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Editor
Colleen Lewis

Modernising parliament for future generations

Minority government: a backbench and crossbench perspective

Parliamentary committees connecting with the public

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

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From Your Editor

Colleen Lewis

I am writing this as Australia prepares to elect a new federal government. Regardless of the outcome of the election in the House of Representatives and Senate, many of the issues raised in this edition of *Australasian Parliamentary Review* (and in previous editions) are relevant to the efficient and effective running of parliament, including its legislative and representative functions, and on the community's perception of parliament and members of parliament (MPs).

Contributors to this edition have examined several matters that are highly pertinent to all Australian parliaments, the New Zealand parliament and other parliaments in the democratic world. These include: modernising parliament; standing orders; petitions; and electoral reform. Some articles use interviews with former parliamentarians to better inform our understanding of how parliaments work in practice.

The first three papers relate to the Australasian Study of Parliament Group's (ASPG) conference "Modernising Parliament: Rethinking parliament for the next generation", held in New Zealand in 2015.

David Bagnall, Principal Clerk (Procedure) in the House of Representatives, New Zealand, examines standing orders and the work of the standing orders committee. He makes the important point 'that only parliament can modernize parliament'. Because of this reality, Bagnall advocates creating opportunities for MPs to work together to achieve meaningful reform, which includes the 'need to consider how to connect the House with today's rapidly changing world'.

Dr Kennedy Graham, a member of the New Zealand Parliament addresses, among other things, the need for greater innovation in the running of parliament, achieving an appropriate balance between the three primary functions of parliament, establishing a prescriptive code of conduct for MPs, issues pertaining to international relations and the need for New Zealand to establish a formal constitutional framework. Two consistent themes underpin the arguments raised in this paper: responsibility and integrity.

Associate Professor Martin Drum's particular interest is in 'how well parliamentary committees connect with the public'. Drum points to the unifying nature of parliamentary committees, which despite the adversarial environment of parliament often bring together opposing sides of politics to formulate effective policy. While

acknowledging that the deliberations of a committee may not always translate into policy implementation, Drum explains that the information gleaned from the committee process often informs parliamentary debates. His article is particularly concerned about improving the relationship between parliamentary committees and the public. Drawing on a pilot study of Western Australian parliamentary committees, Drum examines the methods used by committees to engage the public in the committee process and asks whether they could be improved so as to encapsulate more diverse points of view.

The other articles in this edition of APR are not based on presentations delivered at the 2015 conference, rather they reflect contributors' interests in particular aspects of parliament and parliamentary processes.

The article "Petitioning the Australian Parliament: Reviving a Dying Democratic Tradition", authored by Daniel Reynolds (researcher at the Gilbert + Tobin Centre of Public Law, University of New South Wales (NSW) and Professor George Williams, Dean, Faculty of Law, University of NSW), notes that the right to petition parliament is an old tradition designed to allow people to bring their concerns 'directly before parliament for consideration and debate'. Despite this avenue for input, petitioning has not been commonly used in the Australian federal parliament. Reforms implemented in 2008 to improve the petitioning process included the creation of a petitions committee, accompanied by the expectation that ministers would 'respond to petitions within 90 days'. This desirable outcome has not always been achieved. Reynolds and Williams argue that overseas jurisdictions and several Australian states and a territory have successfully reformed their petitioning system. They suggest that the federal parliament should look at adopting similar reforms, as they have been beneficial to petitioning processes in these jurisdictions.

"Electoral Reform and Party System Volatility: The Consequences of the Group Vote Ticket on Australian Senate Elections" is the topic addressed by Senior Lecturer, Dr Nick Economou of Monash University. Economou's article focuses on the Australian Senate and the relationship (if any) between the 1984 reforms, which saw the implementation of the Group Vote Ticket (GVT) system (above the line voting) and the 'diversification of party representation in the upper house'. Economou argues that GVT did deliver greater diversification to the composition of the Senate. However, he also notes that while the impetus for the 1984 reforms was achieving 'partisan advantage' for the Labor Party and Australian Democrats (the parties that championed the reforms), the outcome from the changed voting system had the opposite effect. It proved to be 'at the cost of these parties' in relation to 'representation outcomes'.

Emeritus Professor of Public Administration Roger Wettenhall's article "Portfolios, Departments and Agencies: Tinkering with the Machinery-of-Government Map" examines the inter-relationship between portfolios, departments and agencies and the degree to which established notions of these machinery-of government structures have been influenced by new government formations, such as Commissions of Audit. The article points to some 'interesting' changes in terminology in relation to portfolios

and departments but notes that, to date, these changes do not appear to have had a notable affect on the manner in which 'we go about building these main elements of government formation'.

"Minority Government: Non-ministerial Members Speak about Governing and Democracy" is the theme of Dr Brenton Prosser (University of Sheffield) and Dr Richard Denniss's (Australian National University) article. Through a series of interviews with former, 'experienced' Australian parliamentarians, from across the political spectrum, the authors seek to gain an insider's account of the effectiveness or otherwise of minority government. Prosser and Denniss offer suggestions about what is required to make minority governments work and on the need for electoral reform. The authors sought the views of crossbench and backbench members of parliament as opposed to political leaders mainly because these groups of MPs are relatively under researched.

David Blunt (Clerk of the Parliaments, NSW Legislative Council) and Alexander Stedman (Principal Council Officer and Deputy Usher of the Black Rod NSW Legislative Council) outline an aspect of the Legislative Council's oral history project, which addresses the establishment of the modern committee system. Their article outlines the reasons why the Council is undertaking this project and the methodology used, which involves interviewing several former parliamentarians. Toward the end of their article, they outline the 'next steps'. As the authors note, the project is helping to 'create an irreplaceable archive of commentary on some of the key events that have shaped the Council's evolution'.

Liz Kerr, Clerk Assistant (Procedure) with the Western Australian Legislative Assembly has generously agreed to compile APR's important regular feature "From the Tables". It gives me great pleasure to welcome Liz to the role and I feel confident that I speak for all ASPG members and other subscribers to APR when I say, *thank you Liz*.

It also gives me great pleasure to welcome Dr Isla Macphail to the Editorial Board of APR and to congratulate her on being awarded her PhD.

The ASPG's annual conference, hosted by the South Australian chapter of the ASPG, is being held this year in Adelaide from 5 to 7 October (inclusive). The theme of the conference is "The Restoration and Enhancement of Parliaments' Reputation". This is an important and very topical subject and I urge those who are presenting papers at the conference to submit them to the APR for possible publication. A collection of articles based on the conference theme will be of great interest to many concerned about the growing trust deficit between members of parliament and those who elect them to office. Of particular interest will be the recommendations put forward by presenters for narrowing that gap.

Articles

Reviewing the Standing Orders—How to Make Dreams Come True

David Bagnall

David Bagnall is Principal Clerk (Procedure), Office of the Clerk of the House of Representatives, New Zealand[1]

Parliament is not modernised by conferences. Fresh perspectives about Parliament are regularly raised in conference papers and journal articles. The presentation and contemplation of ideas, the sharing of experiences and knowledge, the challenging of traditional assumptions, and the championing of principles are all valuable. But while proposals, feedback, advice and impetus are important, only Parliament can modernise Parliament.

The purpose of this paper is to challenge all people who dream of modernising Parliament to engage with the process through which this can happen, and to provide the impetus for change. All Parliaments have—or should have—mechanisms for changing their procedures. In most Parliaments, the primary means for this will be a committee of members that is charged with considering and recommending proposals for change, with recommendations being placed before the plenary for adoption. This paper focuses on the New Zealand experience of this process, but the call to engage in it is relevant for all jurisdictions.

HOUSE DETERMINES ITS OWN PROCEDURES

Like other legislatures in the Westminster tradition, New Zealand's House of Representatives has the right to determine its own rules and procedures without intervention by any other authority. The House's freedom to control its proceedings—described as a right of "exclusive cognisance" or "exclusive jurisdiction"—is an essential aspect of parliamentary privilege.[2] The "freedom of speech and debates or proceedings in Parliament" under article 9 of the Bill of Rights 1688, and the Parliamentary Privilege Act 2014, provide a statutory basis for this, but there is also a broader sense of mutual respect (or "comity") between the legislature and the judiciary. The independence of Parliament from outside interference and, likewise, the independence of the judiciary are

1 Many thanks to my colleagues in the Office of the Clerk for encouragement and assistance. I am grateful to the ever-helpful staff of the Parliamentary Library and indebted to Dr John Martin for his guidance and hugely insightful work on the history of our Parliament.

2 David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore, Wellington, 2005) at 630–632; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at [13.6].

pillars of our democratic system.[3] Members of the Executive can initiate and, in most jurisdictions, control or block the process of parliamentary change, but they can do so only in their capacity as members of Parliament.

In general the House tends to avoid including provisions in legislation that prescribe its procedures. However, even when statutory provisions do touch upon the operation of House, the court refrains from dictating how the House should implement them.[4] The Speaker, not the judiciary, is responsible for ruling on the interpretation or application of rules in the parliamentary context.[5]

This does not place the legislature above the law. It is up to the House to work out how the law is to be observed in its procedure and practice. Parliament is the supreme lawmaking body but it exists within a wider constitutional framework and must be respectful of this.

NATURE OF STANDING ORDERS

The Standing Orders are the House's rules, and they seem filled with detail and prescription. New Zealand's Standing Orders number more than 400, and set out many particular requirements for initiating, arranging and dealing with parliamentary business, followed by four appendices with more detail still. For the most part, these dictates are adhered to in day-to-day House procedures. Questions to Ministers are lodged by 10.30 am—sometimes in their hundreds; members' speeches in the House are terminated after 10 minutes; and select committees hear most evidence in public—but only while a quorum is present.

