, 130

11 *House of Representatives Practice*, B.C. Wright (ed), 6th edition, Department of the House of Representatives, Canberra, 2012, 621

In response to the question, whether the Prime Minister agreed that prisoners should not be released early until the organisations to which they belonged had substantially decommissioned their weapons, a Press Association report and video of the Prime Minister's response showed that Blair had answered: "The answer to your question is, yes, of course it is the case that both in respect of taking seats in the government of Northern Ireland and the early release of prisoners".[12] In the Hansard report the words "The answer to your question is, yes" were missing.

The member for Belfast East, Peter Robinson, asserted in the House: "Clearly, someone acting for, or on behalf of, the Prime Minister has tampered with the record of proceedings in the House."[13] He asked that the Speaker seek an explanation from Hansard's chief editor. Another member expressed the view that not only might Mr Blair's alleged action have an impact on the peace process, but it also called into question the integrity of the proceedings in the House.[14]

The Speaker, Betty Boothroyd, reported the result of her inquiry on 22 June: neither the Prime Minister, nor anyone acting for him, had made the change. It was the editor who made the change on the basis that it "in no way altered the sense of what the Prime Minister said."[15] She reminded members that the official report was "substantially verbatim" and that words on a tape or in a press release could not trump the official report. She also issued a statement to the press and released the editor's letter of explanation, adding: "my concern is at all times and in every situation for the integrity of this House, its procedures and its status".[16]

This claim was made in the context of a highly sensitive and political environment and on the assumption that the member, Prime Minister Blair, had altered the record, when in fact the change reflected an editorial practice. In this case, the Speaker undertook to investigate the issue, backed the editorial decision, and reminded members that the official report was not verbatim.

Editing for correctness: Richard Prebble, 1993

In Question Time on 23 September 1993 the then New Zealand Prime Minister, Jim Bolger, alleged, during a particularly testy exchange about campaign spending, that Opposition member Richard Prebble had "altered his Hansard quite deliberately to mislead this Parliament."[17] Mr Prebble denied it, but Mr Bolger disagreed, replying that the member had changed the words "Labour Government" to "Labour Party", something he said he had heard when he listened to the tape of the debate and

12 *House of Commons Debates*, 18 June 1998, Vol. 314, 540

13 *HC Deb*, 18 June 1998, Vol. 314, 540

14 *HC Deb*, 18 June 1998, Vol. 314, 540

15 *HC Deb*, 22 June 1998, Vol. 314, 704

16 *HC Deb*, 22 June 1998, Vol. 314, 705

17 *New Zealand Parliamentary Debates*, Vol. 538, 23 September 1993, 18338

compared it with the Hansard. Mr Bolger was denied leave to table a "verbatim" transcript due to objection. He then made the allegation in a letter to the Speaker.[18]

The Speaker investigated the complaint and reported later that day that the change had been made by Hansard staff, not Mr Prebble.[19] Mr Prebble sought an apology from the Prime Minister, but the Prime Minister initially refused.[20] At the conclusion of further exchanges across the House, he said "I find it extraordinary that something that came across very clearly on the tape was unilaterally, as you are suggesting, altered by the staff of Hansard." and then withdrew his allegation.[21]

From a reading of the 9 September Hansard, it is difficult to identify the specific sentence Mr Bolger referred to. But it would seem that Hansard had aimed to achieve technical correctness in reference to parliamentary matters. For example, if Mr Prebble had said "Labour Government", but was actually referring to a period when Labour was no longer in government, then Hansard could have regarded that as a technical fix. The real interest lies in the political context in which the matter was raised by Mr Bolger. The exchange was particularly heated on the issue of spending on campaign advertising—a political hot potato—and occurred in the lead-up to the November general election.

Over-editing in the age of social media: Katrina Shanks, 2011

The advent of social media platforms, including blogs, provides many avenues for the public to express their views. Unlike the print media equivalent of "letters to the editor", comments are not subject to editorial discretion and can be made under the cloak of anonymity. This has opened up Hansard editorial policy to scrutiny in a new and not particularly comfortable way.

The Copyright (Infringing File Sharing) Amendment Bill, which sought to control the illegal downloading of files from the internet, went through the New Zealand Parliament under urgency in April 2011. Parliament TV broadcast the debate live and, as was the usual practice, the draft Hansard transcript of the debate was uploaded on to the internet within hours of the debate.

During the Committee stage, Green Party member Gareth Hughes remarked that the bill was being debated in real time on the internet and Twitter, adding that: "The debate online has already moved much, much faster than the debate in the Chamber."[22] As part of that online debate a video clip of a speech in the Committee stage was uploaded to YouTube by a member of the public.[23] The clip juxtaposed a speech given

18 *NZPD*, Vol. 538, 23 September 1993, 18374–5

19 *NZPD*, Vol. 538, 23 September 1993, 18375

20 *NZPD*, Vol. 538, 23 September 1993, 18375

21 *NZPD*, Vol. 538, 23 September 1993, 18375

22 *NZPD*, 12 April 2011, 18109

23 Parliament TV clip uploaded by Kurt Sharpe, https://www.youtube.com/watch?v=rJdPkrpFXBM *Accessed 14 January 2016*

by a National (government) MP, Katrina Shanks, with a speech given by Miss Teen USA, South Carolina, 2007, apparently to ridicule Ms Shanks' attempts to explain the technical challenges of copyright in the digital age. The clip, titled "Katrina Shanks tries to impress the judges with her n00b[24] skills", attracted 185 abusive comments ranging from derogatory to deeply disturbing.[25]

On 28 April 2011 an anonymous post on *The Standard*, an online publication, compared an unofficial, and apparently verbatim, transcript of the speech with the official Hansard version, under the headline "Editing away idiocy". The article provided a link to the web version of the parliamentary broadcast, explaining that "Previously people had to rely on the Hansard official records of Parliament alone." It pointed out that members may make changes to their draft Hansard, but erroneously explained that any differences between a speech as spoken in the House and the Hansard version were because of members' edits.[26]

The article attracted 18 comments, expressing views such as:

> It goes way beyond fixing the grammar. She's inserting things she never actually said into the record. In parts she actually inserts the opposite of what she said. … It's a bloody disgrace that a member of parliament can stand in the house and talk complete gibberish and have it recorded as if she's Winston F*cking Churchill.[27]

However, 'Rich', who seemed to understand something of the editing process, noted: "I'd say that the Hansard version is pretty much the sense of her words. … it's just repairing her syntax. Plenty of MPs and others can be hauled up for that when they're speaking."[28] 'Felix' countered:

> It's not just syntax Rich, she spoke f*cking gibberish and had it translated into English. … I don't think it's acceptable to alter the public record to make it look like you spoke thoughtfully and carefully when you actually stood in the house and dribbled on your notes like a f*cking moron."[29]

Someone helpfully provided a statistic of the actual number of revisions in the speech (221 for 742 words) and 'James' expressed a concern that: "if they [the National

24 Noob = a person who is inexperienced in a particular sphere or activity, especially computing or the use of the Internet

25 One of the milder contributions was Andrew Naera's: "What a crock of shit! How can someone that can hardly form a sentence be aloud [*sic*] to make these sort of decisions". The most disturbing was John Salvador's: "I live in Wellington. If I see this bitch, f*cking kill her and dump her body in the botanic gardens". All 185 contributions can be viewed online at https://www.youtube.com/watch?v=rJdPkrpFXBM *Accessed 14 January 2016*

26 "GUEST POST", "Editing Away Idiocy", 2:36 pm, 28 April 2011, in *The Standard, http://thestandard.org.nz/editing-away-idiocy/ Accessed 14 January 2016*

27 "Felix", "Editing Away Idiocy", 3.45 pm, 28 April 2011, http://thestandard.org.nz/editing-away-idiocy/ *Accessed 14 January 2016*

28 "Rich", 6.30 pm, 28 April 2011, http://thestandard.org.nz/editing-away-idiocy/ *Accessed 14 January 2016*

29 "Felix", 7.21 pm, 28 April 2011, http://thestandard.org.nz/editing-away-idiocy/ *Accessed 14 January 2016*

government] are substantially changing the record of the house that is fraud and extremely extremely undemocratic."[30]

No further reports appeared in the mainstream media or on the social media sites. Nothing was raised directly in the House, although the Speaker did receive and investigate a complaint from an Opposition member about the alterations made to Hansard.

In actual fact, Ms Shanks had made no corrections to her draft Hansard. The speech was reported and edited according to Hansard style, which eliminated false starts and stumbles, repaired broken syntax, and translated a rough form of speech into a polished written form that could be readily understood.

However, there was a significant consequence to this controversy. In May 2011, just two weeks later, the Clerk of the House asked the Standing Orders Committee to consider moving to a more verbatim style of reporting.[31] The committee agreed with the Clerk's recommendation: "With the convergence of audio, video, and print publishing, and a more searchable service, we agree that a more verbatim approach is required."[32] The report was adopted by Parliament and the recommendation that Hansard adopt a "more verbatim approach" was incorporated in the Speaker's rulings.

Minister's staff correct an error: Barnaby Joyce, 2014

In the Commonwealth Parliament of Australia, a similar claim played out somewhat differently when it was revealed that two changes to Hansard were made at the request of a Minister's staff. On 20 October 2014 the Minister of Agriculture, Barnaby Joyce, when answering a question on drought support loans, referred to a figure of over 4,000 people applying for drought assistance.[33] The Hansard of his reply qualified the answer given in the House with additional wording: "if you were also a recipient of the Interim Farm Household Allowance" and "unless it is a new application."[34] On 22 October Joyce provided additional information to the House on drought assistance, but did not correct the previous day's Hansard.[35]

Opposition member Joel Fitzgibbon asked the Minister on 27 October 2014 about the differences between his answer in the House on the 20th and the Hansard report.[36] Mr Joyce replied that "when the question was being answered … we went and found the information … and we put that precisely on the record".[37] Opposition member

30 "James", 5.13 pm, 29 April 2011, http://thestandard.org.nz/editing-away-idiocy/ *Accessed 14 January 2016*

31 Mary Harris, Review of Standing Orders—Proposed redevelopment of the official report (Hansard), Submission to Standing Orders Committee, 10 May 2011

32 *Report of the Standing Orders Committee, Forty-Ninth Parliament*, I.18B, September 2011, 10

33 *Commonwealth of Australia Parliamentary Debates*, House of Representatives, 20 October 2014, 11325

34 *HR(D)*, 27 October 2014, 11986

35 *HR(D)*, 22 October 2014, 11701

36 *HR(D)*, 27 October 2014, 11986

37 *HR(D)*, 27 October 2014, 11986

Tony Burke asked that the Speaker compare the Minister's taped response with the Hansard and consider whether the alterations to Hansard amounted to misconduct or misleading the House.[38] Before the Speaker could do so, the Minister told the House that his staff had requested minor edits to the Hansard without his knowledge and that he had attended to the matter: "My staff have been counselled. Consistent with standing orders, I have asked that the changes requested by my office be removed from the Hansard before the Hansard is finalised."[39] Having accepted Mr Joyce's explanation, the Speaker declined requests for further investigation.[40]

Over the ensuing months fresh copy in the media kept the story alive, and the Labor Party followed up by requesting documents from the responsible department under the *Freedom of Information Act*. In March 2015 the head of the agriculture department, Dr Paul Grimes, took the unusual step of seeking to appear before a Senate Committee on Estimates, apparently because he had further information that had not been put forward as part of the information disclosed under that Act. No such disclosures were made at the hearing, though, and shortly afterwards he stepped down from his position.

Bill Heffernan, the Liberal Party chair of the committee, entered the fray, saying that he had looked at a number of Hansard reports and found them to be changed.[41] This revelation to the Australian Broadcasting Corporation (ABC) followed a news report in the *Guardian* 2 days earlier, reporting a claim by Joel Fitzgibbon that Mr Heffernan had tried to intimidate the committee: "Heffernan called my staff member last night and said if Barnaby had made a mistake in correcting Hansard then a lot of my Labor mates have … too and he now had the evidence to prove it,".[42] Heffernan refuted the claim of intimidation, saying:

> I asked Hansard about how many changes to the Hansard record are made in the last three sitting periods and I found out that changes have been made by all sides of politics—sometimes changes to whole paragraphs, much more than what Barnaby changed.[43]

Questions were raised in the House between 16 and 19 March, in an attempt to drill further into the circumstances behind the departure of Dr Grimes, but they were effectively parried by the then Prime Minister, Tony Abbott, and Minister Barnaby Joyce. The issue was covered extensively by the print and screen media and also received a lot of comments on Twitter under the hashtag #Hansardgate.

38 *HR(D)*, 27 October 2014, 11996

39 *HR(D)*, 27 October 2014, 12264

40 *HR(D)*, 27 October 2014, 11996

41 ABC News http://www.abc.net.au/news/2015-03-16/hansard-inaccuracies/6322746 *Accessed 14 January 2016*

42 www.theguardian.com/australia-news/2015/mar/13/labor-accuses-bill-heffernan-of-intimidation-over-barnaby-joyce-saga *Accessed 14 January 2016*

43 www.theguardian.com/australia-news/2015/mar/13/labor-accuses-bill-heffernan-of-intimidation-over-barnaby-joyce-saga *Accessed 14 January 2016*

Some of the reports appeared to include a good deal of factual information about how Hansard reports are edited and subject to correction by members, so they were, for the most part, well informed. Comments on media site, reddit, however, were less informed and consequently very damning, especially in terms of the integrity of the official record and therefore of Parliament itself.[44] On 16 March 2015 one commentator suggested: "Should really outsource Hansard to … wikipedia."[45] Another wrote: "If it's an official record, it should not be changed after the fact at all. I would consider amendments and explanations okay as long as the original record remains intact for reference."[46] Someone else asserted:

> Hansard has been turned from a Parliamentary record into a work of politically convenient fiction and a respected senior public servant has even been sacked because he didn't want to assist in covering up a Minister's lies and deception."[47]

Ultimately, no further traction was gained and the story finally dried up.

In this example the changes made to Hansard were in fact made on a Minister's behalf. The Minister appears to have followed due process once the complaint was made and the Speaker accepted the Minister's explanation, if for no other reason than by convention a member must be taken at their word. However, this did not prevent a full-blown media storm. The Minister had to account for his and his staffs' actions both in the House and through news media, and the Minister's head of department resigned in circumstances that were not fully disclosed. Neither the departmental head nor Hansard staff could, of course, publicly defend their actions.

Correcting an inadvertent error: Te Ururoa Flavell, 2015

Despite New Zealand's move to a more verbatim approach, claims still arise about members altering the Hansard record. In one such example Hansard's correction of an inadvertent error, a standard Hansard editorial policy, provided an opportunity for political point scoring.