Among the details, however, are statements of principle. The Standing Orders in many places declare what is important, what the purpose should be. Proceedings are broadcast and made available for television coverage,[6] Business Committee determinations must be fair to all parties,[7] the Speaker maintains order and decorum in the House,[8] motions generally require notice,[9] speeches and amendments must be relevant,[10] members can address the House in English, Māori or New Zealand Sign Language,[11] matters subject to court decisions cannot be referred to (subject to the Speaker's discretion) out of respect for the relationship of mutual respect with

3 House of Representatives (NZ) Privileges Committee *Question of privilege concerning the defamation action* Attorney-General and Gow v Leigh (11 June 2013) [2011–2014] AJHR I.17A at 15–16.

4 See, for example, *Bradlaugh v Gossett* (1884) 12 QBD 271; *Awatere Huata v Prebble* [2004] 3 NZLR 359 (CA) at [55].

5 Standing Orders of the House of Representatives (NZ, 2014), SO 2.

6 SO 46.

7 SO 78(3).

8 SO 84(1).

9 SOs 97.

10 SOs 111, 123, 292(1) and 302(2).

11 SO 108.

the judiciary,[12] hearings of evidence are generally held in public,[13] answers must be given that seek to address questions asked.[14] The proportionality of seats held by parties under the Mixed-Member Proportional Representation electoral system (MMP) is reflected in various procedures, such as the appointment of members of select committees and the allocation of speaking slots and questions. The most prescriptive part of the Standing Orders, the appendix relating to the declaration of pecuniary and other specified interests, was amended in 2014 because the Standing Orders Committee considered that an overall purpose statement was needed: the declaration of interests is to promote the highest standards of behaviour and conduct by members, and strengthen public trust and confidence in Parliament.[15] Such statements of principle guide the Speaker, members and other participants when deciding how the rules should be interpreted or applied—how Parliament works.

These rules protect the interests of the institution of Parliament in the progress of legislation, considered scrutiny, fair and proper process, and the representation of different perspectives. The House is a robust environment where passionately held beliefs and staunch opinions are constantly in contest. Legislating is itself an intensely political process.[16] The Standing Orders and the established practices of the House (many of which are expressed in Speakers' rulings) provide a stable backdrop to the tumult. One of their most important functions is to ration the House's time—a "scarce parliamentary commodity".[17] The Standing Orders safeguard the reasonable expectations of Government and Opposition and encompass the vague bounds of acceptable parliamentary behaviour.

As well as being a political boxing-ring, however, the House is a place where political solutions are found. It is not unusual for members across the House to agree that a particular course of action is in the public interest: that a non-controversial bill should be passed to right a wrong or improve the statute book; that a matter warrants debate; that additional scrutiny is needed. Negotiations and deals take place to work out how the usual way of doing things should be adjusted to enable outcomes that are seen as being for the common good. The rules provide a fall-back, "default" position underlying the political problem-solving that goes on all the time.

In this light, the Standing Orders can be seen as an evolving accord representing the accepted balance of the different parliamentary interests.

12 SO 115.

13 SO 222(1).

14 SO 386(1).

15 SOs App B 1(3).

16 George E Tanner "Confronting the process of statute making", paper presented to New Zealand Legal Method Seminar (16 May 2003, Auckland) at [12].

17 David McGee *Parliamentary Practice in New Zealand* (3rd ed, 2005, Dunmore, Wellington) at 116.

STANDING ORDERS AS CONSTITUTIONAL RULES

New Zealand's lack of a single overarching constitutional document is well-known. Instead we turn to a mixture of prerogative powers, statutes, court decisions, and conventions.[18] The Standing Orders are not necessarily included in the usual list of suspects—alongside the Constitution Act 1986, the Electoral Act 1993 and the New Zealand Bill of Rights Act 1990. However, the law and custom of Parliament are regarded as one of the many sources of our "unwritten" constitution.[19] This is because the rules of Parliament form part of the framework that empowers the exercise of government in our democracy.[20]

As rules, the Standing Orders embed not only the interests of political parties, but also of the institution of Parliament and the public that it serves. In particular, the constitutional nature of the Standing Orders stems from their huge influence on the use of legislative power.

PRACTICE

The Standing Orders seem long and detailed, but they do not say everything about how the Parliament operates. The day-to-day working life of the House, committees, members and other participants follow precedents and patterns that fill in the gaps between the Standing Orders. Much of this simply comes down to the way things are done: the Final Order Paper is circulated at particular times, the Leader of the House signals to the House Office when a bill is to be introduced, a Simultaneous Interpretation service is provided, members can get their select committee documents through the eCommittee system—or they can ask for them to be printed and sent as paper copies.

All of these myriad ways of doing things are described collectively as the "practice" of the House. Whenever a dispute or uncertainty arises about how the Standing Orders should be interpreted or applied, or what the appropriate practice should be, it is up to the Speaker to decide.[21] The Clerk keeps track of things, and assists members, staff, Government officials and the public with advice about relevant rules and practices when they want to transact parliamentary business.

18 For a useful summary see Rt Hon Sir Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" *Cabinet Manual 2008*.

19 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wgtn, 2014) at [2.8].

20 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, OUP, 2004) at 2–3.

21 SO 2.

REVIEW OF STANDING ORDERS—PROCESS

The Standing Orders Committee is a select committee that is empowered to review the Standing Orders, procedures and practices of the House.[22] The committee has crossparty representation and is chaired by the Speaker. Usually the Leader of the House and Shadow Leader of the House are members, along with the senior whips or spokespeople of other parties. The committee member with the longest continuous service in the House is traditionally appointed as the Deputy Chairperson, but rarely presides as it would be unusual for the committee to meet when the Speaker is unable to attend.

While strictly speaking the committee has discretion about whether to conduct a review, the practice is for a review to be conducted during each term of Parliament.[23] The Standing Orders Committee also can consider separate matters of procedure and practice as they arise, without needing to commence a review. Similar to other select committees, items of business can be referred or allocated to the Standing Orders Committee for consideration.[24]

The typical process of a review of Standing Orders resembles that for a select committee inquiry. The committee initiates the review and determines its own approach, which tends to involve an open call for public submissions with suggestions for any changes to the Standing Orders, procedures and practices of the House. Generally no limit to the scope of the review is prescribed. Submissions are received, usually including submissions from select committee chairpersons and other members, and from the Clerk of the House. Some enthusiasts and activists feed into the process, but on the whole submissions are relatively few. Hearings are held in public. The Clerk then analyses the submissions and makes recommendations, similar to the provision of advice by departmental advisers on bills (as for other committee business, the Clerk's advice is published on the Parliament website after the committee reports).

The committee works through the recommendations, in the process developing proposals further until the committee is ready to instruct the Clerk about the drafting of amendments to the Standing Orders. A narrative report is prepared to explain the committee's main recommendations and the draft amendments are attached to it once they are adopted.

The House considers the committee's report on a notice of motion, moved by the Leader of the House, for the appended amendments to be adopted by the House.[25]

22 SO 7.

23 Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 4. A review commenced during the 46th Parliament but was not completed before the Parliament was dissolved early for the snap election in 2002. That review was resumed in the next term and concluded in 2003.

24 Since 2002, the committee has considered three bills and three petitions, and one matter referred by the House (a review of Standing Orders relating to pecuniary interests). The committee has also self-initiated consideration of separate matters of procedure and practice relating to: publishing of *Hansard* and other parliamentary publications; television coverage of the House; pecuniary interests; captioning of proceedings and webcasting of select committee hearings; and members' attendance, absence and suspension.

25 A proposed revision of the Standing Orders can be considered in a committee of the whole House; this last occurred in 1995 and would now be unusual.

Once the House has agreed to the amendments, the Clerk arranges for a new edition of the Standing Orders to be published, usually during the election period.

SEEKING A GOOD BALANCE

Members of Parliament are conscious that the Standing Orders are part of New Zealand's constitutional landscape; hence the Standing Orders Committee has a convention of requiring consensus or overwhelming support if proposed amendments are to be effected. In 2003, the committee explained its decision-making process:

> As the body that considers changes to the rules of the House, the Standing Orders Committee includes representatives from each recognised party, and generally operates on a consensual basis. By convention, we do not divide on Standing Orders matters: we ascertain whether the overall package of amendments to be recommended has the support of members who represent an overwhelming majority of the House. This approach does not mean that all of us support every measure, but on the other hand a number of significant proposals that might have obtained majority support have not been adopted. In our collective view, a good balance has been achieved.[26]

This approach has been reiterated in recent reports of the committee.[27] The aim is to find a balance which recognises the different parliamentary perspectives that should be considered.[28]

PRINCIPLE, PRAGMATISM AND FREEZE-DRIED PARLIAMENT

A convention preventing change without overwhelming support might seem to entrench the status quo. It has been suggested to the Standing Orders Committee that an "unattainably high" threshold of consensus results in "unworkable" legislative procedures being anchored in place, with worthwhile changes to these procedures being blocked.[29] In response, the Standing Orders Committee observed that the alternative—a majoritarian approach—would "undermine respect for the Standing Orders and thus their standing as part of New Zealand's constitutional framework".[30]

The seeking of overwhelming support for amendments to the Standing Orders is an important convention from a constitutional perspective. Less lofty, but not insignificant in the hard-headed world of politics, is the realisation by members that the position

26 Standing Orders Committee *Review of Standing Orders* (11 December 2003) [2002–2005] AJHR I.18B at 5.

27 Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 4; (27 September 2011) [2008–2011] AJHR I.18B at 7; (27 August 2008) [2005–2008] AJHR I.18B at 6.

28 Mary Harris, Deputy Clerk of the House, memorandum to Standing Orders Committee (5 December 2006) at [49–51].

29 Legislation Advisory Committee, submission to Standing Orders Committee (October 2006) at [82–83].

30 Standing Orders Committee *Review of Standing Orders* (27 August 2008) [2005–2008] AJHR I.18B at 6.

of Government and Opposition may be reversed after the next election. What goes around comes around. Members may be reluctant to equip one side of the House with weapons that could, in turn, be brought to bear on them when political fortunes change. After all, the Standing Orders Committee usually is more active towards the end of the parliamentary term. Moreover, the parties would be mindful that a rule change which significantly shifted the balance of power could be difficult to unwind.

With principled and pragmatic drivers such as these, it would not be surprising if the House conducted a self-review process that was inherently change averse, resulting in a sort of freeze-dried Parliament. However, this proposition is not borne out by actual experience in New Zealand.

REGULAR CYCLE OF REVIEW

The conservatism that could result from the pursuit of overwhelming support is counteracted by the fact that reviews occur regularly, as part of the relatively short three-year parliamentary cycle. Ideas that seem novel and uncomfortable at first can, with time, become more acceptable. The cycle of regular reviews means that the House can incrementally update its way of operating, and over time these increments can result in major shifts in procedure.

Regular reviews have not always been a given, though: for much of the 20th Century reviews were relatively few and far between.[31] In the last three decades, however, the Standing Orders Committee has been more active, in some cases being appointed to respond to particular legislative developments (such as the passing of the Public Finance Act 1989, and the switch to the MMP electoral system), and in others being established on an ad-hoc basis to consider reforms (such as in 1985). It was not until 2003 that the Standing Orders Committee was itself referred to in the Standing Orders, as one of the select committees established automatically in each term of Parliament.[32]

An important step towards "modernising" Parliament, then, is to recognise that it cannot be done all at once. A regular cycle of review is essential if Parliament is to keep up to date.

ACHIEVING REFORM BY GIVE AND TAKE

Having said this, the Standing Orders Committee's self-imposed regimen for seeking cross-party support has not necessarily prevented significant change from occurring in

31 The inquiry into the Standing Orders in 1962 was the first to take place since 1951, though no significant revision had taken place since 1929 (Standing Orders Committee report [1962] AJHR 1.17 at 5). The Standing Orders Committee was not active during the years of the Reform Government from 1912 to 1928 (John E Martin "From legislative machine to representative forum? Procedural change in the New Zealand parliament in the twentieth century" (2011) 26(2) *APR* 35–52 at 37).

32 SOs 7 and 184(1)(b); Standing Orders Committee *Review of Standing Orders* (11 December 2003) [2002–2005] AJHR I.18B at 29–30.

a single move. Rather than seeking consensus on everything, the committee sees the review as a process of arriving at an overall package. This involves "give and take" by members on all sides to find a balanced set of proposals.[33]

One of the key reforms in recent decades took place in 1985, most importantly to reorganise the select committee system, but also with a number of other notable changes.[34] The normal days of sitting found their current Tuesday, Wednesday, Thursday pattern, with regular Friday sittings being abolished to allow members to attend to constituents—this compensated for the expectation that the House would now meet throughout the year (instead of intense blocks of sittings clustered around the winter and spring months). Extraordinary urgency was introduced as a mechanism for the Government to pass legislation very quickly when required; while on the face of it this would seem to have been a backward step, it was in fact a move to prevent sittings from extending after midnight unless absolutely necessary.[35] The Regulations Review Committee was established to keep an eye on the Government's use of delegated powers to legislate.

This initiative to modernise Parliament took place in the midst of a wider context of major constitutional reform that resulted in such landmark statutes as the Constitution Act 1986, State Sector Act 1988, Reserve Bank of New Zealand Act 1989, Public Finance Act 1989 and New Zealand Bill of Rights Act 1990. Executive control over the institution of Parliament was reduced through the establishment of the Parliamentary Service and the Office of the Clerk as non-Government agencies. A Royal Commission was set up to look at overhauling the electoral system, laying the groundwork for the eventual shift to MMP.

This reform programme patently sought to rectify systemic and constitutional shortcomings that had permitted the dominant style of Government led by Rt Hon Sir Robert Muldoon until 1984. However, the work of the Standing Orders Committee was bipartisan and pragmatic, and focused on a balanced set of proposals. Hon Geoffrey Palmer, Leader of the House, paid special tribute to "the only member of the Opposition who was present at every meeting", and whose "contribution was outstanding".[36] Surprisingly, he was referring to none other than Mr Muldoon himself, who in turn spoke positively about the process:

> The work of the committee has been done in a thoroughly co-operative manner. There was no degree of dissent. When the various proposals were referred back to the party caucuses it was found that a spirit of compromise prevailed. We came together to reach agreement, rather than sticking to the original point on every side. As a result, we have something that I hope the House will accept in due time. Let us try it. Let us try to make it work.[37]

33 Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 4.

34 Standing Orders Committee *First Report* (16 July 1985) [1984–1985] AJHR I.14.

35 This change was successful: extraordinary urgency has been accorded only 10 times in the 30 years since its inception, in each case for the passage of taxation or excise bills.

36 (16 July 1985) 464 NZPD 5600.

37 (16 July 1985) 464 NZPD 5602.

Another fundamental reform of parliamentary procedure was carried out—by consensus—when the Standing Orders were almost completely rewritten in 1995 in anticipation of the first MMP elected Parliament.[38] As always, this included some give-and-take. The omnibus bill rule was introduced to curb the Government's ability to combine disparate legislative proposals in a single bill. This move had been prompted by abuses to the legislative process in previous terms of Parliament.[39] The change effectively shifted the decision-making about the acceptable bounds of legislative proposals from the Executive to the legislature. While this change was, on the face of it, a limitation on the Government's capacity to initiate broad legislative reforms, it was balanced by a rule change to allow divided bills to be taken together for debate at the third reading, a considerable time saving.[40] The Government also benefited from the introduction of party voting,[41] which cumulatively over the thousands of votes during each term of Parliament has amounted to a massive streamlining of House procedure.

In another balancing act, sitting hours were reduced in 1986 following complaints that 11 pm was too late to conclude each day, with the proviso that Members' business be given preference each second Wednesday that the House sat, rather than on every Wednesday sitting, as was previously the case.[42]

More recently, in 2011 the Standing Orders Committee instituted procedures for extended sittings, and for the grouping and selection of amendments. These changes palpably improved the legislative process,[43] but also were to the advantage of the Government. In return, the Standing Orders Committee recommended that instructions to select committees be made debatable, as a deterrent to the Government moving motions to truncate committee consideration of bills.[44]

ENTRENCHMENT AND STRUGGLE

The current balanced approach to reviewing the Standing Orders was not always present. It has evolved as part of New Zealand's constitutional development from a raw colony to a modern democracy. For many years following the establishment of the General Assembly (as the Parliament was then known), the Standing Orders were indeed effectively entrenched. A provision adopted in 1856 prevented any proposal for

38 Standing Orders Committee *Review of Standing Orders* (13 December 1995) [1993–1996] AJHR I.18A at 11.

39 Ibid at 49–51.

40 Standing Orders Committee *Review of Standing Orders* (December 2003) [2002–2005] AJHR I.18B at 52.

41 Party votes are conducted by the Clerk at the Table calling the name of each party in order of the size of their parliamentary membership, with the whip or another member of the party casting its votes en bloc. This procedure takes about 40 seconds per vote, considerably less than the time taken for personal votes (divisions), which involve ringing the bells for 7 minutes in the first instance, followed by the time taken for the counting, checking and reporting of votes. For a second or subsequent personal vote, the bell is rung for only 1 minute.

42 Standing Orders Committee *Second Report* (November 1986) [1986–1987] 11 AJHR I.18A at [2].

43 Mary Harris, Clerk of the House, submission to Standing Orders Committee (November 2013) at 9–11.

44 Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 41.

"altering or annulling" a Standing Order from being dealt with unless at least two-thirds of all members were present and four days' notice had been given.[45] The development of procedures relied heavily on received practice from the House of Commons in London.[46] The rights of individual members to speak were uppermost, against a backdrop of shifting factions and parochialism. There was frequent obstruction through filibustering speeches and other procedural tactics, and constant angst about the procedures for private bills and the influence of the Legislative Council.[47]

Unsurprisingly, the legislative output of the General Assembly was not high. Attempts to adjust the rules came unstuck on several occasions, with the threshold for a successful amendment to the Standing Orders being too high for the most part. With attendance at the House by its far-flung members poor anyhow, it was easy to prevent change simply by walking out.[48]

With the abolition of the provinces in 1876 and, especially, the establishment of parties and the ascendancy of the Liberals from 1891, the Government became more determined and organised in its efforts to reform the House. Richard Seddon, who to this day remains New Zealand's longest serving Prime Minister,[49] took a bullish approach, obtaining a resolution for the Standing Orders to expire in the following year, 1894. Seddon justified his actions on the grounds that the "license of prolix speech" enabled a minority to enslave the majority and interfere with House business.[50]

Seddon tabled a replacement set of Standing Orders that reduced the ability for members to filibuster, including provision for speech time-limits. The quorum requirement for amending the Standing Orders was reduced from two-thirds of the membership to a simple majority.[51] Seddon later also strong-armed the adoption of a procedure for urgency in 1903.[52] It is somewhat ironic that the larger-than-life statue on the plinth in front of Parliament House commemorates the politician who—despite being an accomplished stonewaller in his own right earlier in his career—was arguably the leader most responsible for the truncation of parliamentary debate in this country. On the other hand, given the extreme lengths (literally) that members could go to in obstructing proceedings, perhaps this was just as well. Following Seddon and the

45 SO [1856] 148.

46 The development of procedure in New Zealand's House of Representatives has been detailed by Dr John Martin, former Parliamentary Historian, in a series of articles published in *Australasian Parliamentary Review*. See John E Martin "A shifting balance: Parliament, the executive and the evolution of politics in New Zealand" (2006) 21(2) *APR* 113–131; "From talking shop to party government: procedural change in the New Zealand Parliament, 1854–1894" (2011) 26(1) *APR* 64–81; and "From legislative machine to representative forum? Procedural change in the New Zealand parliament in the twentieth century" (2011) 26(2) *APR* 35–52. These articles are available online at https://www.parliament.nz/en/visit-and-learn/how-parliament-works/fact-sheets/

47 The upper house, which eventually was abolished in 1950.

48 Martin (2011) 26(1) *APR* 64–81 at 66–67.

49 From 1893 (when the office was known as Premier) to his death in 1906.

50 (1894) 83 NZPD 9 (Speech from the Throne), quoted by Martin (2011) 26(1) *APR* 64–81 at 76.