On 23 June 2015 the Minister for Māori Development, Te Ururoa Flavell, in answer to a supplementary question in the House from an Opposition member, the Rt Hon Winston Peters (leader of the New Zealand First Party), said that there had been "an interaction between my staff and Māori Television, of which I was aware, as often happens".[48] The context was an allegation made by Mr Peters that the Minister had improperly interfered

44 https://www.reddit.com/r/australia/comments/2kgixr/barnaby_joyce_admits_his_staff_changed_hansard/ *Accessed 13 January 2016*

45 https://www.reddit.com/r/australia/comments/2z73qz/federal_labor_liberal_members_concerned_about/ *Accessed 13 January 2016*

46 https://www.reddit.com/r/australia/comments/2z73qz/federal_labor_liberal_members_concerned_about/ *Accessed 13 January 2016*

47 https://www.reddit.com/r/australia/comments/2z73qz/federal_labor_liberal_members_concerned_about/ *Accessed 13 January 2016*

48 *NZPD*, 23 June 2015, 4610

with executive decisions made at Māori Television, thus contravening the independence of the service.[49]

The draft transcript published on the web by Hansard included the word "not", so that Mr Flavell's reply read: "an interaction between my staff and Māori Television, of which I was *not* aware, as often happens." Hansard's insertion of the word "not" took into account the context of Mr Flavell's many responses to several supplementary questions, all indicating that he was not aware of all such interactions.

The following day, Mr Flavell corrected his answer to the previous day's question so that it included the word "not"—perhaps an unnecessary step as it had already been inserted by Hansard.[50] Mr Peters' catch-all question to the Minister that day, "Does he stand by all his statements?", allowed him to drill down further into the Minister's in-the-House correction.[51] Mr Flavell denied any involvement in the changing of Hansard, a statement backed up by the Speaker. The Speaker confirmed that the word "not" had been included by Hansard staff not the Minister, suggesting that it had been added in error by Hansard.[52] Mr Peters then asked how Hansard could possibly change the transcript without the authority of the Minister or his office, to which the Speaker replied:

> Hansard record very quickly what happens, to get it out for members to comment on. A mistake was made. How that was made, I do not know. … To suggest that it was either a deliberate mistake by Hansard or that it was somehow influenced by the Minister, I assure the member, is absolutely not correct.[53]

Mr Peters raised the issue again during the general debate, claiming that Mr Flavell or his staff had falsified the record and then drawn the "Hansard people" into the debate as well. He then called for the resignation of Mr Flavell over his handling of the Māori Television issues and the change made to the Hansard. [54] The following day in Question Time, Mr Peters asked further questions, implying a cover-up.[55] However the line of questioning ultimately went nowhere as the Speaker ruled that the question had already been addressed.[56]

This story generated some coverage in the news media, mostly focused on Mr Peter's call for Mr Flavell to resign. The accusations around falsification and cover-ups put plenty of political heat on the Minister. Mr Flavell and the Speaker both confirmed in the House and on the public record that there had been no changes made by Mr Flavell as alleged by Mr Peters. Although Mr Flavell was cleared, members were left with the impression that correcting an inadvertent error, a standard editorial policy, was an error of transcription.

49 As set out in section 10 of the Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003

50 *NZPD*, 24 June 2015, 4693

51 *NZPD*, 24 June 2015, 4698–99

52 *NZPD*, 24 June 2015, 4699–4700

53 *NZPD*, 24 June 2015, 4700

54 *NZPD*, 24 June 2015, 4717

55 *NZPD*, 25 June 2015, 4787

56 *NZPD*, 25 June 2015, 4788–89

TURNING SPEECHES IN THE HOUSE INTO A HANSARD REPORT

There are two ways in which what appears in Hansard differs from what is said in the House. Changes made at the request of members, although potentially high profile, are the least significant in terms of discrepancies between speeches as spoken and reported on. The principal differences occur when Hansard transforms a spoken form of language into a written form, which involves leaving out speech performance characteristics, correcting inadvertent errors, editing out redundancies, editing for correctness, and editing for readability.

Accurate reporting requires Hansard staff to understand what members are saying. This is not simply about knowing what the words mean; it is about comprehending what they mean in combination and in context, and in this respect non-verbal cues help interpret meaning.[57] But not everything associated with the performance of a speech can be conveyed in words or through skilful punctuation. Meaningful pauses, the use of hand, body, and facial gestures, the rise and fall and cadence of a speaker's voice, changes in volume and tone, pauses, stumbles, and regional accents contribute to meaning but are absent in text.

Other absences include features of spoken language, observed by linguist Stef Slembrouck, such as disfluency, intonation, stress, repetitions, half-words, incomplete utterances, unfilled pauses, false starts, and reformulations.[58] Words that amplify meaning are also likely to be stripped out. In 2006 Sandra Mollin found that just 25 per cent of the occurrences of the words, "very", "really", and "absolutely", made it into the official report.[59] Occurrences of the words "actually" and "clearly" were also significantly reduced. Hedging phrases and introductory phrases like "I think", "I guess", "I mean", "can I ask whether", "let me say that", and "I have to say that" were mostly not reported, and contracted verbal forms other than those used in quotes were not allowed.[60]

A common but potentially more controversial editing change, is to correct slips of the tongue or inadvertent errors. These typically occur when a member gets stage fright or overexcited or simply fatigued and mangles their words, sometimes choosing the wrong one or forgetting at the end of a very long sentence how the sentence actually began. Emma Hardman, Hansard editor in the Commonwealth of Australia Parliament, gives the example of a member who might say "We did not do that", when they meant to say "We did do that."—which is what happened in the Te Ururoa Flavell example.[61] A Hansard editor, she wrote, would consider "the surrounding utterances, the context, the tone, the political alliances of the speaker, the body language (perhaps the speaker

57 Emma Hardman, Ways of Seeing, in Griffith REVIEW, January 2011, Vol. 31, (unpaginated) https://griffithreview.com/articles/word-for-word/ *Accessed 14 January 2016*

58 Stef Slembrouck, The parliamentary Hansard 'verbatim' report; the written construction of spoken discourse, in *Language and Literature*, 1992, Vol. 1(2), 104

59 Sandra Mollin, The Hansard hazard; gauging the accuracy of British parliamentary transcripts, in *Corpora*, 2007, Vol. 2(2), 200–201

60 For example, "isn't it?" would be rendered as "is it not?", "won't you" as "will you not?" etc.

61 Emma Hardman, https://griffithreview.com/articles/word-for-word/ *Accessed 14 January 2016*

was distracted at that moment, by someone entering the chamber)", and decide that the speaker meant to say the opposite. In such a case, the Hansard would read: "We did do that."

Less controversial changes include correcting grammatical errors, adopting more formal language by expanding out contracted verbal forms and avoiding usages that might be seen as inappropriate or incorrect, making obscure messages and references explicit, and avoiding "clumsy and inelegant formulations".[62] Slembrouck thought that readers probably assumed that the Hansard was a fair representation of the speech as spoken, but concluded there were considerable discrepancies.[63]

Mollin's 2006 analysis of a later set of speeches concurred.[64] She isolated a number of substitutions where the replaced word or phrase went further than filtering out spokenness;[65] for example, "to ensure" for "to make sure", "consider" or "examine", and so on.[66] She observed that speeches were edited to convey certain parliamentary matters more accurately.[67] She also noted the absence of certain spoken events from the record, such as the Speaker's use of the word "Order!" to quieten down unruly MPs.[68] Similarly, members who thanked the Speaker for allowing them to speak (giving them "the call") would not find their mark of gratitude recorded in the Hansard.[69]

Unsurprisingly, editorial changes can account for a big reduction in the number of words reported in Hansard. In Mollin's 2006 sample, 43,793 spoken words were reduced to 35,661 words in the Hansard version, a reduction of 18 percent.[70]

HOW TRANSPARENT ARE HANSARD EDITORIAL POLICIES?

It is perhaps inevitable that Hansard editorial policies are not well known or understood given the paucity of information in the public domain about how speeches in the House are transformed into a Hansard report. In describing the reporting style used for the House of Commons, Erskine May repeats the 1907 select committee definition: "with repetitions and redundancies omitted, and with obvious mistakes corrected".[71] For the Australian Senate, Odgers states that debates are "recorded and published", "errors of transcription may be corrected", and senators "may make necessary corrections to the transcript, but changes altering the sense or introducing new matters are not

62 Stef Slembrouck, 104–08, 106

63 Slembrouck, 117

64 Sandra Mollin, 189, 208

65 Mollin, 197–201

66 Mollin, 197–200

67 Mollin, 195

68 Mollin, 196

69 Mollin, 196

70 Mollin, 192

71 *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th ed., 2011, 130

admissible."[72] In New Zealand, McGee reflects the 1907 select committee's definition, stating that Hansard is "a report in direct speech … sub-edited to omit repetitions and redundancies." and that members "may make only minor or grammatical alterations to the report.", and observing that "The meaning or substance of what was said cannot be altered in any way".[73]

Parliamentary websites generally acknowledge the existence of some sort of editorial policy, but they do not elaborate. The House of Commons website states clearly that Hansard "is an edited record", describes what is included in it and when it is published, and says it is edited "to remove repetitions and obvious mistakes but without taking away from the meaning."[74] The Hansard pages on the website for the Parliament of the Commonwealth of Australia simply state: "Hansard is the name given to the edited transcripts of debates in the Senate, House of Representatives, Federation Chamber and parliamentary committees."[75] Prior to July 2016 New Zealand's website stated simply that the corrected Hansard report was the only official report of the proceedings of the House, and provided information on its availability.[76] It now acknowledges that there is an editorial policy, but does not provide information on the changes that may be made by Hansard editors, although it does refer to the changes members may seek to make.[77]

CONCLUSION

As the examples in this paper show, when attention is drawn to discrepancies between spoken speeches and reported speeches it usually occurs in a cloud of misapprehension. In most cases the changes were made by Hansard staff, not members, in line with standard Hansard editorial policies. But this was only apparent to members after the matter had been raised in the House and investigated by the Speaker, sometimes in the glare of unwanted publicity.

For any member accused without justification of altering their Hansard, this may lead to difficult exchanges in the House and bad press. And although members may defend themselves against unwarranted attack in the House or through the media, it is still potentially politically damaging. There is no reason to suppose that claims of doctoring the record will disappear, especially given the availability of video clips and the use of blogs and social media sites. Indeed, the chances are that they will increase, because in a political environment members may choose to make political gain from any

72 *Odgers' Australian Senate Practice*, 13th ed., 2012, 104

73 David McGee, 62

74 http://www.parliament.uk/about/how/publications/hansard/ *Accessed 14 January 2016*

75 http://www.aph.gov.au/Parliamentary_business/Hansard *Accessed 14 January 2016*

76 http://www.parliament.nz/en-nz/pb/debates/debates *Accessed 14 January 2016*

77 https://www.parliament.nz/en/pb/hansard-debates/what-is-hansard/ *Accessed 27 July 2016*

opportunities presented to them, and apparent discrepancies between Hansard reports and a member's actual words provide such opportunities.

When this occurs, this inevitably calls into question the accuracy and impartiality of Hansard, as it appears that Hansard is allowing members to rewrite the Hansard, or that Hansard staff are incompetent. This challenges the reliance on Hansard as the ultimate no-spin account of proceedings in Parliament. Unlike members, Hansard cannot answer for itself where the integrity of its processes is questioned.

Hansard can do more to mitigate the risks. One approach is to reduce the extent of editing that occurs. As Slembrouck and Mollin demonstrated, there is no need for a high degree of formality. Indeed, New Zealand's response in 2012 was to make Hansard reports align more closely with the spoken form of speeches in the House by adopting a "more verbatim" approach. Although the Commonwealth of Australia Senate and House of Representatives are silent on the detail of how Hansard reports are actually produced, their websites appear to suggest that their reports are also for the most part verbatim.

Another approach would be to disclose far more about the nature of the official report and Hansard editing policy on parliamentary websites. If Hansard is an important tool in parliamentary transparency, surely there should be some transparency about how it is actually produced? If anything, the examples referred to in this paper make the case for greater transparency not only on parliamentary websites but also when claims are investigated and reported on. Speaker Boothroyd's response in the House of Commons, where she read out the letter of explanation from the chief editor, demonstrated a concern for the integrity of Hansard, as well as members, in the face of baseless claims of misconduct or inaccuracy. Greater transparency might also reduce the opportunities for members to mistake Hansard edits for members' corrections.

Instead of allowing readers to assume that Hansard reports are literally word for word transcripts, perhaps it is time to start explaining why they are not and celebrate the differences, rather than pretend they do not exist.

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When Referendums Go Wrong – Queensland's 2016 Fixed Four-Year Term Proposal

Graeme Orr and Samara Cassar

Graeme Orr is Professor of Law, University of Queensland

Samara Cassar is a student of Law and International Relations, University of Queensland

ABSTRACT

Constitutional referendums are an opportunity to showcase direct democracy and popular sovereignty over the shape of the institutions that govern representative democracy. But to be deliberatively meaningful, referendums on such legal questions require lengthy voter education, and fair structuring of questions. In 2016, Queensland voted narrowly to join the other Australian States and Territories in having fixed, four-year terms. This article explains the context behind the referendum, and analyses the partisan and regional drivers of its outcome. It also critiques the process, which bundled two distinct questions, in a hurried 'campaign' that offered minimal voter education. In the result, the major parties won the longer terms they had long craved. However Queensland is left with less frequent elections, and a powerful executive with neither an upper house nor proportional representation to check it.

WHEN REFERENDUMS GO WRONG – QUEENSLAND'S 2016 FIXED FOUR-YEAR TERM PROPOSAL

Alone of the Australian States and mainland Territories – but like the Commonwealth – Queensland maintained a three year, unfixed term for its lower house of parliament. Until 2016. The other States had moved to four year terms, of varying degrees of fixedness, between 1972 and 1987. The Northern Territory had such terms bestowed on in its inaugural self-government legislation of 1978, and the ACT followed suit in 2003.[1]

The 2016 Queensland referendum, which narrowly endorsed fixed, four year terms, was far from the first time the matter had been considered in that State. A referendum on an unfixed, four year term had just failed in 1991. The matter was the subject of a successful motion in the 49th Parliament after the inconclusive 1998 election, and a parliamentary report in 2004.[2] As recently as 2009 an independent MP – who went on to become speaker of the Legislative Assembly in the 2015–18 parliament – sponsored

1 Marian Sawer and Norm Kelly, 'Parliamentary Terms' (Democratic Audit of Australia Discussion Paper, February 2005) <http://apo.org.au/files/Resource/sawerkellyparlterms.pdf>

2 See further Kerryn Newton, 'The Role of Parliament in Constitution Making and Constitutional Amendments' (2005) 20 *Australasian Parliamentary Review* 144.

a private member's Constitution (Fixed Term Parliament) Amendment Bill.[3] It was even reputed that incoming Premiers would routinely request Crown Law to advise on lengthening the parliamentary term.

The trigger for the 2016 referendum was an opposition private member's bill, sponsored by the Shadow Attorney-General Ian Walker of the Liberal-National Party (LNP). That bill was endorsed by the Australian Labor Party (ALP) minority government and tweaked by a parliamentary committee in late 2015.[4] This repeat agitation for longer terms, by senior politicians, was of course a long cry from the Victorian-era Chartists. One of the six democratising goals of the Chartists – albeit the one never achieved – was for elections to force MPs and governments to renew their mandate *annually*.