51 Martin (2011) 26(1) *APR* 64–81 at 76–77.

52 (1901) 119 NZPD 602; John E Martin "A shifting balance: Parliament, the executive and the evolution of politics in New Zealand" (2006) 21(2) *APR* 113–131 at 125.

consolidation of party government in the early twentieth century, the success rate for the passage of Government bills increased hugely. During his time in charge of the country, Seddon took full control over legislative expenditure and established a period of Executive dominance of the House.[53] This dominance continued, largely without interruption, for the next century.

Over time, the rule requiring an extended, four-day period of notice for motions to alter the Standing Orders was also "thrown to the winds", as the House customarily suspended it whenever amendments were mooted.[54] The provision was finally revoked in 1929,[55] when the current method of amending the Standing Orders by notice of motion was instigated.

WHEN CONSENSUS WENT AWOL—THE ARRIVAL OF CLOSURE MOTIONS

Seddon had managed to shorten speeches and introduce urgency, but he failed in his attempts to bring in closure motions, which is a procedure to move summarily for the termination of a debate. Even members of his own party recoiled at the idea.[56] It was not until the early 1930s that a Government finally forced the procedure into the Standing Orders. This unusual exercise of a majority to change the House's rules was an exception to prove the rule: it was resorted to after an accord reached at the Standing Orders Committee was deemed to have fallen over.

In 1929 the Standing Orders Committee had taken a bipartisan approach to the revision of the Standing Orders, the first major review in many years. It was led by the tireless drive and learned diligence of Speaker Statham, with an overall spirit of improving the way the House conducted its business, particularly by sitting more reasonable hours.[57] The most contentious part of the Committee's consideration appears to have been a proposal to curtail the circulation of newspapers by messengers in the House, and even this proposal was eventually struck out in the committee of the whole House to ensure unanimity.[58] Most notably, the 1929 revision included new limits on speeches and sitting hours for the House.

In making these recommendations, the committee noted that it was hoping to avoid a provision for closure as had been installed in other Parliaments.[59] The committee had considered a closure procedure but in the end had "almost unanimously" agreed that its adoption would not be advisable.[60] The decision to start sittings in the middle

53 Martin (2006) 21(2) *APR* 113–131 at 124–129.

54 (28 March 1931) 227 NZPD 544 (Speaker Statham).

55 Prior to its revocation in 1929, this was numbered as Standing Order 448.

56 Martin (2011) 26(2) *APR* 35–52 at 36–37.

57 (2 August 1929) 221 NZPD 881882.

58 (2 August 1929) 221 NZPD 893.

59 Standing Orders Committee, report on revision of Standing Orders (11 July 1929) [1929] 3 AJHR I.18 at [4].

60 (2 August 1929) 221 NZPD 878.

of the afternoon (then 2.30 pm) was unanimous, after a compromise by members who preferred "daylight sittings" to reduce the prospect of sittings proceeding into the "unthinkable hours" of previous years.[61]

Speaker Statham acknowledged that views on some matters were not unanimous, "but the Committee had worked well together, and, although there had been individual differences of opinion, there had never been an actual division. If one or two members did not agree with a proposal, they were willing that the general wish of the Committee should be submitted to the House".[62] The new approach to the House's sitting hours was regarded as "honourable" and "experimental", and members hoped it would stand the test of time.[63]

Within two years the House had changed its mind.

George Forbes was a United Party member on the Standing Orders Committee in 1929, when the committee had worked earnestly to avoid the introduction of the closure procedure. However, by 1931, Forbes, who by now had become Prime Minister, considered that the spirit of the committee's agreed package of amendments had not been observed by the Labour Opposition. He was angered by the stalling of legislation, particularly a bill to cut wages and salaries, which was introduced in response to the growing Depression.[64]

Forbes argued that the Opposition's attitude, combined with the shortening of sitting hours under the 1929 revision, made it impossible to transact the House's business. On this basis, he made good his threat by moving new "Standing Order 205A" to implement the closure procedure.[65] Statham, who to this day is well regarded as an independent-minded and scholarly Speaker, was inclined towards Forbes' view.[66] The ensuing fierce struggle dragged on for several days, ending at 2.22 am on a Tuesday morning.[67] While the closure rule was initially included in the Standing Orders on a temporary basis, it was soon made permanent and was used—with enthusiasm—by Labour when in Government from 1935.[68]

DISSENT AND "LEAST-BAD" SOLUTIONS

Fortunately, there have been no recent instances when the Standing Orders have been amended by exercise of a majority. However, while a unanimous voice is sought in Standing Orders Committee reports, this does not prevent disagreement being aired.

61 Ibid.

62 (2 August 1929) 221 NZPD 886.

63 (2 August 1929) 221 NZPD 885.

64 Martin (2011) 26(2) *APR* 35–52 at 38.

65 (28 March 1931) 227 NZPD 546—547.

66 (28 March 1931) 227 NZPD 543.

67 Ibid at 668.

68 Martin (2011) 26(2) *APR* 35–52 at 38.

Declarations of members' pecuniary interests have been an area where members have voiced strong concerns but then, ultimately, avoided voting in dissent. The creation of a register of members' financial interests for public inspection was made as long ago as 1986, when a detailed proposal was put forward by the then Leader of the House, Hon Geoffrey Palmer. However, he opted not to proceed with the proposal "in light of the fact that there was not unanimity among committee members".[69]

An initiative to create a register surfaced again in 2005. The Government first approached the Standing Orders Committee but, when agreement could not be reached, resorted to introducing a Government bill for a statutory regime. At this point, members opposed to the concept accepted that providing for the register in the House's rules was, at least, preferable to a law being passed. The Standing Orders Committee recommended that the bill not proceed but that the provisions for a Register of Pecuniary Interests of Members of Parliament be incorporated in the Standing Orders.[70] The committee recounted these ruminations in its commentary on the bill and observed that:

> There is no presumption that every party in the House will agree with every recommendation made by the committee. For example, in 1995 there was considerable disagreement with the Standing Orders Committee's decision to include the position of Leader of the Opposition in the Standing Orders. Consequently, agreement to Standing Orders Committee reports means that particular parties must sometimes accept what they perceive to be the least-bad solution.[71]

In 2011, Government members found themselves in the minority when the committee discussed the swearing-in of members. The committee had unanimously agreed to bring in explicit requirements for members to observe the words of the oath or affirmation as required by law or risk being required to withdraw from the House. A majority of members thought the wording of the oath and affirmation should itself be reviewed, though a change would require an amendment to the law and so could not be effected through the Standing Orders.[72] Members from the National Party and ACT New Zealand disagreed with this idea and, while those members were in the minority, the committee refrained from expressing this suggestion as a formal recommendation to the Government.

At points in the 2011 report, the Green Party expressed concerns about the position reached by the committee.[73] However, the Green Party did not enter a separate minority report on the basis that its views were reflected in the report's main text. This accords with the Standing Orders Committee's preferred way of operating.

69 Standing Orders Committee *Second Report* (November 1986) [1986–1987] 11 AJHR I.18A at [5.1].

70 As Appendix B to the Standing Orders.

71 Members of Parliament (Pecuniary Interests) Bill (81–2) (commentary, 23 June 2005) at 4.

72 Standing Orders Committee *Review of Standing Orders* (27 September 2011) [2008–2011] AJHR I.18B at 11.

73 Ibid at 16 and 38. Green Party proposals were noted in several other places without an expression of divergence from the committee's position.

TRIALS OF NEW PROCEDURES

It is not unusual for significant new procedures to undergo a trial period before being made permanent in the Standing Orders. The two most significant reviews in recent times were implemented on the understanding that they would be followed up by further reviews after a year or so. The major reforms of 1985 were under probation until largely confirmed through a second report in 1986. Don McKinnon, the National Party's Senior Whip was, unlike Muldoon, relatively circumspect about the 1985 changes, and stated that his agreement was contingent on there being an opportunity to revisit them after a year.[74]

The rewritten Standing Orders adopted in anticipation of MMP actually came into force at the beginning of 1996, thus permitting several months of experimentation with the MMP-based procedures while the House was still populated with the members elected under the First-Past-the-Post system. A further review was conducted just before the election, with the amended Standing Orders coming into operation in September 1996 when the Parliament opened in the new era of proportionality. Another health-check of the operation of the new Standing Orders was carried out in 1999.

A new procedure can also be trialled through the passing of a sessional order, which is a resolution of the House about its procedures that has lasting effect but lapses at the end of the term of Parliament (or sooner if the House decides this). This mechanism is useful when members are uncertain about how particular new procedures might work in practice, and wish to give them a go without making a permanent commitment. Major new initiatives tested in this way included the 1991 sessional order setting out the financial procedures following their revamp to implement the Public Finance Act 1989 and to introduce financial reviews; the introduction of international treaty examinations in 1998; and the re-establishment of a record of the attendance and absence of members in 2014 in association with a statutory provision for docking the pay of members who persistently are absent without permission.

FACTORS DRIVING CHANGE

Different factors can drive changes to Parliament's rules: changes in law, shifting social expectations, new technology, evolving practice, or political adjustments. The Clerk's submission will usually draw the Standing Orders Committee's attention to legislative changes that require incorporation. Aside from the implementation of proportionality and other changes associated with MMP, the 1995 review took a close look at the implementation of natural justice procedures in the House and select committees in light of early experiences under the New Zealand Bill of Rights Act 1990.[75] The 2005 review largely focused on changes to financial procedures consequent to the passage of the Crown Entities Act 2004 and Public Finance Amendment Act 2004.[76] The Clerk also will

74 (16 July 1985) 464 NZPD 5598–5599.

75 Standing Orders Committee *Review of Standing Orders* (13 December 1995) [1993–1996] AJHR I.18A. See in particular the report by Philip Joseph on natural justice (Appendix F, 204–246).

76 Standing Orders Committee *Review of Standing Orders* (23 June 2005) [2002–2005] AJHR I.18C.

counsel the committee about practices that have evolved so they are no longer suitably reflected in the Standing Orders, or that no longer seem to offer much value to the House.

Members themselves have a high awareness about social attitudes and expectations for Parliament, and about the opportunities that new technologies provide, and fresh ideas and perspectives are supplied through public submissions. Not all members are early adopters of technology, nor is the House. A number of ideas were floated during the 2014 review; the committee did not reach agreement on progressing particular new technology-based engagement initiatives, but made cogent observations about some of the possibilities on offer:

> Public engagement is crucial to keeping Parliament relevant. We acknowledge that tensions between representative democracy and direct democracy have emerged, particularly regarding the considerable potential offered by technology and social media to harness direct popular engagement in public policy. …
>
> We envisage that in the future the public could be able to engage with their representatives via electronic channels, with controls in place to ensure systems were not open to manipulation. An online petition process might support the introduction of a bill, or the holding of a debate on a particular matter sponsored by a member.[77]

Members also have a sense of procedures that are not working well, and will feed these thoughts into the committee's consideration. Sometimes these observations are not tendered formally through submissions but arise during the hearing of evidence or other conversations and seem to strike a chord. Changes are occasionally proposed to deal with concerns that members have about procedural tactics in the House, if they consider that those tactics have crossed a line into new territory. One significant development was the provision of authority for the Chairperson to group or select amendments in a committee of the whole House,[78] which followed determined filibustering of controversial bills in the 49th Parliament through the lodging of amendments by the hundred.

In any select committee, the making of submissions can have a considerable impact on members and can influence their findings and recommendations. This is also the case for the Standing Orders Committee. In its 2011 report, which made a suite of recommendations to improve the arrangement of the House's time, the committee made special mention of a submission by the Urgency Project, which provided an abundance of detailed research and in-principle discussion about the use of urgency in the House. It is fair to say that, while a number of proposals were already on the committee table, including the establishment of extended sittings, the Urgency Project submission helped to propel the overall package of proposals over the line.[79]

77 Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 30–31.

78 Standing Orders Committee *Review of Standing Orders* (27 September 2011) [2008–2011] AJHR I.18B at 45–46;

79 Ibid at 14–15. The Urgency Project was a research project under the auspices of the New Zealand Centre for Public Law and the New Zealand Law Society. The research team, Claudia Geiringer, Polly Higbee and Elizabeth McLeay, later published the work as *What's the Hurry: Urgency in the New Zealand Legislative Process 1987–2010* (2011, Victoria University Press, Wellington).

ENGAGEMENT OF MEMBERS

Like many aspects of parliamentary procedure, the success of the process hinges on the engagement of the participants. This applies especially in relation to members, who as well as developing their own views about proposals are then required to inform their caucus colleagues and articulate the caucus position. In the Standing Orders Committee, where cross-party support is needed for procedural innovations, the buyin of all committee members is crucial. Prospects of success are not assisted when members are placed under pressure to get caucus agreement quickly—the most likely answer in these circumstances will be "no".

The ideal is for members to be able to gauge the responses of their caucus colleagues, obtain an understanding of any concerns underlying them, and bring those concerns back to the committee room with time to problem-solve. The Speaker, as Chairperson, has a leading role in facilitating the discussion so that members can find a good compromise in the interests of Parliament.

Through interactions like these a balanced package of proposals, with overwhelming support, can emerge.

PARLIAMENTARY EFFECTIVENESS

A necessary part of any review is scrutiny of how well procedures are working. But this is more than a textual revision—for the process to be meaningful, it involves asking the question: "How can Parliament be more effective?". Effectiveness is a highly subjective concept. There has been an attempt to express generic parliamentary benchmarks[80] but, while these provide a useful baseline for democratic legislatures, they do not provide a high level of aspiration in the New Zealand context.

Parliamentary effectiveness can be gauged with reference to the various functions of the House. For example, in relation to the legislative function, the House is effective when it enables a Government to implement its mandated policy programme, encourages the public to have a say, and empowers members to be good legislators, considering, testing and improving proposed laws. The job of the Standing Orders Committee is to balance these needs in the best way possible. In the political environment, this means gaining cross-party support for improvements that are aimed at enhancing the institution of Parliament.

NERVE-CENTRE OF PARLIAMENTARY INNOVATION

The 2011 review of Standing Orders clearly achieved this aim, providing a coherent package of amendments with a theme of encouraging constructive negotiations about

80 Commonwealth Parliamentary Association and World Bank Institute *Recommended Benchmarks for Democratic Legislatures* (December 2006, CPA Secretariat, London).

the arrangement of House business. These amendments centred around the powers of the Business Committee to determine how business is to be dealt with. The Business Committee is a group of senior members representing parties across the House, which is chaired by the Speaker and discusses pending business with a view to arranging it through decisions that are unanimous or nearly unanimous.

With the additional powers conferred on it in 2011, the Business Committee was cemented as the true nerve-centre of parliamentary innovation in New Zealand. The Business Committee meets every sitting week. It arranges debates, allocates speaking times to parties, extends sittings, and finds ways to facilitate business in the public interest. In particular, the committee has arranged extended sittings to enable several Treaty of Waitangi claims settlement bills to be passed, providing redress to Mâori iwi for Crown breaches of the Treaty.[81] Some of these bills would not realistically have been dealt with if they had been in direct competition with other Government bills for a place in the legislative programme.[82] The Business Committee has also arranged for debates to be held on significant select committee inquiry reports that otherwise would have disappeared without discussion in the Chamber,[83] and for a special debate on Pacific issues to be held at the same time as the hosting of a conference of Pacific members of Parliament.[84]

Notably, the Business Committee has successfully reconfigured the debates for the scrutiny of the Estimates and annual reviews of government agencies.[85] The Standing Orders Committee had considered but not reached agreement on the adoption of similar procedures.[86] The Business Committee has simply made the arrangements, with members having the comfort of knowing that the new debate formats can be trialled without necessarily committing to a permanent rule change.

There is much more that the Business Committee could do. Controversial bills could be given time-limited debates in the committee of the whole House in return for longer second reading debates (during normal hours or even during extended sittings). Committee stages of bills could be arranged (say, by the grouping of parts for debate) before they are introduced, reducing the tendency to structure bills in two parts for the purpose of minimising debate. State occasions could be arranged; while they are primarily intended to allow for speeches by foreign leaders, there are other possibilities.[87] State occasions are, as yet, a blank canvas to allow the Business

81 (9 December 2015) 710 NZPD 8717.

82 (5 June 2013) 690 NZPD 10820.

83 For example: Health Committee *Inquiry into improving child health outcomes and preventing child abuse, with a focus from preconception until three years of age* (18 November 2013) [2011–2014] AJHR I.6A; Business Committee determinations for 3 December 2013.

84 Pacific Parliamentary and Political Leaders Forum 2013; Business Committee determinations for 10 April 2013; (18 April 2013) 689 NZPD 9537, 9554–9589.

85 Business Committee determinations for 3 June 2015 and 23 September 2015.

86 Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 26.

87 SO 82; Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 6–7.

Committee to associate Parliament with events of national significance. The Standing Orders Committee has prompted the House to give these and many other powers to the Business Committee to encourage cross-party innovation in Parliament's interests.

FINDING NEW WAYS TO WORK AND ENGAGE

Opportunities for innovation don't end there. New practices are found all the time as presiding officers, members and staff look for better ways to do things. This approach is not just to be encouraged—it is essential. Recently the Local Government and Environment Committee set up its own Facebook page and has been using it actively to promote its business and engage with the interested public.[88] The experience from this trailblazing committee will inform what will surely be an ever-increasing trend for committees to interact with the public through social media. Significant improvements to the Parliament's website are expected in 2016, presenting a better interactive experience for people wanting to access parliamentary information and have their say.

Members of Parliament and parties have their own ways of connecting with the public, and many have jumped enthusiastically into diverse social media channels, while retaining more traditional ways to stay in touch with constituents. Their expectations for how Parliament should operate will develop in light of this.

CONCLUSION—PROVIDING THE IMPETUS

I began this paper by asserting that only Parliament can modernise Parliament. Technically, this is true. But Parliament does not exist in a vacuum. It can remain relevant only if it stays in touch with the public and is responsive. After all, the House is inhabited by politicians, who as a group are highly motivated towards gleaning the public mood.

Finding common ground and co-operating are like bread and butter for the Standing Orders Committee: working together to understand the issues and figuring out what is in the interests of Parliament. Sometimes proposals that members considered had merit did not get implemented because the practical details were difficult, or there was concern about unintended consequences or unforeseen interpretations of suggested new procedures. The secret of success is to give members the opportunity to engage with each other and their caucuses, and to problem-solve. It has happened before. Reform is possible.

When it establishes its next review, then, the Standing Orders Committee will need to consider how to connect the House with today's rapidly changing world. On the other hand, the challenge for all those who have ideas and dreams for Parliament is to convey them when the call goes out, to provide the impetus to modernise.

88 https://www.facebook.com/localgovtenvironment.

Guiding Principles for Modernising Parliament

Kennedy Graham[1]

Dr Kennedy Graham is a Member of the New Zealand Parliament.

INTRODUCTION

Our subject is modernising how parliament operates. My task is to find a set of guiding principles to that effect.

My observations focus on the New Zealand (NZ) Parliament. There will be a limit to their significance for the larger world of 163 parliaments. There is no immediate limit to the obverse – how much the larger world can offer insights for the NZ situation. I intend to take advantage of that fact. Recently the Inter-Parliamentary Union (IPU) issued a statement that "democracy is only as strong as the political participation of citizens".[2] This must be increased, said the IPU President, for world peace, social cohesion and development. The IPU called for a step-up in efforts to involve the public more deeply in formal political processes and institutions, including parliaments. It urged parliaments to be more open and accessible to their citizens, and more representative of society as a whole.