This article is an account of the context and the results of the 2016 referendum. Besides analysing these factors, we will pose a critique of the deliberative failings of the process that was adopted. Both major parties endorsed the proposal. Whether by design or not, the proposal cleverly bundled two distinguishable questions. One was fixed terms, which had the obvious appeal of depoliticising the calling of elections. It *did not* require a constitutional amendment, but could have been adopted at any time by a parliamentary vote. The other was lengthening the term. This was a democratically problematic idea in a State with few checks and balances besides regular elections, although it was popular not just with the major parties, who craved greater security of tenure, but was also promoted by major business and union groups, who reasoned it might improve the efficiency of government. Longer terms *did* require a referendum.[5]

Electors were then treated to a hurried referendum, with no serious attempt at preparing the ground with voter education. This was despite the proposal containing broad and significant issues of constitutional complexity. Nor was there any funding of the 'yes' and 'no' campaigns, beyond the standard 1000 word, black and white pamphlet for each case, delivered to households.[6] Given the government and shadow ministry enjoyed taxpayer funded travel and the incumbency benefit of easy media access to press the 'yes' case, the process had flaws on both deliberative and political equality grounds.

3 Elizabeth Young and Nicolee Dixon, 'Fixed Term Parliaments under the Constitution (Fixed-term Parliament) Amendment Bill 2009 (Qld)' (Queensland Parliamentary Library, e-Research Brief 2009–24). The MP was Peter Wellington.

4 Constitution (Fixed Term Parliament) Amendment Bill 2015 (Qld). See Queensland Legislative Assembly, Finance and Administration Committee, *Inquiry into the Introduction of Four Year Terms for the Queensland Parliament* (Report 16, 55th Parliament, 9/11/2015).

5 *Constitution Act Amendment Act 1934* (Qld) s 4. In the aftermath of the abolition of the Legislative Council in Queensland, it was felt wise to 'entrench' the term for the Assembly at three years or less.

6 The standard requirement, eg *Referendums Act 1997* (Qld) s 11, echoing *Referendum (Machinery Provisions) Act 1984* (Cth) s 11. The text-only 'yes'/'no' pamphlet is a century-old technology. Its deliberative limits were recognized at least as long ago as the 1999 Republic Referendum, where public funds were committed for web and broadcast material. For further critique see Australian Parliament, House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No?* (December 2009).

In the absence of sufficient time or resources to deliberate, and with an unresourced voice for 'no', under-informed electors were always likely to do what under-informed electors do. That is, to follow partisan and elite cues, and in this case to vote 'yes'. Of course, cynical electors might have gone the other way and followed the 'If in doubt, kick it out' instinct. In the result, partisan cues outweighed cynicism. Whilst opinion polls during the short campaign showed the proposal initially likely to pass, then heading to defeat, ultimately the proposal passed narrowly but clearly with 52.96% of the formal vote. Support for the referendum was strongest in the Brisbane and Gold Coast corner of the State. It was weakest in the non-coastal regions.

Before moving to discuss these issues, in the interest of full disclosure the authors note they were both involved in the 'no' case. Graeme Orr advised the Katter Australia Party (Katter Party) whose two MPs settled the pamphlet for the 'no' case. Along with a few civil libertarian lawyers and The Greens and Katter Party, he also publicly advocated rejecting extending parliamentary terms.[7] This was based on arguments from democracy and the lack of checks and balances in Queensland, a State with no upper house, no proportional representation, no charter of rights and limited media focus on State affairs. Samara Cassar created a multi-media presentation summarising arguments against four-year terms.[8]

BACKGROUND TO THE REFERENDUM

Conventional wisdom has it that referendums, and specifically constitutional reform, are a Sisiphysean task in Australia. This is born out of the relative lack of success of referendums under section 128 of the Australian *Constitution*. Only eight of 44 such proposals have passed. Indeed there have only been five occasions (out of 19 referendum days) on which successful referendums have been held.[9] That day, almost 40 years ago, marks the last successful Commonwealth referendum. Of the eight that were successful, only two were of real consequence (extending Commonwealth power over social welfare in 1946, and Indigenous affairs in 1967).[10]

The reasons for this lack of success are many. The 'double majority' requirement has defeated four referendums that were carried by a national majority but not in a majority

7 Through opinion pieces, media interviews and at a public forum. A transcript of the public forum, organized by the ASPG (Qld) at the Queensland Parliament House on 14/3/2016, is at <www.parliament.qld.gov.au/aspg/transcripts.htm>

8 This was disseminated through the minor parties and online regional, Fairfax and Guardian media outlets, alongside a video for 'yes' featuring the Shadow Attorney-General. See, eg, <http://www.sunshinecoastdaily.com.au/videos/vote-no-referendum/36532/>

9 Referendums in 1967 and 1977 each involved multiple successful proposals on the one day. For details of Commonwealth referendum proposals and dates see the appendix to George Williams and David Hume, *People Power: the History and Future of the Referendum in Australia* (UNSW Press).

10 A further two, in 1977, involved democratizing, but narrow, proposals: to ensure Senate casual vacancies were filled on party lines, and to count Territory electors in referendum ballots.

of states.[11] Compelling people to vote on legal questions gives a free-kick to 'Don't Know? Vote No' campaigns,[12] and invites knee-jerk 'Say NO to Canberra' campaigns.[13] The mechanism, whereby only the Commonwealth parliament may present proposals,[14] has tended to generate proposals to extend Commonwealth powers. States, by law, can spend taxpayer money opposing such proposals, but the Commonwealth has to play an even hand.[15] In relation to such proposals, electors might also baulk at expanding explicit Commonwealth power, when the High Court has done so by constitutional implication and interpretation in many cases since 1920.

Largely ignored, however, has been the question of State and Territory referendums (and plebiscites).[16] Of these explanations for referendum failures, only the compulsory voting question applies to State and Territory referendums. The federalist factors of double-majorities, oppositional campaigns funded by other levels of government, and Commonwealth versus State powers do not arise. Referendums at NSW State level, for instance, regularly pass: the last seven held since the 1970s have been successful.[17]

Queensland, admittedly, has voted against plebiscites on alcohol prohibition (1920s) and daylight saving (1992) since a plebiscite on religious instruction in schools was passed in (1910). Most pointedly, a 1992 constitutional referendum on unfixed, four-year terms, lost by 40 000 votes or barely a 2.5% margin. Understandably then, proponents of the 2016 referendum were not confident, despite adding the more popular fixed term option to the proposal.

FLAWS IN THE PROCESS

What makes this referendum of interest was its risible process. There was no tilling of the soil; rather, there was a hurried campaign and minimal voter education. The

11 Of these, three were significant: Commonwealth power over employment law and agricultural marketing free of judicially implied straight-jackets (both 1946) and simultaneous elections for the Senate and House (1977).

12 Graeme Orr, 'Reforming Constitutional Reform: Voluntary Voting for Referendums in Australia' in Simon Rice et al (eds), *Law Reform in Australia* (working title, under negotiation, ANU Press).

13 A Queensland government campaign applied that very slogan to a proposal about the retirement age of Commonwealth judges: Hume and Williams, above n 9, 162.

14 *Australian Constitution* s 57. In theory the Senate, if it acted as a 'states house' could send federalizing proposals to the people, but this has not occurred. See Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2010) ch 12. In any event, the bigger issue is the lack of any popular or citizen-based mechanism for constitutional reform.

15 Orr, ibid, 269–70.

16 In Australian legal parlance, 'referendum' means a binding vote, and 'plebiscite' covers other direct popular votes: Paul Kildea, 'Uncharted Territory: The Constitutional and Regulatory Dimensions of a Plebiscite on Same-Sex Marriage' (2017) 27(4) *Public Law Review*, forthcoming. The more important distinction is that very few State 'constitutional' matters require a referendums for their formal amendment. On the other hand, States have held plebiscites on social issues (like liquor licensing, daylight saving and trading hours) more than the Commonwealth.

17 NSW Electoral Commission, 'NSW Referendums', <https://www.elections.nsw.gov.au/past_results/referendums_and_polls/nsw_referendums>

parliamentary committee reported in late November 2015. The bill was introduced and passed in a day, on the final sitting before Christmas. On 16 January, the poll was called, to coincide with the 19 March local government election day. That decision could be rationalised to economise on the cost of the referendum and achieve a higher turnout. But piggy-backing on council elections displeased the Local Government Association.

It also offered an advantage to the 'yes' case as Brisbane City Council elections are partisan – thus over a million electors in that city could be exposed to 'vote yes' how-to-vote cards, as the major parties would be staffing those booths anyway. As it was, the referendum was so low-key that electoral commission staff reported electors turning up to cast their local government ballot, unaware a referendum was being held at all.[18]

The official 'yes' case focused on appeals to authority. The first two pages of the pamphlet consisted of quotes from party, business and union leaders asserting that longer terms would improve planning and governance.[19] The 'yes' case also repeatedly pressed the argument about Queensland being the only state or territory left with three-year terms. That 'odd-man out' argument may or may not have resonated in the state, given it is used to being labelled as 'different' at least by its southern cousins. Alignment of the length of terms, of course, means little in a federation where, unlike the United States, there is not a single, cross-border 'election day'.

Otherwise there was little in the way of substantive argument. Indeed, under the heading 'Good Reasons to Support the "Yes" Case', the official pamphlet included such relatively trivial arguments as:

- A set date 'will prevent summer holidays being interrupted by an election'.
- An October date will mean 'the election period is taken out of the wet season'. Of course with unfixed dates, a Premier can easily avoid summer elections, and in any event a fixed term did not require a referendum.
- 'Fewer elections mean Queenslanders save money'. A figure of $24 million was then cited as the logistical cost of the 2015 election. Yet having one fewer election every decade equates to a saving of barely $2.5m per year.

As mentioned, proponents of a 'no' vote were, on the whole, against longer but not fixed terms.[20] They objected to longer terms without any compensating checks or

18 Saskia Edward, 'Technical Issues with Electoral Roll, Polling Station Workers' *612 ABC Radio Brisbane*, 21/3/2016 <http://blogs.abc.net.au/queensland/2016/03/technical-issues-with-electoral-roll-polling-station-workers.html> (recording of interview with Assistant Electoral Commissioner).

19 The official cases are embedded in Brian Hurst and Matt Eaton, 'State Referendum 2016: Fixed Four Year Terms Yes and No Cases Presented', *ABC News Online*, 26/2/2016 <http://www.abc.net.au/news/2016-02-26/2016-four-year-fixed-term-referendum-yes-no-case-summary/7200730>

20 Exceptionally, law professor James Allan argued for a 'no' vote on the grounds that a need for flexibility, especially in hung or gridlocked parliaments, requires unfixed terms: 'Queensland Referendum: Different Views on Fixed Four-Year Terms', The Courier-Mail (online), 16/3/2016 <http://www.couriermail.com.au/news/opinion/queensland-referendum-different-views-on-fixed-fouryear-terms/news-story/2c1a108e13a3ca0cba23c2feb6a2519d> For a deeper account of problems that may arise with fixing terms, see Peter Congdon, 'In a Fix: Fixed-Term Parliaments in the Australian States' (2013) 42 *Federal Law Review* 265.

balances in a State with no upper house, no proportional representation, no charter of rights and just one State-wide newspaper. For its part, the official 'no' case mixed appeals to principle and populism.[21] It stressed regular suffrage as the most fundamental civil right, and recited a litany of structural arguments. Chief amongst these were the risk of less political responsiveness, and of greater executive power in a State with few checks-and-balances. In a more cynical vein it characterised longer terms as 'job security for politicians'. It also cited the voter dissatisfaction that had led to record swings in both 2012, when a long-term ALP government lost in a landslide, and in 2015, when a one-term LNP government was swept away. Finally it noted the lack of empirical evidence that more secure government meant improved decision-making.

The 2016 proposal necessitated a specific law to augment the referendum process – the *Constitution (Fixed Term Parliament) Referendum Act 2015* (Qld). That opportunity could have been taken to modernize and broaden the public information process, whilst still maintaining State neutrality by allowing equal resources to both sides, as well as investing in a prior, neutral information campaign to set the scene.

Besides a weak and lop-sided advocacy and education effort, the process was also deliberatively muddled by the bundling of related but separable issues into a single question. In contrast some US State constitutions insist that referendums and initiatives 'shall embrace but one subject'. In Queensland's case, the issues were related but separable. They deserved two questions, albeit on the same ballot.

But people were not asked whether they wanted 'fixed' terms, and/or 'longer terms'. If they had, the answer would have been 'yes' to fixed terms and very likely 'no' to longer terms. Evidence of this lay in polling for a State public sector union – a union that supported longer terms – which was leaked after the referendum.[22] It showed that a sizeable majority of citizens wanted fixed terms, yet a similar majority wanted to keep short terms. Electors' democratic instincts and values were keen.

Significant constitutional reform proposals need a decent lead-time involving good consultative discussion and public information, to till the field of public consciousness, before diving into a campaign.[23] This is doubly so when meta-issues – the constitutional law of amending the constitution – are germane to the debate. As mentioned, there was no legal need for a referendum on fixed terms, only for the question of lengthening the term. The term – whatever its length – could have been fixed by parliament, prior to the question of a longer term being put to the people.

21 'No' Case, available at *ABC News Online*, above n 19.

22 Together Union polling, revealed 19/3/2016 (referendum night) by Scott Steel, that union's pollster and analyst, via his Twitter handle 'Possum Comitatus', and confirmed in Joshua Robertson, 'Queensland Referendum Result Attacked as a Victory for "Elite Voices"', *theguardian* (Australia edition) 20/3/2016 <https://www.theguardian.com/australia-news/2016/mar/20/queensland-referendum-longer-terms-likely-as-yes-vote-ahead>

23 Paul Kildea and Rodney Smith, 'The Challenge of Informed Voting at Constitutional Referendums' (2016) 39 *University of New South Wales Law Journal* 368.

This does not mean the public required a lesson in the arcane law of entrenchment of features of the 'constitution, practice and procedure of State parliaments, through 'manner and form' requirements.[24] But even MPs, politically-astute journalists and otherwise well-read law students were ignorant of the distinction between flexible and entrenched State constitutional issues.[25] What chance, then, that regular citizens would have known of let alone understood such a crucial issue? On such fine points of constitutional procedure rested the fate of this referendum.

ANALYSIS OF VOTING PATTERNS

Although the campaign was a Goliath versus David one, the referendum passed fairly narrowly, by 52.96% to 47.04%, on a turnout of just over 2.5 million. To put this in context, the winning margin represented just 1 in 34 of those who voted opting for 'yes' over 'no'. Indeed in the week prior to polling day, the referendum appeared doomed. Not so much because the final opinion poll on the issue showed limited support.[26] (Opinion polling of low-information populations is notoriously unreliable. A poll taken a few weeks earlier had shown a clear lead for 'yes'). But because, towards the end of the referendum campaign, the Premier threatened to call an early election.[27] She did so to assert her authority in a hung parliament, after a second ALP MP had defected to the cross-bench. That declaration revealed a level of hypocrisy on the government's part. It was simultaneously advocating a vote for fixed and longer terms, but insisting a right to cut this parliament short to ensure stability. Paradoxically, this threat probably encouraged voters to plump for the fixed term aspect of the proposal.[28]

Statistics showing electorate-level social-political characteristics are summarised in Table 1. These include standard demographic data, as well as voting patterns, by electorate, at both the referendum and the 2015 general election. The 'yes' vote ranged from a low of 45%, in the vast north to north-western seat of Dalrymple, to just over 60% in the small and dense seat of Surfers Paradise in the heart of the Gold Coast.[29] Electorate size ranged from 19 935 to 42 212; the lower figure reflecting the five massive electorates that have a dispensation from one-vote, one-value.[30] Indigeneity also ranges dramatically between Queensland electorates, from a low of

24 As to which see Gabrielle Appleby and Alexander Reilly, *Australian Public Law* (2nd ed, OUP, 2014) 142–7.

25 This was attested to in interviews and discussions the first author had with such people during and after the campaign.