That, essentially, is the call to older parliaments, such as New Zealand's, to ensure that they remain relevant through a continuous process of modernisation. In this respect I see three challenges to be addressed. The first is attaining optimality between tradition and innovation within a national parliament. The second is identifying those parliamentary traditions that may thus require modernising. The third is developing principles and actions for guiding that modernisation.

1. *Optimality between tradition and innovation*

The authority of a parliament rests on the extent of its political legitimacy. Political legitimacy requires, by definition, constitutional roots. Those roots are embedded in the sub-stratum of a country's societal characteristics. If the institutional product fails to grow or, having grown and matured, weakens to the point of incompatibility with, or alienation from, those characteristics, trouble lies ahead.

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2 'Democracy only as strong as people's participation'. IPU Press Release, International Day of Democracy, Geneva, 14 Sept. 2015

If the response is revolutionary, a radical re-alignment of values and institutions occurs, justified either as a rediscovery of the 'true tradition', or the introduction of a 'new order'. In the former case, tradition guides innovation, claiming self-justification. In the latter case, innovation trumps tradition, seeking legitimacy through an untested vision.

If the response is evolutionary, it is because the society has summoned sufficient foresight and resolve, while retaining cohesion and coherence, to avoid revolution. Yet that avoidance requires genuine change, albeit incremental and measured. The art of evolutionary survival lies in finding the optimal balance.

2. *Traditions in need of modernisation*

The challenge for a parliament, then, is twofold: it must accurately identify which traditions are in need of modernisation, and it must judge the extent to which any such change is optimal.

There are, perhaps, five areas where tradition may have an undue lag effect on the modernisation of a parliament. They are demographic composition, structure and function, behaviour and conduct, international role, and constitutional status.

(a) Demographic Composition

Societies change, usually with greater rapidity and less predictability than do their representative institutions such as parliaments. They mutate with respect to ethnicity, gender, age and religion. The task for a national parliament is to check whether it remains, after a certain period, truly representative of the society for which it makes the law that binds its members. Underpinning all these is the question of political diversity.

Political diversity

With respect to representation, New Zealand has done well through its reform of the electoral system. Dissatisfaction over the results of the British 'first-past-the-post' (FFP) system, in which minority political views across society's spectrum were continuously marginalised, resulted in a royal commission of enquiry, a global review of other systems, a recommendation for change, a national referendum, and a decision to adopt the 'Mixed Member Proportional' representation system (MMP). The result, since 1996, has been a broader representation of political views in the NZ Parliament than ever before, and a more flexible style of governing. There is a tendency among the two major opposing parties to cling informally, even subliminally, to the traditional ways of a two-party system, but in general the NZ Parliament is more flexible and representative than it used to be.

Whether this translates into greater diversity in other areas (ethnicity, gender, age, religion) is a derivative of such change, dependent on the parties themselves, but greater diversity of political view is almost guaranteed. The referendum of 2011 on retaining DELETE [[the Mixed Member Proportional]] (MMP) system (58% to 42%) made it clear that New Zealanders were satisfied that the new system was appropriate to the

times, despite broad opinion in favour of marginal changes. Parliament modernised itself, or more accurately, the people modernised their parliament.

Ethnicity

Although indigenous peoples make up 5 per cent of the global population and account for one third of the one billion extremely poor rural people, an IPU survey in 2014 found that out of more than 45,000 MPs in the world, fewer than 1,000 were indigenous people.[3]

In the case of New Zealand, ethnic diversity has increased considerably. In 1900, Mâori representation in Parliament was 7%, in 1950 it was 5%, in 2000 it was 14% and in 2015 it was 21%. Pasifika representation has gone from 3% in 2000 to 7% in 2015; while Asian representation has increased from 1% in 2000 to 4% in 2015. In each case, this is, in very rough terms, proportionate to population.

Gender

Women account for just over 22% of all parliamentarians in the world and less than 18% of all government ministers. Mechanisms such as quotas or other special measures have proved effective in many countries to increase women's representation in parliament, particularly when the concept has been enshrined in national constitutions or set figures established in electoral laws.

In New Zealand, the gender balance has evolved, from 100% men in 1900, to 96% in 1950, to 69% in 2000, increasing again to 77% in 2015. There is a considerable way to go, for Parliament to be truly 'modern' in this respect. The presence of women within parliamentary caucuses in 2015 varies from 0% to 59%.

Age

It is a misconception that early parliaments were frequented by older people: in the case of New Zealand, the Parliament in 1900 had 20% of its MPs over 60 years, in 1950 this was 39%, in 2000 it was 8% and in 2015 it is 18%.[4]

The optimal spread of age for parliamentary representation is a contentious issue, reflecting divergent cultural contexts. On one hand, it is argued that life-experience is essential for sound political judgement and law-making. The counter-argument is that the interests of the younger cohort in society should be directly served by parliamentarian representation that is more accurately proportionate to the demographic spread, especially in light of the threat to inter-generational justice posed by climate change.

There may be a need for more debate on the optimal age-spread for a modern NZ Parliament.

3 'Beyond numbers: the participation of indigenous peoples in parliament'. IPU Survey Report, Sept. 2014.

4 NZ Parliament Library Research Service, Sept. 2015.

Religion

Unlike the United Kingdom (UK), New Zealand has no official religion, with no established church. There are, however, certain anomalies apparent in this country. The head of state must be, by declaration, a Protestant Christian who will uphold the Protestant succession in accordance with the Accession Declaration Act 1910. The Act of Settlement 1700 (Section 3), applicable in NZ law, requires that the King or Queen of New Zealand must be an Anglican. The Title of the Queen of New Zealand includes the statement 'by the grace of God' and the title 'Defender of the Faith'. It is not made clear in NZ law, however, which faith it is.

This is essentially high theory derived through British, more accurately English, heritage. It contrasts with the more ecumenical common sense observed in the colony in its earliest days. At the signing of the Treaty of Waitangi in 1840, Governor Hobson affirmed, in response to a question from Catholic Bishop Pompallier, that "the several faiths (beliefs) of England, of the Wesleyans, of Rome, and also Maori custom shall alike be protected". The statement has no constitutional effect, but is taken to have considerable political significance.

In 2007, the government issued a National Statement on Religious Diversity containing, in its first clause, the observation that 'New Zealand has no official or established religion.'[5] The Prime Minister delivered the Statement to the Asia-Pacific Dialogue on Inter-Faith Cooperation in May of that year. The Statement caused some controversy at the time, opponents arguing that New Zealand's head of state, Queen Elizabeth II, was the 'Supreme Governor of the Church of England'. In fact Elizabeth does not perform that role in her capacity as Queen of New Zealand. Yet she does retain the title 'Defender of the Faith' within her official role. And yet, in turn, the last Governor-General was a Roman Catholic; and the Press Release from Buckingham Palace announcing his appointment in 2006 omitted to mention this fact.[6]

In the NZ Parliament, the day's activities commence with a Christian prayer whose current version somewhat puzzlingly refers to the 'true religion' of New Zealand. The idea of rewriting the Prayer was raised by the Prime Minister and the Speaker in 1961, but was abandoned because of insufficient cross-party support. In 2015 the Speaker re-visited the idea of a change to the Prayer, but dropped it when a majority of MPs, at least within the governing party, opposed the initiative.

5 http://www.teara.govt.nz/en/document/28196/statement-on-religious-diversity

6 https://gg.govt.nz/node/264, 3 April 2006

It has to be asked, nonetheless, how the current Prayer uttered by Parliament, the sovereign law-making body of the Realm, can be reconciled with the Statement of Religious Diversity whose first principle among eight asserts that "the State treats all faith communities, and those who profess no religion, equally before the law".[7]

(b) Structure and Function

There still exists, to this day, uncertainty over what the full range of functions a national parliament should fulfil. To what extent is it a legislative machine, designed to construct the settings for governance; an instrument designed to hold government to account; or a debating chamber designed to reflect the mood of society?

To some extent it is all three, but there is no calibrated balance amongst them. The passage of legislation in the form of bills is characterised by 'debates' over three readings. These are, however, essentially expressions of party views on a single piece of legislation; with 12 speakers in each of the three readings totalling 24 speeches of 10 minutes each, plus an average of two hours in committee of the whole, means 6 hours for each bill.

This contrasts with Question Time (government accountability) and General Debate (reflecting public mood) for which considerably less time is allocated. In fact, the average weekly schedule for the House, apart from committee work, is roughly as follows:[8]

Function	Hours	% Time
Legislation	11	73% (80% Government.; 20% Private/Members)
Question Time	3	20%
General Debate	1	7%

7 "New Zealand is a country of many faiths with a significant minority who profess no religion. Increasing religious diversity is a significant feature of public life. … The following statement provides a framework for the recognition of New Zealand's diverse faith communities and their harmonious interaction with each other, with government and with other groups in society:

1. The State and Religion: The State seeks to treat all faith communities and those who profess no religion equally before the law. New Zealand has no official or established religion.
2. The Right to Religion: New Zealand upholds the right to freedom of religion and belief and the right to freedom from discrimination on the grounds of religious or other belief.
3. The Right to Safety: Faith communities and their members have a right to safety and security.
4. The Right of Freedom of Expression: The right to freedom of expression and freedom of the media are vital for democracy but should be exercised with responsibility.
5. Recognition and Accommodation: Reasonable steps should be taken in educational and work environments and in the delivery of public services to recognise and accommodate diverse religious beliefs and practices.
6. Education: Schools should teach an understanding of different religious and spiritual traditions in a manner that reflects the diversity of their national and local community.
7. Religious Differences: Debate and disagreement about religious beliefs will occur but must be exercised within the rule of law and without resort to violence.
8. Cooperation and Understanding: Government and faith communities have a responsibility to build and maintain positive relationships with each other, and to promote mutual respect and understanding

8 Parliamentary Library Research Service

Finally, there is the question of parliamentary style. An adversarial system prevails in the NZ Parliament, heightening the adversarial nature of debate to the detriment of reason and, on occasion, sanity. There are two underlying reasons:

- The physical lay-out of the Chamber. The NZ lay-out derives from the British Westminster system of opposing benches, two sword-lengths apart. It compares, unfavourably, with the hemispherical lay-out of the European, American parliaments, and indeed today, most places.
- The Standing Orders allow loud, frequent, and boorish behaviour from MPs during speeches. This includes sports-style clapping in support. It is unedifying, and astonishing to visiting school-children who are taught to behave otherwise so that they may be worthy one day of political leadership. It is incorrect to justify the antics that are perpetrated in the name of 'robust debate'. Most debates elsewhere prohibit such behaviour and are superior in quality as a result. The Standing Orders need to be stricter, and more strictly applied, for Parliament to become 'modern' in the sense of attaining a higher level of dignity and respect that retains public confidence.

(c) Behaviour and Conduct

This raises the more general question of the behaviour and conduct of members of parliament outside the precincts, where they are left unprotected by parliamentary privilege. As evidenced through repeated opinion polls, public regard for parliamentarians is very low.[9]

How much of this is due to behaviour in the House and how much to conduct outside is difficult to gauge, but probably it is both. It does nothing to assist when members engage in errant behaviour – whether it is misleading the public over campaign financing, sending salacious texts, using executive office for family gain, pulling the hair of waitresses, abusing bartenders, tweeting accusations of Speaker's bias, or drunkenly posting degrading selfies. Parliamentarians cannot expect to be held in high esteem if they acquiesce in a system that tolerates such actions. Personal freedom in society does not, by extension, give cover to public indignity in office.

New Zealand seems reluctant to take any prescriptive action in remediation. The Privileges Committee is, for good reason, slow to recommend that individual members be cited, but it often fails, for no good reason, to use cases of specific referrals to improve upon the parliamentary system.

Individual members have drafted codes of conduct, but they have elicited a general indifference and perhaps suffered from inter-party animosity. It is a strange irony that parliamentarians evince no discernible interest in making the modest effort required to lift their collective reputation.

9 See two recent Research NZ surveys of public trust in ten professions (2013 and 4 June '15) in which parliamentarians came 10th (2013) and 9th (4 June '15). See also Victoria University's IGPS survey, conducted by Colmar Brunton (March 2016), in which parliamentarians came 13th out of 14 professions.

There is a need for an open and candid debate on this issue. It is possible that the initiative may need to come from outside the Parliament. There is always a tendency to adjust the mirror to self-reassuring effect. Institutional self-regulation carries its own societal dangers, whether this is in professional bodies such as medicine and the law, or in the body of parliament.

(d) International Role

What proportion of time should the NZ Parliament devote to domestic issues and how much to foreign issues?

Although there is a 'foreign affairs, defence and trade' committee, these issues are rarely debated in the House. It is only when such issues take legislative form, usually through free trade agreements, that they become part of the legislative machine, absorbing the time of the House.

But as the 21st-century world becomes globalised, the membrane separating domestic and international affairs is becoming permeable. The best example is climate change, which is orphaned in terms of parliamentary focus, being tucked awkwardly into LGE (Local Government & Environment). There is a strong case for establishing a Standing Committee on Climate Change, in order for the House to develop a sustained focus on this issue. The global ecological crisis is not simply a matter for local government or for national environmental standards; it is about the global economy and New Zealand's role in it.

Much of the reason the NZ Parliament plays such a stunted role in international affairs has to do with its stunted constitutional development. The relationship between international law and national law is complex, and somewhat obscure as to the precise convention that applies to each country. Of the two main approaches, monism and dualism, the British-based, common law systems tend generally to respect the dualist system. Although there is no precise correlation, most continental countries with civil law traditions observe the monist system.

There is a major procedural difference between these two approaches to implementation of international law, and opinion differs on the extent to which these differences impact on the disposition of countries to respect the international obligations they assume.

Monists assume that their national legal system and international law together constitute a unified body of law. International law thus does not need to be translated into national law. The act of ratifying an international treaty immediately and automatically translates those provisions into national law – it 'becomes' national law. International law can be directly applied by a national judge as if it were national law, and it can be directly invoked by citizens.

Such international law, moreover, may in some cases take precedence. In some countries, a judge can declare a national law invalid if it contravenes international law that a country has accepted on the grounds that the international provisions have

priority. In its pure application, monism holds that a national law (even a constitutional provision) is null and void if it contradicts international law. In other countries (such as Germany), treaties have the same status as national legislation, and take precedence only over those laws enacted prior to ratification.

This applies especially to the timing of legislation. In a monist tradition, international law will take precedence over national law, whether or not the latter was adopted prior to or after the treaty was ratified. In the dualist tradition, however, incorporated international law will take precedence only over laws enacted prior to ratification.[10]

In contrast, dualism recognises a 'firewall' between national and international law. It requires the conscious and explicit translation of international law into national law for the former to have any effect within a state. If international law is not so translated into national legislation, it is no law at all – effectively the obverse of monism. If a state, which accepts a treaty but does not adapt its national laws to ensure conformity or explicitly incorporate the treaty into domestic law, commits an action in violation of the treaty's provisions, then it has contravened international law but not its domestic law. Given that international law carries few sanctions, a dualist state carries a less weighty feeling of obligation under international law. Citizens cannot rely on international law for redress. Judges can apply only international law that has been translated into national law.

In the UK and New Zealand, the dualist approach is dominant, and a treaty has no effect in domestic law until an Act of Parliament is passed to give effect to it.[11] That 'act of implementation' by the legislature is separate and distinct from the act of ratification which is done by the executive. In the majority of states, however, the legislature participates in the process of ratification, so that ratification becomes a legislative action and the treaty becomes effective in international law and national law simultaneously.

New Zealand takes dualism at least as far as does the UK.[12] Five approaches to the use of legislation for the implementation of treaties in NZ law have been identified:[13]

- no legislation is required;
- the Act gives direct effect to the treaty text, by using a formula to the effect that the treaty provisions 'have the force of law' in New Zealand;

10 "Lex posterior derogat legi priori". The later law replaces the earlier law. See Vienna Convention on the Law of Treaties, Art. 30, para. 3.

11 In UK, the celebrated case of Rex v. Jones testifies to the strength of the dualist tradition, and the 'firewall' which British domestic courts retain, even to this day, between the national and the international legal systems.

12 "There is a basic constitutional principle … that the executive cannot, by entering into a treaty, change the law. In addition to the prerogative steps taken by the executive to become party to the treaty, legislation is in general needed if the treaty is to change the rights and obligations of individuals or to enhance the powers of the state." A NZ Guide to International Law and its Sources Report 34, NZ Law Commission (May 1998, Wellington), Ch. 2. "The Implementation of Treaties through National Legislation", p. 14.

13 Ibid.

- the Act uses some of the wording of the treaty, incorporated into the body of the relevant area of law, or indicates in some other way its treaty obligations;
- the substance of the treaty is incorporated into the body of the law, without any obvious indication of the fact;
- the Act authorises subordinate legislation that gives effect to identified treaties or otherwise takes cognisance of them.

A monist state is less at risk of violating international law because its judiciary apply it directly. It is only in a dualist state that governmental negligence or unwillingness to translate international law may arise. A dualist state may delay or choose a particular interpretation of international law, and face no liability. As is shown above, New Zealand has taken lengthy periods of time to implement international law, based on a strict dualist tradition. We have meandered at our leisure on matters of global import. Theoretically, states are equally accountable for international treaty obligations, but there is no question that the monist tradition reflects a more purist respect for international law.

A monist state also has no problems of direct transformation – the international law simply becomes national law. In contrast, a dualist system undertakes a conscious act to ensure consistency of current national law, and to transform international law consistent with the intent of the negotiators. Human machination and fallibility can, and does, get in the way.

Against these considerations, monist states run the risk of fallible judicial decisions through a limited understanding of international law. Yet dualist states face the challenge of both the legislature and the judiciary, both of modest experience and insight in international law, getting it right.

Under current Standing Orders the Legislature, as opposed to the Executive, has no significant role in the handling of international treaties. It is only relatively recently that international treaties were required to be submitted to Parliament for examination. Yet even today, the Parliament performs a perfunctory and insubstantial function. Two recent cases offer egregious example.

- Lack of mandatory time-period: With no mandatory time-period, the Government may defer, for a considerable time, the submission of a treaty to Parliament. This can be grossly abused, as in the case of the Doha Amendment to the Kyoto Protocol. The Amendment was signed in December 2012. After wallowing in the bowels of the Foreign Ministry for nearly three years, the amended treaty was submitted to Parliament in September ‘15, giving the committee 15 days to ensure the democratic input through public submissions on a major piece of international climate legislation. Foreign ministry officials appeared surprised, and unmoved, at the Committee’s expression of concern.
- Lack of sovereign decision-making capacity: Once the treaty text is submitted to the House, it is referred to the relevant select committee, usually Foreign Affairs, Defence and Trade. Under current Standing Orders, the Committee is given just

15 sitting days in which to invite and receive public submissions, and to take oral hearings. The Committee may determine that it needs longer time, in which case the Government may consider that. But the Government, notwithstanding, is not obliged to wait beyond the 15-day period before proceeding to ratification if it believes this to be necessary.[14] In other words, the Government is in no way encumbered by the Legislature from proceeding from signature to ratification. The Committee's report back to the full House, moreover, does not require a debate, and usually no debate is held, by majority decision. During the recent Trans-Pacific Partnership Agreement hearings, the Committee chairman individually determined when to proceed to deliberation on a report.[15] Committee officials were instructed to draft the report, reflecting majority view, before the public hearings concluded. And, in a bizarre move, the report was sent by the Committee to the Executive (Ministry of Foreign Affairs and Trade) for checking of the factual and legal accuracy, thereby making a mockery of the Diceyan theory of parliamentary sovereignty in New Zealand.