26 'Four Year Terms Tipped to be Rejected', *Brisbane Times* (online), 10/3/2016.

27 Steven Wardill, 'Palaszczuk Stands Firm on Snap Poll', *The Courier-Mail*, 22/3/2016, 7.

28 See URL above n 18 (recording of interview with Shadow Attorney-General).

29 The electorate-level 'yes' vote mean is slightly higher than the actual 'yes' vote. This probably reflects slightly lower turnout in 'no' voting regional areas, and higher enrolments in fast-growing Sunshine Coast areas that also tended to vote 'no'.

30 *Electoral Act 1992* (Qld) s 45. This was a post-Fitzgerald inquiry compromise, to assist electorates over 100 000 km^2. Representation in such vast, remote electorates has been the subject of recent parliamentary inquiry and debate. The wide range of enrolments in 2016 also reflected the fact that a redistribution was due.

0.6% (in the urbane Brisbane electorate of Indooroopilly) through to 58.2% (in the far northern electorate of Cook). Proportions of residents from an NESB or non-English speaking background also range widely. From lows of just over 1% in some rural and regional seats, to over 55% in some inner and southern Brisbane seats.[31]

Table 1: Electorate-level Socio-political Indicators

	Mean	Standard Deviation	Minimum	Maximum
Yes vote (%)	53.24	3.53	45.13	60.72
Informal vote at referendum (%)	2.91	0.92	0.74	5.02
Income ($)	31,328	5,714	20,540	45,488
Age (years)	36.74	3.90	29	45
NESB (%)	8.11	9.23	1.16	57.25
Indigenous (%)	5.51	7.95	0.61	58.15
ALP Primary vote 2015 (%)	37.47	11.10	16.34	68.46
ALP TPP vote (Two-Party Preferred) 2015 (%)[32]	50.03	10.31	~ 25	75.95

One other socio-political variable was included. This was 'BCC-ness', that is whether an electorate was within the Brisbane City Council area. This was of interest since, as noted earlier, the referendum was held on the same day as local government polling and Brisbane alone in Queensland has explicitly partisan council elections. Voters in seats heavily overlapping with the BCC area were thus exposed to partisan cues at the ballot box. Both major parties campaigned for a 'yes' vote whilst the Greens, a minor force in BCC elections,[33] advocated a 'no' vote. Electorates were coded 'BCC' if a majority of their population in the BCC area – some 22 of the 89 electorates. Of the 67 not coded 'BCC', all but two fell essentially entirely outside the BCC area.[34] As it was, all 22 of the BCC electorates voted 'yes'.

Bivariate correlations between particular socio-political factors and the size of the 'yes' vote are listed in Table 2. Older electorates correlated strongly with the 'no' vote, and

31 And in Cook, the highly Indigenous electorate, whose Indigenous MP had been elected for the ALP but forced onto the cross-benches after familial scandals.

32 Six electorates had no indicative two party preferred vote count from the 2015 election due to the ALP running third. Data for these were included based on author estimates. Four were – very conservative – rural seats. Two were conservative Sunshine Coast seats where strategic voting was high. The estimate of 50.03% for the ALP vs LNP is supported by the reality that the ALP fell one seat short of a majority, and formed government with the support of an independent from one of the Sunshine Coast seats in question.

33 Minor, but with a growing constituency in the inner-city and youth vote. This culminated in The Greens winning their first Brisbane ward on the day of the referendum.

34 One electorate coded 'BCC' had a 66% overlap with the Council. Two not coded 'BCC' had 33% overlap.

with a high level of statistical significance. Density was inversely coded, and the finding was of a fairly strong relationship between less dense (that is, more rural if not remote) electorates and 'no' voting. Conversely, more dense electorates in the south-east corner, especially Brisbane and the Gold Coast, tended to vote 'yes'. This is visually demonstrated in the Map at the end of the article. Income also had a reasonably substantial and statistically fairly significant correlation with 'yes'.

Statistically significant correlations between ALP voting electorates and 'yes' also were substantially positive, with statistical significance being very high in relation to ALP TPP or 'two-party preferred' vote share. NESB heavier electorates also showed strong and statistically very significant correlation with the 'yes' vote.

The correlation with electorate-level Indigeneity (suggesting Indigenous electors more likely to vote 'yes') was only marginally significant. The correlation with BCC-ness was not statistically significant, in part because, as the Map shows provincial (ALP) cities and especially the Gold Coast region also plumped for 'yes'.

Table 2: Bivariate correlations

	Size of correlation with 'yes' vote	p-value
Age	–0.362	0.001***
Density rank	–0.281	0.008**
Income ($)	0.283	0.007**
NESB (%)	0.373	0.001***
Indigenous (%)	0.192	0.071
ALP primary (%)	0.255	0.016*
ALP TPP (%)	0.293	0.005**
BCC	0.153	0.153

Note: 'size' denotes how substantial the correlation was. A positive correlation means the factor correlated with a higher 'yes' vote; a negative correlation with a higher 'no' vote. The number of asterisks, on the other hand, denotes the level of statistical significance of each correlation.

Finally, Table 3 shows the results of a standard multiple regression analysis. BCCness was omitted from this analysis because whilst it correlated with voting 'yes' it was not statistically significant factor. Whilst the other factors asterisked in Table 2 correlated in a statistically significant way with referendum voting outcomes, their significance as stand-alone explanations washes away when the factors are considered alongside each other. Put another way, whilst the factors in Table 2 are reliable correlations to help explain differences between electorate level responses to the referendum proposal, those factors interrelate and overlap such that they lack strong explanatory power on their own. The exception was Indigeneity, whose significance increased.

Table 3: Multiple Regression Results

	Unstandardised 'b' coefficient	Standard Deviation	p-value
Income ($)	0.001	0.001	0.087
Age	0.004	0.128	0.978
NESB (%)	0.091	0.043	0.039*
Indigenous (%)	0.111	0.051	0.033
Density rank	–0.023	0.018	0.214
ALP TPP (%)	0.043	0.40	0.284
R^2	0.315		
Adj R^2	0.256		

To summarise: despite its constitutional signifcance, this was a low-information referendum with a short campaign. Low-information voters reacted as low-information voters do. Electors in ALP seats (Brisbane and provincial), and especially younger, NESB and Indigenous electors (who have a propensity to support the ALP anyway), proved more likely to trust a proposal put forward by a newly elected ALP Premier.

Conversely, older, poorer and regional electorates (themselves overlapping categories) were more likely to vote 'no'. This may in part be because they were less likely to trust a new ALP Premier. But since the LNP Opposition also supported the proposal, partisanship is only an indirect part of the picture. Tables 4 and 5, below, list the electorates that voted strongly one way or the other. Supported visually by the Map that finishes the article, it is clear that electorates in the south-east corner almost invariably voted 'yes'. These include ALP electorates, both well-off and not-so-well off, and well-heeled 'Liberal' electorates in the Brisbane and Gold Coast regions. Unsurprisingly, the levels of trust in government are greater in those regions, which have dominated State politics since the abolition of the 'Johmander' system of rural malapportionment of electoral divisions.[35]

35 This was a zonal system of allocating electorates to population that strongly and deliberately favoured rural areas. On that malapportionment, see Graeme Orr and Ron Levy, 'Electoral Malapportionment: Partisanship, Rhetoric and Reform in the Shadow of the Agrarian Strongman' (2009) 18 *Griffith Law Review* 638.

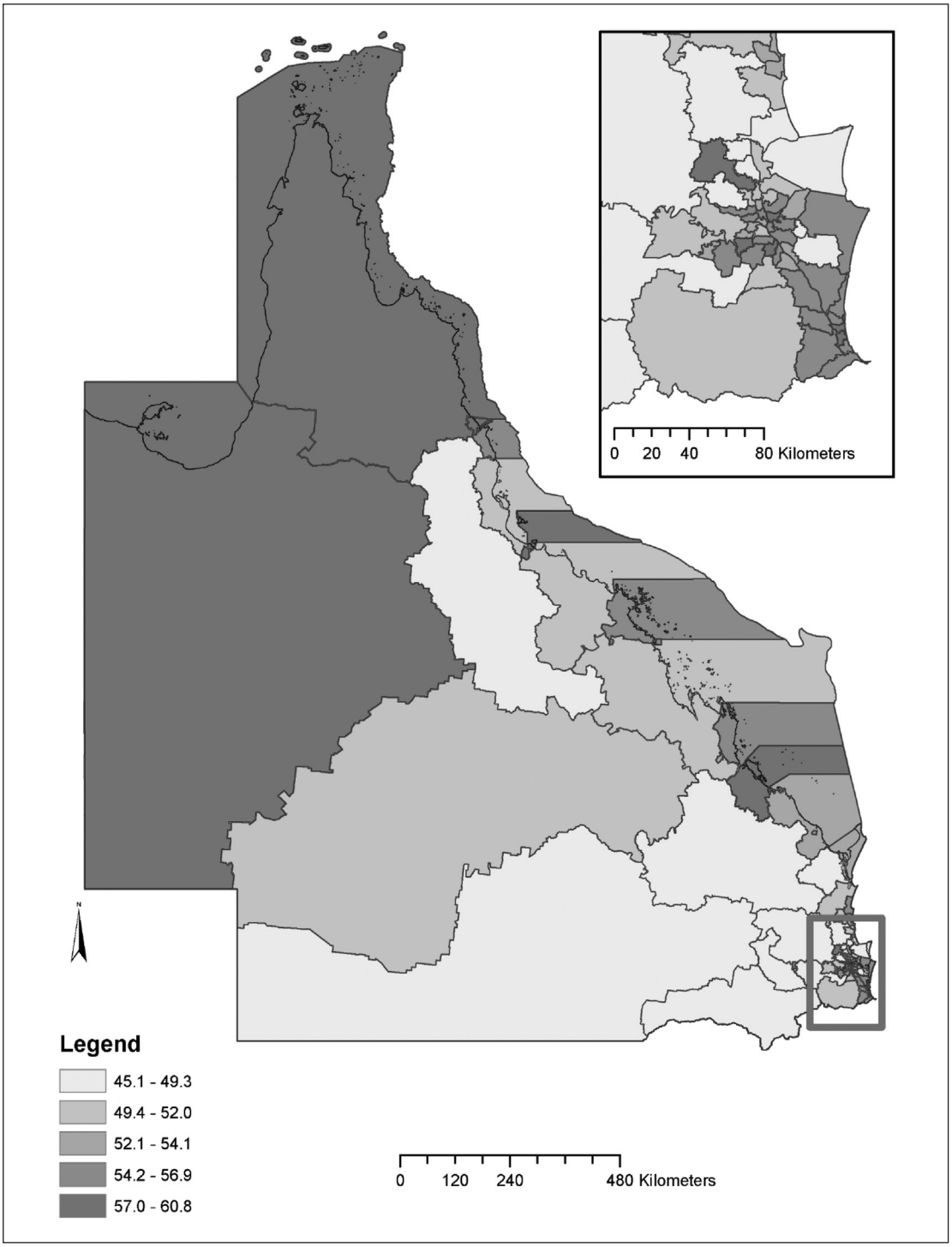
Table 4: Strongest 'Yes' Electorates: above 55% approval of fixed four-year terms

Electorate	Approval rate
Surfers Paradise (Gold Coast)	60.72
Gladstone (Provincial Coast)	59.97
Pine Rivers (Brisbane North)	59.95
Inala (Brisbane South)	59.33
Mermaid Beach (Gold Coast)	59.29
Cook (Rural/Remote)	58.66
Cairns (Provincial Coast)	58.33
Barron River (Provincial Coast)	58.29
Mount Isa (Rural/Remote)	57.89
Stretton (Brisbane South)	57.73
Townsville (Provincial Coast)	57.31
Thuringowa (Provincial Coast)	57.27
Bulimba (Brisbane East)	57.14
Albert (Gold Coast)	56.96
Gaven (Gold Coast)	56.46
Woodridge (Brisbane South)	56.39
Burleigh (Gold Coast)	56.38
Bundamba (Brisbane South)	56.36
Coomera (Gold Coast)	56.14
Mudgeeraba (Gold Coast)	56.12
Mulgrave (Provincial Coast)	56.12
Whitsunday (Provincial Coast)	55.80
Cleveland (Brisbane East)	55.75
Currumbin (Gold Coast)	55.66
Sunnybank (Brisbane South)	55.62
Broadwater (Gold Coast)	55.54
Noosa (Sunshine Coast)	55.14
Keppel (Provincial Coast)	55.12

Table 5: Strongest 'No' Electorates: under 49% approval of fixed, four-year terms.

Electorate	Approval rate
Capalaba (Brisbane East)	48.93
Condamine (Rural/Remote)	48.90
Morayfield (Sunshine Coast)	48.77
Warrego (Rural/Remote)	48.72
Kallangur (Brisbane North)	48.20
Redlands (Brisbane East)	48.10
Pumicestone (Sunshine Coast)	47.80
Maryborough (Provincial Coast)	47.65
Nanango (Rural/Remote)	47.48
Lockyer (Rural /Remote)	47.42
Southern Downs (Rural/Remote)	46.82
Callide (Rural/Remote)	46.01
Dalrymple (Rural/Remote)	45.13

Figure 1: 'Yes' Vote by Geographic Electorate



On the other hand, the Sunshine Coast tended to vote 'no'. (Exceptions were the well-off Noosa electorate, and the Nicklin electorate which is represented by the independent Speaker who supported the referendum). In this, the Sunshine Coast – a fast-growing, urbanising and LNP supporting area – had more in common with rural electorates than the rest of the south-east corner. One curious exception in voting patterns was the electorate of Mount Isa, which bucked the trend of rural and remote electorates voting 'no'. This is curious, because that electorate is the home of the Katter Party leader. Yet 'neighbouring' Dalrymple, also a Katter Party seat, was the strongest region for the 'no' case.

CONCLUSION: HOW TO WIN A REFERENDUM

This referendum bundled or conflated two separable questions. One, to depoliticise election dates, was innately attractive to the public. The other, to have less frequent elections, carried less intuitive appeal. Given this schizoidal bundling and a short campaign, with no funding of the 'yes' or 'no' cases, the result could have gone either way. The conflation of issues forced electors to swallow the greens of less frequent elections if they wanted the dessert of fixed election dates. Electors might have chosen to reject partisan and elite recommendations that they order from the one-item menu and go hungry instead. But narrowly, they embraced fixed four-year terms.

Had the referendum lost, Queensland would now be undergoing discussions about more holistic reform, and considering trading longer terms for either proportional representation or reinstating its upper house.[36] Instead, the major parties, with business and union allies, achieved the longer terms they had long desired. They did so by ignoring even the modest submission, of the Clerk of the Parliament, that longer terms should be compensated for with a strengthened parliamentary committee system. That submission had even been endorsed, before the referendum, by a parliamentary report. Nonetheless, despite support from the Clerk and MPs, the proposal put to the people did not include any entrenchment of the committee system.[37]

The passage of the 2016 Queensland referendum reveals divisions within the State. Whilst about three-quarters of electorates voted 'yes', the State was split between Brisbane and the Gold Coast, which most clearly approved the referendum, and non-provincial regions, where distrust in the executive government, dominated by south-east Queensland, was most apparent. In structural terms, the passage of the

36 Which was abolished in 1921–22. See Gerard Carney, 'The Abolition and Reinstatement of a Legislative Council: Queensland and Other States' in Nicholas Aroney et al (eds), *Restraining Elective Dictatorship? The Upper House Solution* (UWA Press, 2008) 254.

37 Queensland Legislative Assembly, Finance and Administration Committee, above n 4, 11 and 54–57 (summarizing submission of Neil Laurie, Clerk of the Legislative Assembly, and Recommendation 9 recommending the referendum include a proposal to entrench seven portfolio committees, a budget estimates process and a requirement that each bill be scrutinized for at least six weeks unless the opposition agreed a bill were urgent).

referendum puts Queensland parliamentary terms on the same footing as the other States and the mainland Territories. All now have fixed, four year cycles.

That may sound like a step forward. But looked at holistically, Queensland's constitutional structure is now on a par with the least-best in Australia, that of the Northern Territory. Both of these jurisdictions have fixed, four-year terms, for a unicameral parliament, elected by majority-rules voting. Neither has a bill or charter of rights, although Queensland is exploring the latter.[38] And each lacks a competitive, quality press, with their media agendas being set in recent years by a single Murdoch-owned tabloid. This is especially a problem since the ABC withdrew from State-level current affairs television.

Each of Queensland and the Northern Territory has also been characterised by long periods of rule by one party bloc, with oppositions weakened by the disproportionate outcomes of a single-member electoral system. Recently, that electoral landscape has been punctuated by occasional dramatic lurches, or over-corrections in electoral swings. It will be interesting to see if such swings are magnified with longer terms. Certainly the entrenchment of fixed, four-year terms has reposed even greater power, and hence trust, in the 'elective dictatorship' of the executive government.[39]

38 Legal Affairs and Community Safety Committee, *Inquiry into a Possible Human Rights Act for Queensland* (Report 30, 55th Parliament, June 2016).

39 Compare the 1976 quote of Lord Hailsham about the unicameral Westminster system: 'We live in an elective dictatorship, absolute in theory if hitherto thought tolerable in practice.' See further Aroney et al (eds), above n 36.

Making Honey in the Bear Pit: Parliament and its Impact on Policymaking

Steven Reynolds

Steven Reynolds is Deputy Clerk, NSW Legislative Council[1]

Parliamentary politics is often referred to by analogies of warfare, with major parties seen as the warring armies, sometimes assisted by smaller allies in the minor parties:

> One of the core features of the traditional Westminster system is a majoritarian electoral system that tends to produce a political system dominated by two large parties. Where single-party majorities are the norm, the political culture treats elections as the winner-takes-all battles between the two great political tribes. The spoils of electoral triumph are near complete control of the legislature and the apparatus of the state for a full parliamentary term.[2]

Much of this reference to war, battles and tribes reflects the reluctance of writers to search for more original metaphors. However it also conveys that politics is nothing if not a manifestation of human interaction, of which conflict has always been a feature. If Westminster parliaments are an adversarial environment it is not only because its processes facilitate conflict, it is also because each chamber is a room full of human beings acting in groups seeking to dominate other groups in a competition for resources. Political party discipline assists one group in exerting dominance over the other competitor, in response the other major parties adopt similar discipline. Nevertheless, this group discipline also provides the potential for co-operation, if it moves towards an equality of power that prevents one organised party overwhelming smaller, less organised groups.

In his book *The World until Yesterday* Jared Diamond examines in detail patterns of conflict and warfare in tribal societies, and concludes that while conflict is inherent in the human condition it is also not inevitable, and is strongly influenced by external factors:

> It is equally fruitless to debate whether humans are intrinsically violent or else intrinsically cooperative. All human societies practise both violence and co-operation; which trait appears to predominate depends on the circumstances.[3]

1 The views expressed in this article are those of the author, and do not represent those of the Department of the Legislative Council. The author is grateful for the research assistance of Christine Lammerton, NSW Parliamentary Library and Aneesa Kruyer, parliamentary intern.

2 Paun, Akash "After the age of majority? Multi-party governance and the Westminster model" *Commonwealth & Comparative Politics* Vol 49, No.4, November 2011, 440–441.

3 *The World Until Yesterday* Jared Diamond (2012) Penguin, p157

While warfare is endemic to the human condition, co-operation is equally part of being human. This duality is examined at the conclusion of Steven Pinker's epic examination of the decrease in violence in human society, *The Better Angels of our Nature.*[4] He discusses the potential trade-offs between aggressive behaviour and co-operative behaviour, and how over time and repeated interactions the greater potential payoffs for both sides of co-operation can be learnt:

> Motives like greed, fear, dominance and lust keep drawing us toward aggression. And through a major work around, the threat of tit for tat vengeance, has the potential to bring about co-operation if the game is repeated, in practice it is miscalibrated by self-serving biases and often results in cycles of feuding rather than stable deterrence.
>
> But human nature also contains motives to climb into the peaceful cell, such as sympathy and self-control. It includes channels of communication such as language. And it is equipped with an open-ended system of combinatorial reasoning. When the system is refined in the crucible of debate, and its products are accumulated through literacy and other forms of cultural memory, it can think up ways of changing the payoff structure and make the peaceful cell increasingly attractive[5]

The quote is a fair summary of a typical week in the NSW Parliament. Despite a ferocious reputation as the "Bearpit" the NSW Parliament also sees political parties working together to achieve policy outcomes that benefit that community the members are elected to represent. The co-operation needs to be celebrated, because there is no shortage in attention devoted to its opposite behaviour. In this paper examples are provided in which NSW political parties have used parliamentary processes to act co-operatively to influence policy outcomes. The impact of the party votes in the chamber is considered – is co-operative behaviour more likely in "hung parliaments", and is there a difference between upper and lower houses in this? Finally a case study of the impact of a minor party, with no ability to influence voting outcomes in the chamber is used to further understand the potential for co-operation in current parliaments.

PARLIAMENTARY PROCESSES USED TO CHANGE POLICY BY LEGISLATIVE AMENDMENT

The most effective form of action in any political chamber is to legislate. Parties in government can vary in the their approaches – from pushing a bill though both Houses urgently, shutting down debate and ignoring objections and attempts at amendment in the upper chamber, to taking a measured approach with negotiation behind the scenes and on occasions during debate. In NSW the practice has developed of pushing controversial legislation quickly though the Assembly, which governments have dominated since 1995, and leaving attempts to amend bills to consideration

4 (2012) Penguin, p824–840

5 *Ibid, p 840.*

in the Council, where no government has held a majority since 1988. Even here the exercise of the power to legislate has evolved. The paper by David Blunt "Parliamentary speech and the location of decision making"[6] examines how the process of bills being amended in the NSW Legislative Council has moved from one in which persuasion and deliberation occurs on the floor of the House during debates on bills to a situation where backroom negotiations are instead reported on to the House prior to amendments being agreed to.

The debate on the Public Health (Tobacco) Amendment (E-cigarettes) bill provides a good example of where negotiations and co-operative discussion, conducted by several political parties behind closed doors but alluded to in the final debates, results in an outcome quite different to that originally intended by the party in government. In the process Parliament is seen to be "adding value" to public policy while performing its legislative function (though manufacturers of e-cigarettes would no doubt beg to differ).

The bill in its original form began in the Legislative Assembly, and was reported to the Council on 27 May 2015. The purpose of the bill was to prohibit the sale of e-cigarettes and accessories to minors, on the basis that the potential risks and benefits (if assisting to give up smoking) are not conclusively supported by evidence. Unusually it was amended in the Assembly (to regulate distribution by vending machines) prior to reaching the Council.

During the second reading debate in the Council on 27 May amendments to the bill were circulated by both the Opposition and the Greens, that if agreed to would have the effect of significantly widening the reach of the bill. These amendments included:

- Prohibitions on advertising of e-cigarettes
- Enacting the same restrictions for e-cigarettes as apply to tobacco cigarettes in "smoke-free zones"
- Giving the minister the power to declare by regulation a class of e-cigarettes to be prohibited
- Banning the "vaping" of e -cigarettes in cars when juveniles are in the vehicle

The full impact of these measures was to effectively put e-cigarettes under the same regulatory regime as tobacco products. Significantly during this debate Revd. The Hon Fred Nile of the Christian Democratic Party (CDP) indicated that he supported the Greens and Opposition amendments.[7] Given the numbers in the House,[8] the support of the two CDP members would have been sufficient to carry all the amendments. For several weeks there was a legislative stalemate, with debate on the committee of the whole stage continually postponed.

6 *Australasian Parliamentary Review* Autumn/winter 2015 Vol 30 No. 1

7 *NSWPD (LC)* 27/05/2015 p857

8 The Government has 19 votes out of 41 on the floor of the House, with the President, a Government member, having a casting but not deliberative vote.

Finally the Government reached a compromise position. It agreed to support most of the amendments, but Government circulated its own amendments to that effect, perhaps to be seen to be in control of events rather than defeated by them. The Opposition and cross bench parties allowed the Government to save face by supporting the new amendments, and some Greens amendments were not agreed to. The bill returned to the Assembly and passed into law with a much wider reach than the original proposal. The representatives of each of the parties spoke about how they had reached a compromise during the debate on 24 June:

> *Minister the Hon John Ajaka*: The Government has had the opportunity to consult further with parties in relation to this bill and has accepted the information provided. For that reason the Government has taken the step of moving these amendments at the first available opportunity so that the bill, with its paramount purpose to protect young people, is able to pass and be accepted. I commend the amendments to the House.
>
> *Reverend the Hon. Fred Nile*: I thank Minister Ajaka for moving these amendments. I had discussions with the Minister for Health about this bill. I was worried that we might have lost this bill. I thought it was important to get this bill through the upper House. We discussed various amendments proposed by different members. We have worked with the Government and agreed on a number of amendments to get this bill through today, near the end of this session. I am pleased the Government has taken the initiative. We are making progress with this bill, which will protect children from e-cigarettes. This bill is the first stage, and I hope the Government will put that on the record.[9]
>
> …
>
> *(Mr Jeremy Buckingham*): I support the Government's amendments. Today is a good day as it shows how this place should operate—across the Chamber parties have worked together for the benefit for the people of New South Wales, especially the young people of New South Wales. I commend Reverend the Hon. Fred Nile, the Hon. Walt Secord, the Hon. Jillian Skinner—
>
> *The Hon. John Ajaka*: And yourself.
>
> *Mr Buckingham* —and myself for all our excellent work in this space. I am pleased, as Reverend the Hon. Fred Nile has said, that this bill is being dealt with before the winter recess. I am pleased to see the substance of the Government's amendments—that is, bringing e-cigarettes and vaping into line with other tobacco products.[10]

This is not an uncommon outcome, though the process of compromise in amending legislation is rarely as transparent. Another example is provided in Blunt's paper

9 *NSWPD (LC)* 24/06/2015 p1748

10 *NSWPD (LC)* 24/06/2015 p1749

regarding the Police Death and Disability Bill 2011,[11] but each parliamentary year sees similar examples. Here the parliamentary process of the second reading debate, where positions can be flagged, and the flexible Committee of the Whole process, where amendments can be explored, facilitates co-operation, just as other standing orders on debate can be used to restrict opportunities and increase levels of conflict. But what of other parliamentary processes?

ORDERS FOR PRODUCTION OF PAPERS AS AN IMPACT ON POLICY

There is one parliamentary procedure that the NSW Legislative Council has exercised which to a degree unique in Australian jurisdictions – the power to order the production of state papers under its Standing Order 52. Since it established conclusively its power to do so in the High Court in 1998 in *Egan v Willis,*[12] the House has on numerous occasions ordered government agencies to produce, within a set period of time, all documents as defined by the order, including documents covered by Executive privilege.[13] Many times these orders are contested, with the Government arguing the mover of the motion is engaging in a "fishing expedition" that will waste great amounts of public servants' time and taxpayer money. The adversarial approach is certainly the most common, and generally the greater control the Government has of votes in the chamber the fewer motions moved under standing order 52 are agreed to.[14] But there are exceptions when governments have conceded that there is a public interest in releasing documents without opposing non-government parties in the House.

One exception to this occurred in 2016 when a controversy arose regarding under dosing of chemotherapy patients by a surgeon at a major private hospital, St Vincents Darlinghurst. A motion was moved by Jeremy Buckingham, a Greens member, and was agreed to as formal business without debate on 25 February 2016. The order to produce state papers was directed at both NSW Health and the private hospital (which as a private entity disputed the power for the Council to order papers from it, an area not canvassed directly in the *Egan* cases). The Government's support for the motion and the subsequent information revealed by the return has led to a NSW Health inquiry, which has uncovered other similar issues in another 5 hospitals. The tenor of debate has now very much turned adversarial in the wake of growing calls for a Special Commission of Inquiry.[15]The development of the issue though, shows how a parliamentary process, used with bipartisan support, has made a significant

11 *Op cit* p91–92.

12 73 *ALJR* 75

13 For more detailed discussion see Lovelock and Evans *NSW Legislative Council Practice* (2008) Federation Press p473–486.

14 Lovelock L, "The Declining Membership of the NSW Legislative Council Cross Bench and its Implications for Responsible Government*" Australasian Parliamentary Review* Autumn 2009. p82–95.

15 "Skinner Stares Down Critics" *Sydney Morning Herald* 3 August 2016 p4, "Hospital Crisis A Sick Disgrace" *Daily Telegraph* 3 August 2016 p6–7

contribution to public policy and administration. In this particular instance the nature of that contribution is still unfolding.

COMMITTEE INQUIRIES AND POLICY CHANGE

Of all parliamentary processes, committee inquiries especially lend themselves to making a constructive contribution to public policy, providing an opportunity for members of all parties to work together to reach consensus on difficult issues. In terms of pushing public policy to unexpected directions, the inquiry into the decriminalisation of medicinal cannabis that reported in 2013[16] has had far reaching impacts on public policy, even beyond NSW. The process by which the committee made up of Government, Opposition, Greens and Shooters and Fishers Party members reached a unanimous report has been documented in an earlier paper.[17]Two comments by members of the committee are illustrative:

> I was a member of this committee. In a sense, I was a reluctant participant. It is a fraught subject and, quite frankly, I thought that little good would come from the inquiry. I was wrong. Unbeknownst to me, all the committee members approached the subject in a moderate and thoughtful way and the issue did not become politicised, as I had expected.[18]

> This committee investigated a complex area, namely, the use of cannabis for medicinal purposes, and came to an agreement that, I think, in equal measures was open-minded and open-hearted. I should point out that the committee members came from a diversity of backgrounds comprising the Shooters and Fishers Party, the right of the Labor Party, the Hon. Charlie Lynn from the Liberal Party, The Nationals and me representing The Greens. We had different perspectives, yet we reached a unanimous report. It is to the credit of the Hon. Sarah Mitchell, committee staff and members that we landed somewhere that was positive, open-minded and open-hearted.[19]

On 16 September 2014 following the committee's report Premier Baird announced that the NSW Government would support a clinical trial for medical cannabis, and trials have also subsequently been discussed in other states.

Most jurisdictions can point to similar examples of committee inquiries that have contributed to public policy areas, following an inquiry where committee members have worked in a co-operative and constructive way. The inquiry process is a parliamentary activity that actively encourages co-operation, negotiation and consensus as members spend time together working to a common purpose. Arguably it is more powerful in

16 General Purpose Standing Committee No. 4 *The use of cannabis for medical purposes*, (2013)

17 Blunt *op cit* p94–96

18 *NSWPD (LC)* 27/08/2013 p 22746

19 *Ibid p22373* .

the longer term than many other parliamentary processes in its ability to impact on policy, although measuring the impact is much harder than, for instance, a legislative amendment, where the policy change is directly achieved.

DO UPPER OR LOWER HOUSES HAVE THE GREATER INFLUENCE ON POLICY OUTCOMES?

There is an argument that the use of parliamentary procedures to influence policy outcomes is only significant when electoral systems produce a result in which no party has a majority. There is a substantial literature on "hung" parliaments, which while rare at a Federal level in Australia have been relatively frequent in State Parliaments, and in New Zealand since the Mixed Member Proportional voting system was introduced. Hung parliaments are still seen as an aberration in Australia, when in non-Westminster democratic systems governments by coalition are the norm.[20] The correlation of this perception is that many non-Westminster legislatures rely on co-operation and negotiation in contrast with the more adversarial parliamentary system in Westminster jurisdictions.[21]

But within the Westminster system there are chambers in which government dominance is unusual – the Senate and most Australian upper houses being exemplars. So do upper houses, where a Government in minority is the norm, develop a culture supporting co-operative outcomes? And do lower houses, because they see a period of minority government as a temporary abnormality, engage in more aggressive behaviour than usual because the "government always wins" approach is frustrated? One can only speculate, it is certainly a question worth more detailed examination.

When single chamber legislatures or lower houses diverge from the "elective dictatorship" model in a hung Parliament outcomes vary – witness the NSW Legislative Assembly between 1991 – 1995,[22] or the several Tasmanian examples, [23]or the 1996 and current Queensland Parliaments.[24] Sometimes instability creates chaos and conflict, at other times considerable policy outcomes are achieved as a direct result of the actions of parliament. Dr Gareth Griffith[25] has provided a comprehensive examination of two decades of Australian experience to 2009, summing up this mixed experience. More recently, the House of Representatives from 2010 to 2013 with

20 Green-Pedersen, Christopher and Hoffman Thomsen, Lisbeth "Bloc Politics vs Broad Cooperation? The functioning of Danish Minority Parliamentarianism" *The Journal of Legislative Studies* Vol 11, No. 2 Summer 2005, pp153–169

21 *Ibid* p154.

22 Reynolds S, 'Minority government from the other side of the fence' (Spring 1998) 13(1) *Legislative Studies* 17

23 Griffith G, Minority Government in Australia from 1989–2009 https://www.parliament.nsw.gov.au/researchpapers/Documents/minority-governments-in-australia-1989-2009-acco/Minority%20Governments%20Background%20Paper.pdf

24 Wellington, the Hon Peter, Speaker of the Legislative Assembly "The workings of a hung parliament – the forgotten art of compromise" 47th Presiding Officers and Clerks Conference July 2016.

25 *Op cit*

standing orders more conducive to co-operative outcomes, was noted for its adversarial party politics. Positive policy outcomes such as the National Disability Insurance Scheme arose from co-operation and consensus prior to the any proposal being put to the Parliament, not as a result of parliamentary processes. The Gillard government was able to be effective in implementing its legislative agenda through Parliament, but this was not because the House of Representatives became a forum for co-operation and deliberation on policy outcomes.[26]

In their unofficial history of the NSW Parliament Clune and Griffith's *Decision and Deliberation*[27]depicts NSW parliamentary history as a struggle between the "executive" model which focuses on facilitating the passing of the government's legislative agenda, and the "liberal" model which emphasizes the role of parliament to scrutinise the performance of government. Both are valid models in a democracy. However after reviewing 150 years of NSW political history they conclude that the tension between the two roles of parliament is especially intense for lower houses of parliament, and that the most effective way to balance the two models is through a bicameral system.[28]

THE POWER OF ONE VOTE: CASE STUDY OF THE ANIMAL JUSTICE PARTY

Whatever the differences between the chambers, voting power between political parties will always influence the use of parliamentary processes. A chamber in which the government does not hold a majority has a structural incentive for major parties to negotiate and compromise and reach revised policy outcomes. But what about smaller parties? What if a party does not have enough votes in the chamber to have a stake in negotiations? Is their case hopeless? Can parliament allow minority parties to influence the policy agenda despite not having any voting power? In New South Wales there is a current instance that warrants close analysis.

The impact of the election of Mr Mark Pearson of the Animal Justice Party (AJP) to the New South Wales Legislative Council in the 2015 election has become increasingly topical in the time (May to August) during which this paper has been written.
Mr Pearson was the last of the 21 members elected in the periodic election, gaining 1.78 % of the votes state wide, just over a third of the quota normally required to gain a seat. In the House the Government holds 19 of the 21 votes required to win any division, and all other parties have at least 2 votes each. The consequence of this is that Mr Pearson has no ability to use his single vote to influence the outcome of any decision of the House. As evidence of this, in three elections for cross bench positions on standing committees, Mr Pearson has lost on each occasion to other cross bench

26 "Was Julia Gillard the most productive prime minister in Australia's history?" *The Guardian* https://www.theguardian.com/news/datablog/2013/jun/28/australia-productive-prime-minister

27 Federation Press 2006, p15

28 *Ibid* p693.

parties, and his is the only party without a member appointed to any of the Council's 11 standing committees. He has also moved a number of amendments to bills without any success to date, nor has he been successful in obtaining an order for the production of state papers.

What is notable, however is that his election and participation in the House has opened a whole area of debate and discussion on animal welfare issues. The area was discussed before, but never as a regular concern. In his inaugural speech the representative of Animal Justice stated the significance of his election as a way of reframing the issue:

> The people of New South Wales have elected me because the protection of animals is important to many, and that importance is continuing to grow nationally and internationally. The Animal Justice Party can be seen as a single issue party—I thought that when I was participating in its formation. Rather, it is a single purpose party with multiple issues. Interestingly, the Party for the Animals in Holland has found that about 80 per cent of issues that come before this House have some impact one way or another on the lives of animals. But even if the issues brought before this House are not directly or indirectly related to animals, the Animal Justice Party will apply the principles of compassion and consideration to any legislation being considered. Our relationship with animals throughout time is extremely important and complex. It is very much a part of our humanity—for example, I refer to those homeless, broken people in their dirty and torn clothes that we often see in Hyde Park feeding crusts to the pigeons. Clearly they enjoy that experience of interaction.[29]

Shortly after his election, a joint select committee into "puppy farms", with membership from both houses, was established on the initiative of the Minister for Primary Industries following adverse media comment.[30] This was an issue referred to by Mr Pearson in his inaugural speech, and he was appointed as a Legislative Council member of the joint select committee. The House has also debated a motion by Mr Pearson on sheep mulesing practices, in which 10 members contributed over a debate split across two sitting weeks. The motion was ultimately amended by the Government and passed by the House as amended.[31]

It has become a noticeable feature of Question Time in the Legislative Council that questions on animal welfare are regularly asked. It is not only the new member asking the questions – other parties such as the Greens and ALP have regularly asked questions, perhaps concerned that they are competing for the same voters. In preparing this paper, research was undertaken to compare the number of questions asked by all members on animal welfare related topics in Question Time for the first 12 months since the election of the Animal Justice representative with a comparable 12 month period in the last Parliament. The results are very instructive:

29 *NSWPD (LC)* 06/05/15

30 *NSWPD (LA) 13/05/15, NSWPD (LC) 13/05/15.*

31 *NSWPD (LC)* 10/03/16, 23/03/16.

Table 1: Impact of election of Animal Justice Party on animal welfare questions in Question Time[32]

Time period	Number of members asking a question during the period	Total number of questions asked in the period
July 2013 – June 2014	7	19
July 2015 – June 2016	22	72

It can be seen that the number of questions in Question Time with an animal welfare subject has more than tripled since the election of the Animal Justice Party member. Of course the member himself partly explains this, having asked 26 of the 72 questions, but it is apparent that more questions have been asked and by more members since his election. In total 22 members, just over half the membership of the House, has asked a question relevant to the Animal Justice Party agenda. It is difficult to point to any other cause, as this increase was measured prior to the major controversy detailed below.

The middle of this year bought a most dramatic and unexpected illustration of the impact on public policy of increased interest in animal welfare perspectives. The recent announcement by the NSW Government of a ban on greyhound racing following the report findings of a Special Commission of Inquiry has made national headlines. In making the announcement the Premier cited findings of up to 70,000 dogs being killed, widespread use of illegal live baiting by trainers and "catastrophic" injuries suffered by dogs during races.[33] The rationale for closing the industry has consistently been made on animal welfare grounds. Perhaps the most interesting revelation in the reporting of this decision came in an online article explaining the decision. The journalist reported that three weeks prior to the announcement, the Premier had met with the Animal Justice member:

> Baird told him it was clear that animal welfare was a new and serious concern for the community, and his election to Parliament in 2015 had opened a new chapter in politics. The pair discussed animal rights issues, touching briefly on the fact the government was yet to respond to the greyhound special commission of inquiry. Pearson walked out thinking Baird had changed, and it was a response to the strong public interest in animal welfare. But he had no idea of the bombshell to come.[34]

With the passage through both Houses of the Greyhound Racing Prohibition Bill on 10 and 24 August 2016 the closedown of what is estimated to be a $300 million industry is in the process of occurring[35] despite very strong opposition to the move, including

32 The author is grateful for Aneesa Kruyer, parliamentary intern, for her research on the questions asked by each member. The 12 months immediately prior to the 2015 election was not used as, being an election year, there were fewer sitting days and the impact of the-Animal Justice Party election would appear even larger.

33 Scratched: Death of the Dishlickers" *Daily Telegraph* Friday 8 July 2016 p1

34 Greyhounds voters led Mike Baird to backdown on NSW industry" Kirsty Needham, Sydney Morning Herald Friday 8 July 2016 , online version www.smh.com.au/nsw/greyhounds-voters-led-mike-baird-to-crackdown-on-industry-20160707-gq0t2s.html

35 However less than a week after this paper was delivered, the NSW Government announced a backing away from a complete closedown of the industry. The situation is clearly very fluid.

within the Government and its backbenchers. It is certainly a major milestone for the supporters of animal protection:

> Euphoric animal protection groups regard the outcome not just as a triumph but a precedent that eventually will lead to a nationwide ban on greyhound racing. Some activist groups see wider potential for eventual prohibitions on the live cattle export trade, battery farming, horse racing and other equestrian sports, fishing and game shooting – even zoos.[36]

Even more recently, the ripple effect of the greyhound industry decision can also be seen in the recent announcement by Racing NSW that a $2 million welfare fund will be established for horse welfare funded by a levy on new prize money. Racing NSW will form a new department, including vets and staff to retrain racehorses and place them within the horse community after their racing life is at an end. It will also build partnerships with riding schools and other equestrian clubs. Reports attributed this as a reaction to the Government's decision on greyhounds.[37].

This is not the first time that the election of a representative of a party with a new constituency or support base has introduced a new policy discourse into the chamber. One of the earliest examples was the election of Ian Cohen, as the first Greens member of the New South Wales Parliament, and similarly John Tingle, representing the Shooters Party. In these cases however the large and complex cross bench gave these members some leverage despite only having one vote. But what is shown by recent experience is that regardless of a voting influence in the chamber, the mere election of a new political party in a chamber can be enough for existing parties to shift and consider new policy debates and priorities: – "people have voted for this, we need to respond."

CONCLUSION

The Australian parliamentary system contains competing tendencies for both adversarial and co-operative behaviour. Parliamentary processes, such as committee work and legislative debate, can assist and deepen the potential for this to contribute to public policy. The culture of a House, and the extent to which its members believe power will be shared instead of being a temporary aberration, is important. A bicameral system provides a way to reconcile the democratic right of the party of government to implement its legislative agenda with the core tenet of parliamentary democracy, that of scrutiny of the Executive and its policymaking. But as has recently been seen in NSW, even one member in one chamber can have an impact on public policy. Conflict is inherent in our parliamentary system, it always has been. But co-operation is no less a part of what political parties do in Parliament every year, and can have some very surprising results on public policy.

36 Norington B, "What's Next, Premier" The Australian 25 August 2016 p11.

37 Roots, C, "Racing NSW creates new welfare fund for horses" *Sydney Morning Herald* 7/9/2016 p36.

Chronicles

From the Tables – January–June 2016

Liz Kerr

Liz Kerr is the Clerk Assistant (Procedure) with the Western Australian Legislative Assembly and is editor of the biannual publication *Parliament Matters*. This article is an edited extract of the contributions from the various jurisdictions.

AUSTRALIAN CAPITAL TERRITORY

In January 2016, following the resignation of one Minister, the Chief Minister appointed two new Ministers, which meant that for the first time the Territory had seven Ministers. The ratio of members performing executive roles had been 35 per cent, but with the appointment of the additional Minister that ratio increased to 41 per cent. The number of elected representatives in the ACT increased from 17 to 25 at the 15 October election. The Assembly was refurbished and now has the capacity to accommodate the increase in numbers.

In March the Assembly amended Standing Orders to enable co-sponsored bills to be introduced into the House. This means multiple members sign the presented copy of the bill, and each hold speaking rights at all stages of the legislative process.

In May the Leader of the Opposition successfully moved to have all documents relating to the lease variation charge waiver at the former Brumbies site at Griffith tabled (made public). There have been relatively few uses of this standing order since it was adopted in 2012.

AUSTRALIAN HOUSE OF REPRESENTATIVES

In most legislatures, access to the floor of the chamber during proceedings is limited to members and parliamentary staff. Recent years have seen a push to allow members to breastfeed and care for infants during parliamentary proceedings. In February, in response to a Procedure Committee recommendation, the House agreed to amend Standing Order 257 to provide that 'a visitor does not include an infant being cared for by a Member'. The Opposition supported the motion, which was carried on the voices.

Toward the end of the 44th Parliament in May, the Procedure Committee presented a review of the procedures of the House under the reference 'maintenance of the standing orders'. The report reflected broadly on the relationship between the Executive and the House and recommended procedural changes to enhance the relative status of the House. These included: reforms to ensure that private Members have control over the selection and programing of non-government business; the election of committee

chairs by secret ballot of the whole House; and the election of Deputy Chairs by each committee. Currently, Chairs and Deputy Chairs are appointed by the Prime Minister and Leader of the Opposition respectively.

In its 17 March report, the Privileges and Members' Interests Committee recommended that the House find the former Member for Dobell, Craig Thomson, guilty of contempt for a deliberately misleading statement he made to the House on 21 May 2012. In May, the Chair of that Committee moved a motion calling on the House to agree with the recommendation to find the former Member guilty of contempt and to reprimand him for his conduct. The motion was debated and carried on the voices.

On 21 March, acting on advice from the Prime Minister, the Governor-General issued a Proclamation proroguing the Parliament with effect from 15 April and summoning all Members and Senators to meet at Parliament House for a new session on 18 April. It is unusual, in recent times, for the Parliament to be prorogued for the purposes of ending one session and beginning another. The last time this occurred was in 1977 to enable the Queen to open a new session. Recent practice has been for the Parliament to be prorogued just before the dissolution of the House of Representatives.

All business before the House lapses at prorogation and while business does not automatically carry over, both Houses have procedures to enable the resumption of bills in a new session of Parliament. Proceedings on a bill which lapsed at prorogation may, if the House in which the bill originated agrees, be resumed at the stage reached in the previous session. In the second session of the 44th Parliament, proceedings on a number of bills were resumed, including the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] and a related bill. Following debate however, the question that the bills be read a second time was negatived on division.[1]

On 2 May, three Supply Bills were presented by the Assistant Minister for Finance in anticipation of the double dissolution. The function of supply bills is to provide funds for the interim period when the main appropriation bills are not scheduled to pass both Houses before the beginning of the financial year. In this case, the supply bills appropriated 5/12ths of the estimated 2016–2017 annual appropriations (excluding Budget measures) to provide continuity of normal government business in anticipation of the dissolution of both Houses before the passage of the 2016–2017 Budget. Following a cognate (combined) second reading debate on the three bills each was passed by the House and by the Senate on the following day.

THE SENATE

On 9 May 2016, the seventh Senate of the Commonwealth of Australia – which first met on 14 September 1987 – was dissolved, together with Australia's 44th House of Representatives. A ceremonial reading of the dissolution proclamation took place

1 These bills were listed as meeting the requirements of s57 of the Constitution in the Governor-General's Proclamation dissolving both Houses.

under Parliament's Great Verandah; a formality originated for the 1960s news media, somewhat overtaken by the publication of the proclamation on the Governor-General's website, along with the Prime Minister's advice, the previous afternoon. A general election for every seat of each House followed, with polling day falling on 2 July 2016. The government was returned, with a reduced majority in the House, and gifted by Australian electors a most interesting eighth Senate.

The conditions for a dissolution of the Senate

Simultaneous (or double) dissolutions of the federal Houses of Parliament may occur only in accordance with section 57 of the Constitution, and the Senate may not otherwise be dissolved. The conditions in the first part of that section are met when different iterations of the same bill are passed by the House but rejected by the Senate, provided there is a 3-month interval between the first rejection and the House passing the second iteration. The rejection may take the form of a negative Senate vote on any stage of the bill, in which case the date of the initial rejection is clear and the 3-month interval easily determined. Section 57 also applies, however, where the Senate 'fails to pass' a bill, or passes it with amendments to which the House 'will not' agree, in which cases it may be more difficult to determine the date of the rejection and the succeeding 3-month interval.

Bills twice rejected in this manner become known as *triggers*, on the basis of which the Prime Minister may advise the Governor-General to dissolve both Houses. Two triggers – the Clean Energy Finance Corporation (Abolition) Bill 2013 and the Fair Work (Registered Organisations) Amendment Bill 2014 – were identified. It is by no means rare for double dissolution triggers to be established. They frequently arise early in the life of a parliament, to be stockpiled for future use. Such judicial consideration of section 57 as has occurred (arising from the double dissolution of 1974) confirms that there is no need for a trigger to be pulled immediately, despite the connotation in section 57 of a deadlock between the Houses requiring resolution.

Another condition relates to timing. Section 57 provides that 'such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.' In the context of the 44th Parliament it could not therefore happen after 11 May 2016 – the day after the 2016–17 budget was scheduled to be handed down. These considerations influenced legislative proceedings in the last months of the 44th Parliament.

In the early part of 2016 the government sought passage in the Senate of a pair of bills proposing the reestablishment of the Australian Building and Construction Commission (the *ABCC bills*). Those bills, having been rejected by the Senate at the second reading stage on 17 August 2015, would – if rejected again – provide further double dissolution triggers.

The Commonwealth Electoral Amendment Bill 2016 had been introduced into the House of Representatives on 22 February. The changes it proposed partially adopted

the recommendations of the Joint Standing Committee on Electoral Matters (JSCEM) in its report on the conduct of the 2013 election, which had produced the largest cross bench in the Senate's history. The bill, which proposed to remove registered party tickets, greatly reducing the potential for 'gaming' preferences, and to introduce optional preferential voting for at least 6 parties above the line, was introduced into the Senate in early March. The bill's final stages occurred under an order, proposed by the Government and supported by the Australian Greens, deferring the Senate's adjournment on 17 March until proceedings on the bill had been completed. A number of senators moved to vary this order to give precedence to other bills, including the ABCC bills – resulting in the Government voting against bringing on bills that it had claimed needed to be dealt with as a matter of urgency. The bill finally passed at around 1.30 pm on 18 March after nearly 39 hours of debate, with amendments moved by the Government and the Australian Greens, to which the House readily agreed. The sitting on 17–18 March 2016 lasted for 28 hours and 56 minutes, and appears to be unique in the Senate's history in being a continuous sitting without breaks of any kind.

On the afternoon of 8 May the Governor-General received the Prime Minister and accepted his advice that both Houses be dissolved the following day, being the anniversary of the opening of the first Federal Parliament in 1901 (as well as of the provisional and new parliamentary buildings in 1927 and 1988). The prorogation for a new session of Parliament and the simultaneous dissolution of both Houses under section 57 of the Constitution – both procedures invoked for the first time in some decades – signalled that the end of the 44th Parliament was an unusual one.

NEW SOUTH WALES

On 25 February both Houses of the New South Wales Parliament passed motions of apology to participants in the first Gay and Lesbian Mardi Gras, which took place on 24 June 1978 to demonstrate against the criminalisation of homosexual acts and discrimination against homosexuals. The apology addressed the harm and distress that the events surrounding the demonstration have had on them and their families and to affirm an ongoing commitment to an inclusive society and full respect for the rights of all LGBTQI citizens protected in law.

On 22 June 2016 the Speaker and the President made statements in the Houses about correspondence received from the Premier regarding recommendations on the Code of Conduct for Members, an Ethics/Standards Commissioner and the interest disclosure regime contained in 2014 reports of the Legislative Assembly Parliamentary Privilege and Ethics Committee and of the Legislative Council Privileges Committee.

In short, the recommendations contained in the reports are aimed at developing a more robust model for managing Members' conduct, focussing on ethics, clarity, independent oversight and transparency.

On 6 May 2016 Ms Linda Burney resigned as the Member for Canterbury to contest the Federal seat of Barton, and on 30 May Mr Andrew Gee resigned as the Member for Orange to contest the Federal seat of Calare. In both cases the Legislative Assembly agreed to a motion that the former Members' seats be declared vacant, in accordance with section 70 of the *Parliamentary Electorates and Elections Act 1912 (NSW).*

On 3 May 2016, the President announced the death of Dr John Kaye, a Member of the Legislative Council since 2007. Subsequently, the House immediately adjourned as a mark of respect. Dr Kaye, a member of the Greens, was elected to the Legislative Council in March 2007 and went on to become a widely respected and admired Member of Parliament. Due to the onset of a serious illness over the 2015 summer, Dr Kaye did not attend the Council in 2016 prior to his death. On 1 June, the Leader of the Government in the Legislative Council moved a condolence motion placing on record the deep sense of loss sustained to the State and the House by the death of Dr Kaye. Members of Dr Kaye's family, friends, colleagues and staff were present in the galleries for the debate.

On 23 June 2016 the Chair of General Purpose Standing Committee No. 3 tabled the Committee's report on the inquiry into reparations for the Stolen Generations in New South Wales. Members and officers then stood as mark of respect to members of the Stolen Generations. The Chair then spoke to the report, with Stolen Generation survivors and their family members as well as other inquiry participants present in the President's and public gallery. The Minister for Aboriginal Affairs, the Hon. Leslie Williams MP, was also present in the President's gallery during the debate. Members of the committee all spoke on the debate, and emphasised the unanimous agreement reached by committee members on the report's 35 recommendations.

VICTORIAN LEGISLATIVE ASSEMBLY

Homosexuality was decriminalised in Victoria in 1980. In 2014, the Parliament passed an amendment to the *Sentencing Act 1991 (Vic)* which recognised that consensual homosexual sex should never have been a crime and established a scheme to expunge historical convictions. On 24 May 2016, the Legislative Assembly formally apologised to Victorians convicted under past laws that criminalised homosexuality. The apology, delivered to a special sitting of the Assembly with Legislative Council members attending, was streamed live on the Parliament's website and broadcast into Queen's Hall, where a large number of affected people and their families gathered to watch. Six members, including Council members, addressed the special sitting after the Premier had moved the formal apology. After the motion was agreed to, and Council members left, a take note motion was then moved in order for other members to contribute to the debate. In recognition of the apology, the rainbow flag flew above Parliament House on the day.

VICTORIAN LEGISLATIVE COUNCIL

On 9 March the Opposition introduced a motion to suspend the Leader of the Government for a period of up to six months for failure to produce certain documents, arguing that failure to provide these documents constituted an obstruction of a direction of the Council. The clause specifying "a period of up to six months" was included to avoid criticisms and claims of expulsion of a member which may arise had the motion been open-ended. During debate on the motion, the Opposition moved a closure under Standing Order 12.25, which has not been used in the Council since 2003. There was reluctance to use it and other options were considered before it was decided to end the debate which had been going on for a number of weeks.

The House divided and agreed to the motion to suspend the Leader of the Government for a period of up to six months. This motion set a precedent in suspending a Member from the House for a substantial period of time. The President made a statement about the motion expressing his concerns that the matter could not be resolved by other means and expressed his desire to see a speedy resolution to the issue. The President made a further statement to the House clarifying his position in participating in the vote to suspend the Leader of the Government. He explained that as the Chair of proceedings he needs to uphold the motions or the directions of the House. Given that the documents had not been provided and, more importantly, given that the government had not used provisions in standing orders for an arbiter, he felt that he needed support with the suspension motion.

SOUTH AUSTRALIAN HOUSE OF ASSEMBLY

Section 67A of the *Constitution Act 1934 (SA)* provides that the Governor, on the advice of Executive Council, can appoint up to two Parliamentary Secretaries. Since provision was first made for their appointment in 1996, the Standing Orders have not acknowledged the existence of or attributed any specific responsibilities to Parliamentary Secretaries. On 9 March 2016, the Government successfully moved to enable Parliamentary Secretaries to act on behalf of Ministers, and reference to Ministers in the Standing and Sessional Orders were taken to include reference to Parliamentary Secretaries, except in respect to certain circumstances. While the sessional order enables Parliamentary Secretaries to act in the place of a Minister, it has a number of exceptions, the most noteworthy being to prevent them from answering questions during question time, in estimates hearings or to appear and answer questions in the examination of Ministers in matters contained in the report of the Auditor-General.

The Constitution (Deadlocks) Amendment Bill 2015 passed the Assembly on 8 March 2016. The Bill proposes a new mechanism in the *Constitution Act 1934 (SA)* to resolve persistent disagreements between the Houses. Section 41 of that Act currently provides that where a Bill has been rejected by the Legislative Council and,

after a general election the same or a similar Bill is again rejected by the Council, the Governor may either dissolve the Parliament or issue writs for the election of two additional members for each Council district. This Bill proposes a new deadlock mechanism, modelled on that found in section 57 of the Commonwealth Constitution in which the Governor-General has the power to dissolve the parliament in the event of a deadlock. If the deadlock remains when the parliament returns, the Governor-General may convene a joint sitting to resolve the deadlock, with the requirement that the bill passes by an absolute majority of the total number of members of both Houses. On the Bill being transmitted to the Legislative Council, where the Government does not have a majority, it was obvious that the proposal did not have the support of the Opposition and cross benchers. On the question that the Bill be now read a second time, there was no reference to the constitutional requirement for an absolute majority and the second reading was defeated on the voices.

Condolence motions are predominantly the means by which the House recognises the death of former members of parliament, and other prominent people. Recent practice has seen a wider recognition of the work of many other worthy people in society. In February 2016 the Premier moved a motion of condolence for the passing of prominent aboriginal woman Auntie Josie Agius. Eleven other Members contributed to the debate after which the motion was carried in silence by Members standing in their places and the House suspended for ten minutes as a sign of respect.

A Statement of Principles for Members was proposed by the late Hon Dr Bob Such MP in 2010. After the 2014 election the Government gave notice of a motion for the House to adopt the Statement of Principles. However the motion was not passed until 23 February 2016. The Statement acknowledges the unique position held by a Member of Parliament and his or her responsibility to maintain the public trust placed in them by performing their duties with fairness, honesty and integrity. It also recognised the electorate as the final arbiter of the conduct of Members of Parliament with the right to dismiss them from office at elections. The resolution was transmitted to the Legislative Council for its concurrence. On 19 May 2016, the Council subsequently informed the House that it had adopted a similar Statement of Principles relevant to Members of that House. The agreement by the House to the Statement of Principles was seen as a fitting legacy for Dr Such, who campaigned for heightened standards of accountability and openness among MPs. Dr Such passed away while in office on 11 October 2014.

QUEENSLAND LEGISLATIVE ASSEMBLY

In accordance with an election campaign commitment, the first Palaszczuk Ministry consisted of 14 Ministers and one Assistant Minister, down from 19 and four respectively in the previous Newman Government. However, media reports on the potential negative effects of such a small Ministry, cited communication issues and the inability of Ministers to be completely across their large portfolios. Following the resignation from Cabinet of the Minister for Police on 8 December 2015, the Premier

announced a reshuffle, and an increase to 17 Ministers and two assistant ministers. The Deputy Speaker was made a minister and was replaced by the member for Bulimba when Parliament resumed on 16 February 2016.

In March 2016, the member for Cairns resigned from the Labor Party. He now sits as an Independent member but has stated he will support the Labor Government on confidence and supply matters. Following a leadership spill in May, the member for Clayfield and the member for Nanango became the new Leader and Deputy Leader of the Opposition. A significant reshuffle of the Shadow Ministry resulted from this change and was announced on 8 May 2016. When the House resumed in August the numbers were ALP 42, Opposition 42, minor parties 2 and Independents 3.

The referendum to determine if there should be fixed parliamentary terms was held on 19 March 2016 and was approved by 52.96 per cent of electors. The Constitution (Fixed Term Parliament) Amendment Bill was assented to on 5 May 2016 and the Act will commence on the date of the proclamation by which the Governor summons the Legislative Assembly after the next general election. The next (56th) Parliament will be considered an extraordinary election and fixed four-year terms will commence from the start of the 57th Parliament, with the polling day being held on the last Saturday in October in the relevant year.

NORTHERN TERRITORY

On 27 June 2016, the final sitting day of the 12th Assembly, the Chief Minister tabled the report of the Inquiry into the establishment of an Anti-Corruption, Integrity and Misconduct Commission in the Northern Territory. The Clerk of the Assembly's submission to the Inquiry discussed the likely intersection of an anti-corruption body with the Legislative Assembly and recommended that measures be taken to address conflict between the privileges of Parliament and powers vested in an anti-corruption body. The submission provided an analysis of models for a Commission and consequences of such a body. At the time of writing, government was considering the report's 52 recommendations.

Following deliberations and a report from the Standing Orders Committee, the Assembly adopted the following three new Standing Orders in the May sittings. Standing Order 23A, *Speaking in a Language other than English*, provides that a Member may rise to speak in any language other than English provided the Member provides an oral English translation prior to speaking. The Member must table the written translation and provide the original text language for incorporation into the Parliamentary Record. This formal approach arose from a request by a Member for express approval in Standing Orders to replace the previous leave granted approach used over the past 41 years of the Assembly.

The NT has also moved to accommodate members caring for infants. Standing Orders provide for proxy votes during a division where a Member nursing an infant may provide

their vote in writing to the Clerk at the Table. Another Standing Order provides that, except with the permission of the Speaker who may exercise discretion–namely in the case of nursing parents with young infants–only Members are permitted on the floor of the Chamber during meetings of the Assembly.

NEW ZEALAND HOUSE OF REPRESENTATIVES

In March 2016 the second of two referendums was held on the future of the New Zealand flag. This one asked New Zealanders to choose between the current flag and an alternative chosen in the first referendum. The outcome saw New Zealanders choose to keep the current flag, with a majority of 56.6 per cent of votes. Voter turnout was 67.8 per cent, a noticeable increase from the 48.78 per cent turnout for the first referendum.

On 3 July 2014 the Māori Language (Te Reo Māori) Bill was introduced. The bill was intended to support the protection of the Māori language (Te Reo Māori), including affirming the status of the language as an official language of New Zealand and establishing a new entity to provide leadership on the revitalisation of the language. The bill as introduced was drafted in English, and was considered by the Māori Affairs Committee, which recommended transforming the bill into a dual-language bill. The Committee also recommended inserting a provision stating that the two versions were of equal authority but, in the event of a conflict between the two versions, the Te Reo Māori version would prevail. Ministerial advisers arranged for the bill to be translated into Te Reo Māori, and the dual-language bill was reported from select committee on 26 February 2016 as Te Pire mō Te Reo Māori / the Māori Language Bill.

As the bill was awaiting its third reading, language experts who had assisted in the translation process further reviewed the Te Reo Māori version. They identified over 100 style and grammatical amendments to the text that they considered necessary. These amendments were too significant to be made under the Clerk's discretion. The only way to make these changes was to recommit the bill to the committee of the whole House. Immediately prior to the bill's third reading on 14 April 2016, the Minister in charge of the bill successfully sought leave for the bill to be recommitted for the consideration of the tabled amendments, and for the bill to then be set down for third reading forthwith. The committee of the whole House unanimously agreed to the amendments, and the House proceeded to the third reading, which was completed that afternoon. Te Ture mō Te Reo Māori 2016/the Māori Language Act 2016 received the Royal assent on 29 April 2016, and largely came into force on the following day.

WESTERN AUSTRALIA

Bell Group Liquidation

The Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 passed both Houses on 26 November 2015 and received the Royal Assent the same day. Affected parties lodged a successful application in the High Court for special leave to challenge the constitutional validity of the legislation. Initial questions as to standing were resolved prior to a hearing of the matter when the Commonwealth joined proceedings. With specific reference to the dispute before the High Court, the Western Australian Government introduced the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Amendment Bill 2016 to the Legislative Assembly on 23 March 2016. This Bill passed through both Houses on 5 April 2016 and received the Royal Assent that same day.

The full High Court heard the constitutional case relating to the Bill (as amended) on 5, 6 and 7 April 2016. On 16 May 2016, judgment of the High Court was delivered in the matter of *Bell Group NV (in liquidation) v Western Australia; WA Glendinning & Associates Pty Ltd v Western Australia; Maranoa Transport Pty Ltd (in liq) v Western Australia* [2016] HCA 21. Under the principal Act, s22 established an alternative statutory scheme of arrangement for the distribution of proceeds relating to the Bell Group liquidation to that provided under the applicable corporate law. The six High Court justices comprising the majority decision held that s.22 was invalid, pursuant to s.109 of the Commonwealth Constitution, at [61] and [66]. The High Court further held that, as s.22 could not be severed from the Act without fatally compromising the statutory scheme of arrangement, the entire Act was also invalid, at [72] and [73].

Special Joint Sitting to Elect Senator Pat Dodson

On Thursday, 7 April, both Houses of the WA Parliament adjourned until Tuesday, 10 May 2016. Former Senator Joe Bullock, Senator for Western Australia, advised the President of the Senate of his intention to resign on Wednesday, 13 April 2016 and this advice was conveyed to the Governor of Western Australia the same day. On Thursday, 21 April 2016, the Governor in Executive Council issued a proclamation recalling Parliament on Thursday, 28 April 2016 to enable the necessary resolutions to be passed in each House to for a joint sitting to occur to choose a person to fill the casual vacancy in the Senate.

The Houses of the WA Parliament had never before been called to meet on a particular day by proclamation other than one issued to commence a new session following a prorogation. No legal authority was expressly cited in the recall proclamation and the question arose as to whether the proclamation was lawful. The powers of the Governor to determine the sittings of the Houses of Parliament are expressly vested in the Crown under s3 of the *Constitution Act 1889 (WA),* and are limited to determining a meeting date after prorogation (new session) and prorogation and dissolution of the Assembly

in preparation for a general election (new session/parliament). The recall proclamation had implications for the Legislative Council's capacity to determine its own days of meeting, an incidence of its undoubted privilege of exclusive cognisance.

A difference of opinion arose between the Legislative Council and the Executive as to the proper mechanism to achieve the recall. To avoid an impasse and to assuage any doubts regarding the privileges of the Legislative Council, on Tuesday, 26 April 2016 the President of the Legislative Council, Hon Barry House MLC, published a notice recalling the Legislative Council to the same date and time as that provided for in the recall proclamation. In doing this, the President exercised a discretionary power to recall the Legislative Council equivalent to that possessed by the House of Commons as at 1 January 1989 and imported as a power and privilege of the Houses of the Western Australian Parliament pursuant to s1 of the *Parliamentary Privileges Act 1891 (WA)*. The notice of recall followed the wording of the equivalent notice of recall issued by the Speaker of the House of Commons which is published in the London Gazette.

The special Joint Sitting that was subsequently held in the Legislative Council, pursuant to s15 of the Commonwealth Constitution, received a single nomination for the casual vacancy, that of Professor Patrick Lionel Dodson. During debate on the motion, it was noted that Professor Dodson would be the first indigenous Australian to be elected as a Senator for Western Australia. The Deputy Leader of the Opposition in the Legislative Assembly, Mr Roger Cook MLA observed that; "We often observe how people's stature is raised upon their election to the Senate, but can I just say that, today, the Senate's stature has been raised by the election of Patrick Dodson." At the conclusion of debate, there being no other nominees, Mr President declared Professor Dodson duly elected as a Senator for Western Australia.

Book Reviews

Parliamentarians' Professional Development: The Need for Reform

Edited by Colleen Lewis and Ken Coghill, Public Administration, Governance and Globalization Series, Springer Press 2016, 213pp.

June Verrier

Dr June Verrier was the Head of the Parliamentary Information and Research Service and Visiting Fellow at the ANU.

The genesis of this collection appears to be twofold. The first is the argument that in an increasingly complex world, greater professionalism in the business of the politician is called for and that this should be achieved by the development of their knowledge, skills and abilities and attitudes. The second is the obvious ineffectiveness, catalogued in a number of contributions to this volume, of so much of the effort to date to 'educate' or to 'train' members of parliament both in advanced democratic parliaments and in emerging parliaments, in spite of the very considerable resources committed to the task, and thus that a fundamental review of how it is done is overdue.

This volume purports to be the first to consider a human resource management (HRM) perspective, of which education and training are an integral part, to the issue of improving the performance of democratic parliaments, or rather of the members which make them up. It argues that much of the relatively recent efforts to date has not been informed by theories of androgogy (how adults learn) and that the usual 'trainers' are not well enough prepared for the task at hand. The authors examine the theories and the practice and some propose solutions, the most controversial of all being that participation in rigorous preparatory education and training be compulsory for all members of parliament.

Let's first dismiss the seriously unrealistic suggestion Colleen Lewis makes in chapter six, 'Compulsory Professional Development for Members of Parliament' that 'once elected, parliamentarians should undertake a series of performance development programs and that participation should be compulsory'. There is only one kind of parliament where that could happen. Given that this volume is about strengthening the functioning of democratic parliaments it is curious that a chapter on the Chinese National People's Congress is included. As a classic rubber stamp parliament on the spectrum identified by Robinson and Mico more than twenty years ago running from rubber stamp through 'nascent', then 'informed', and on to the ideal (in democratic terms) 'independent legislature', it is quite out of place in this context.

Could compulsory training be effective in any case? Consider ethics. Cristina Neesham contributes a chapter on 'The Value of Ethics Education for Parliamentarians'. All admirable in theory. But can ethics be taught? Yes you can and must make sure that

MPs are aware of the rules and regulations – and of the consequences of ignoring them. But if their values, their own moral code, the reasons for ethical behaviour are not well imprinted prior to pre-selection – and this is something that surely can only rest with party selectors to judge – it is surely not something officials or academics can 'teach'.

Then there is the problem presented by not only the very different backgrounds of MPs suggesting different training needs, but the different objectives they bring to incumbency. Donahue in his chapter two on 'The Career Development of Parliamentarians', makes the point, one rarely acknowledged in training programmes, that MPs coming from different backgrounds and with different priorities – the high flying front bencher, the special interest independent, the conscientious constituency representative, the time-serving senator etc – will have different 'training' needs making the design of any generic training above and beyond the 'how to' technicalities nigh on impossible to design.

As well, the compulsory proposition is highly contentious for at least two reasons. The first is that it sets up, or certainly has the potential to set up, a new kind of exclusionary regime that could end up being not so very different in consequence from earlier exclusionary requirements of property ownership or gender for membership of parliament. If potential candidates do not have, do not want, or feel themselves unable to acquire these putative professional skills, is not a significant proportion of the relevant community potentially excluded from aspiring to be a member of parliament? Isn't a democratic parliament meant to represent the whole of the people, from all walks of life, the best and the least amongst us? Should those who aspire to serve as members of parliaments not bring the best background, 'education' and 'training' that there could be, namely that of life, and lives differently lived, with all their richness, albeit as a postman, a paramedic, a market gardener, a mother, ...?

A second reason the suggestion that professional training be made compulsory for MPs is unrealistic is that it completely fails to grasp the unique status, or even what can be called a certain kind of 'sovereignty', that attaches to members of parliament.

There is something essentially and necessarily anarchic about the extraordinary mix of characters that make up members of parliament. Putting aside the fact of the sinecure in some senate situations, MPs are typically strong, smart, individualistic, articulate, energetic, competitive, committed, driven, go-getters and networkers with necessarily large egos who have put themselves through the fire and brimstone of pre-selection and election. They are an elite group (only 1134 in total in the Australian Federal Parliament as at the 2013 election) who, though beholden to their party in many respects, represent the sovereignty of the people in each and every electorate. As such the 'member' is much more important than the 'man' and it is in the member that a special status sits which sets them – the position not the person – apart. As Phillip Norton, in chapter eleven 'Learning the Ropes: Training MPs in the United Kingdom' concludes: '...by virtue of election, their electoral legitimacy is such that they feel it is not up to others to tell them how to do their job'.

There is another issue critical to the success of the effort to support the development of the skills and capacities of members of parliament and one not considered in this volume, apart from recommending that the whips be recruited to the cause, which is that of support from the top. The role of the legislature is to hold the executive to account and this creates a natural tension between them. Executives thus do not have the same interest in building the capacities of legislatures as, especially, do parties in opposition. Unsurprisingly it is parties in opposition which most vociferously call for the strengthening of the capacity of the parliament to hold the executive to account, for example by increasing access to quality research services or improving resources for committees and it is executives which have periodically, even in the Australian context, sought to limit them. In the case of developing democracies especially, support from the top is critical.

So what does this volume tell us about what can be done to improve members' capacity to fulfil their legislative, budget setting, oversight and representational responsibilities?

No greater effort to introduce new members to their responsibilities could be made than was made in the House of Commons following the election of 2010 which produced the biggest turnover of MPs since WWII (232) triggered by the expenses scandal and this is described by Colleen Lewis in her chapter six. And yet the results were so disappointing. Some greater success is recorded for the Australian Senate's efforts primarily because it is able to use the months before new senators are sworn in, when they are not yet overwhelmed by their new responsibilities, with much better results (chapter three, 'Adult Learning: From Learning Theory to Parliamentary Practice' by Holland and Lenders). The same is true of apparently the only other parliament, the German Bundestag, able to take advantage of preparation for new members some time ahead of them taking their seats (Julia Schwanholz in chapter nine).

So clear are the lessons from the efforts that have been made over the years that we could – should – conclude that the only kind of 'training' that can be provided effectively at the beginning of new parliaments to mixed party groups of members is the nuts and bolts type of 'how to' training – staffing, allowances, travel, technology, access to parliamentary libraries and research services and so forth. For the rest, they can be alerted to where they may seek assistance and advice to service their constituency, to play an active roles on committees, for legislative drafting or to develop expertise in a given subject area for example to speak on a certain bill or to assist the development of alternative policies in a shadow portfolio. Experience suggests that it is only when the need arises, and they know why they need to know, will MPs turn their minds to the task.

Then MPs will seek out what they need for themselves. They will find mentors (former local members or ministers in the portfolio area they aspire to hold for example), party grandees (famously Keating of Jack Lang) or experts in the areas in which they aspire to make a mark. In the Canberra context strong professional relationships often

develop for example between a shadow minister and a specialist(s) in the Parliamentary Research Service.

As far as assistance to the parliaments of developing democracies is concerned, trainers could do worse than absorb the wisdom displayed in Greg Power's chapter eight, 'A Solution in Search of a Problem: International Approaches to "training" MPs'. From his long experience he tells us why programmes fail and suggests a way forward. He takes full account of the uniqueness of MPs' endeavour, their sense of self and of the limits of what therefore can be done and concludes that they learn best by doing/observing. He also argues that more can be done, especially in the fields of parliamentary procedure, legislative drafting and budget scrutiny with and for officials, who so often represent the continuity in these parliaments. In these cases however, if resources are not to be wasted in tokenism, he emphasises that it is also vitally important – and surely a responsibility – for those doing the training to have a thorough grasp of the situation – parliamentary, community and cultural – on the ground.

Something to consider in the context of training for MPs in developed or developing democracies could be for courses to be made available by each political party to aspirant MPs and, indeed, aspirant parliamentary staffers. More likely may be the prospect of the development of a post graduate or diploma course for all aspirants to public office at all levels of government and to those who aspire to work with them – or just for those interested in the workings of the democratic system. Here study for example of constitutions, of ethics, of fiduciary duty – and of John Stuart Mill's starting proposition that it should be all about the pursuit of the greatest good of the greatest number – could be offered. Could completion of some such course be a pre-requisite or perhaps one consideration for pre-selection, even when parties and pre-selectors are more likely to value other 'qualifications' than this one for candidature?

Parliamentarians Professional Development: The Need for Reform makes an important contribution to the literature in this challenging field. There is value in canvassing even controversial options as parliamentary officials and overseas assistance experts strive to design more effective programmes to develop the capacities of democratic parliaments. It is to be hoped that they read it. MPs, though, are unlikely to – and I hope the Foreign Minister never does for she will surely cut all aid to parliamentary development and support (from which other benefits such as influence and relationships surely flow) on reading the very good chapter with extremely negative conclusions in chapter seven on 'Legislative Capacity Building: Pacific Case Studies' by Abel Kinyondo.

Dr June R Verrier
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