(e) Constitutional Status

Perhaps more than any other aspect of political life in New Zealand, the constitutional status of the Parliament is the least developed. The presidential system in the US with its strict separation of powers, and the presidential-prime ministerial system in France, contrasts with the constitutional monarchy of the UK and New Zealand, with the Executive drawn from and remaining part of, the Legislature. The result makes for constitutional complexity, if not some passing confusion.

Head of State:

- The NZ Parliament consists of the Queen of New Zealand and the NZ House of Representatives. The head of state is thus part of the legislature.
- Our head of state is shared with 16 other sovereign jurisdictions, thereby constraining our capacity to determine the nature and role of our own.
- The head of state resides on the other side of the world.
- The delegation of daily head-of-state function to a resident individual in New Zealand raises complexities as to division of responsibility, engendering a certain lack of clarity.

Merger of Executive and Legislature:

- The Executive and Legislature is merged, through the Westminster system, according overlapping of function and lack of clarity, as evidenced with the sharing of information platforms (for 'practical' reasons) which raised a matter of privilege in 2013.
- The Executive maintains excessive control of sensitive functions of government such as intelligence, extending to self-review under the managerial control of the head of government, who is the subject of such review.

14 Cabinet Manual, 7.119

15 This rested on a controversial interpretation of Standing Order 190/2.

Status of Speaker:

- The Speaker remains a member of a party's caucus (compared with the UK whose Speaker must resign from the party), thereby giving a political implication, even signal, of institutionalised bias in the office.
- Specifically, responsibility for issues of privilege such as security and intelligence files being opened on current MPs is confined to the Speaker, thereby introducing a perception of natural bias.
- The Legislature is unicameral, thereby according greater control to the Executive, with fewer checks and balances.

Centralised Jurisdiction:

- The Executive has far-reaching control over the local jurisdictional authorities, with powers to disband or restructure them. Parliament has less control than the Executive in this respect.

Some of these concerns may be seen as extending beyond the immediacy of modernising Parliament, but they do have an effect on the nature of a country's constitution. If, for example, the head of state were a New Zealander, with no relationship to any religion, this would have a far-reaching effect on the parliamentary Prayer, or even whether there would be one.

A recognised authority on the Constitution, Mathew Palmer, has identified four norms of the New Zealand culture that are "essential to the character of the NZ constitution: representative democracy; parliamentary sovereignty; rule of law, including judicial independence; and the unwritten, evolving nature of the Constitution. There are, he says, three aspects of the NZ cultural attitudes to power: egalitarianism, authoritarianism, and pragmatism.

None of these, he says, "support the constitutional norm of the rule of law and separation of powers in New Zealand, making that norm vulnerable". Yet Palmer is not uncomfortable with this: "The evolving nature of constitutional life in New Zealand, he says, "is the most internationally distinctive aspect of New Zealand's constitution and resonates with both our British constitutional heritage and the Mâori tikanga; our constitution is not a thing but a way of doing things."[16]

This resonates with the observations of Moana Jackson, who would effectively return the constitutional debate to the pre-1840 era, based more directly on the Declaration of Independence rather than the Treaty of Waitangi, thereby making the 'constitutional conversation' between iwi and Crown more one between equals. Now, this would 'modernise' Parliament, to an existential level.

16 New Zealand Constitutional Culture, Matthew S R Palmer, NZ Universities Law Review, Vol. 22, pp. 565, 580

The question, however, is whether the Parliament is proactive enough to lead in the evolution of constitutional life in New Zealand sufficiently to keep pace with societal change. The point is that a constitution is not a 'way of doing things'; it is, in fact a 'thing'. The 'way of doing things' is the cultural underlay to the codified document, which cements, at a particular point in time, the values and principles that prevail at that point. The cultural evolution is the essential ingredient for updating (amending) the constitution; but it ought not be mistaken for the thing itself.

Because society is in constant flux, the task of ensuring that Parliament remains 'modern' is a continuous one. What structures are in place to meet that demand?

The Parliament's Privileges Committee has, to some extent, a role to play in modernising Parliament. Its job is to ensure that parliamentary privilege is upheld and that parliamentary supremacy over the Crown is maintained. It is a misnomer insofar as it suggests personal privilege to individual MPs. It is the opposite; it guarantees freedoms to MPs to perform their responsibilities, and holds them to account for that in their performance.

To the extent that New Zealand has an 'evolving constitution', this places greater importance on the Privileges Committee to keep Parliament updated. This the Committee has done in a number of respects in the three most recent parliaments, with reports on a number of matters. The Committee has not been required to engage in personal disciplinary matters, but some issues involving individual actions have been seen as giving rise to general matters of privilege which the Committee has handled upon referral by the Speaker.

To a considerable extent, a parliamentary committee is acting as guardian of New Zealand's constitutional integrity, but acting in the capacity as one of its creatures. The Diceyan notion of sovereignty in which the Parliament is supreme, remains alive if not especially well in New Zealand.

This compares, unfavourably I suggest, with the German system, whose Constitutional Court is empowered to adjudicate between the branches of government, and even strike out legislation. The United States (US) Supreme Court may declare congressional legislation to be unconstitutional, but in the US system, it is one of the three branches of government making the judgement. The German system would seem to be superior; its Constitutional Court is even tucked away, thoughtfully, in a city a decent distance from the capital.

The major issues recently addressed by the NZ Privileges Committee are varied. It has addressed issues of parliamentary freedom of speech in relation to judicial name suppression; parliamentary protections against potential defamation charges; ownership of information, whose platforms are (erroneously) shared between the Executive and the Legislature, rights and responsibilities of MPs in relation to police and intelligence investigations, and reflections by MPs on alleged bias of the Speaker. Each of these issues have direct implications for the rights and responsibilities of parliamentarians, and occasionally on the role of Parliament itself. In the latter case,

there are clear and important constitutional implications, most particularly in the defamation case of 2013 in which primary legislation ensured.[17]

This kind of work by the Privileges Committee is important, and perhaps critical, given the low-key, pragmatic way New Zealanders approach constitutional issues. Charlotte Macdonald has observed that "Abstraction has little tradition of popular following in Aotearoa/New Zealand. Institutionally, we have tended to favour the simple, accessible and pragmatic."[18] And Silvia Cartwright has commented:

> "….constitutional change is often the result of a pragmatic and practical response to events. It is often unheralded and sometimes even slips in almost by the backdoor. Change is incremental and gradual, and frequently the result of emerging consensus on an issue. Future changes are likely to occur in a similar way – New Zealand's constitutional development has always been based on consensus, never revolution."[19]

This cultural attitude, however, also gives rise to the kind of mindless ignorance and resulting arrogance that resulted in the Henry inquiry[20] and the need for Parliament's Privileges Committee to step in rapidly and decisively, and clear things up. In doing so, it is not aided by any national constitutional roots, and finds itself in the invidious position of reaching to other jurisdictions for help.

Moves to consciously develop the constitution have come to little. A major effort in the 1980s to codify the constitution resulted in less than what was originally envisaged. In 2004 the Parliament established a Constitutional Arrangements Committee to undertake a review of New Zealand's existing constitutional arrangements and the appropriate processes to follow if significant constitutional reform were considered. The Committee concluded that "although there are problems with the way our constitution operates, none are so apparent or urgent that they compel change now or attract the consensus required for significant reform. We think that public dissatisfaction with our current arrangements is generally more chronic than acute". The Committee did, however, suggest an independent institute for the fostering of a better public understanding of, and informed debate on, New Zealand's constitutional arrangements.

17 Report of the Privileges Committee (Parliamentary Privilege (2013). Pursuant to the defamation case (*Attorney-General and Gow v Leigh*), the Committee recommended and referred primary legislation to restore and reaffirm understandings of the scope of aspects of parliamentary privilege, in the form of consolidated and modernised legislation. As the Committee put it: "The importance of this bill for our country and parliamentary democracy should not be understated. Once enacted, it will form part of our constitutional framework." In this report the Committee, and on its recommendation the Parliament, 'pushed back' against a Supreme Court ruling that adopted the test of 'necessity' (for the proper and efficient functioning of the House) in deciding the level of privilege (absolute or qualified) by which members and their advisers should be protected. In the view of the legislature, the judiciary had breached the fine line between the two branches that is drawn by the principle of comity.

18 'What constitutes our nation? How do we express ourselves?" in Colin James, Building the Constitution (2000), p. 87

19 Dame Silvia Cartwright, *The Role of the Governor-General* (NZCPL Occasional Paper, 2001), p. 15

20 Question of privilege regarding use of intrusive powers within the parliamentary precincts. http://www.parliament.nz/en-nz/pb/sc/documents/reports/50DBSCH_SCR6018_1/interim-report-on-question-of-privilege-regarding-use-of

A decade later, the Government-inspired Constitutional Panel produced a report described as 'a snapshot of a developing conversation about New Zealand's constitution'. It recommended that the Government invite and support the people to continue the conversation about constitutional arrangements.

It seems clear that the NZ people, and the Parliament that represents them are conscious of the need to address the issue of a national constitution, but hesitant over how to go about it. In my view, there is a need for constitutional reform in New Zealand, and for its product to take the form of a single legislative act, entrenched by a 75% majority for change.

3. *Guiding Principles and Actions for Parliamentary Modernisation*

In light of the above considerations, I put forward the following suggestions as guiding principles for modernising Parliament, and their possible manifestation.

Principle 1: Innovation

> Parliament should maintain an optimal balance between tradition and innovation, in order to retain links with the past and the foundations of the society it represents, while adapting to the dynamism and change the society itself experiences.

Principle 2: Function

> Parliament should maintain an optimal balance between its triple functions: as a representative body for legislation to construct the settings for governance; an instrument for holding government to account; and a debating chamber for reflecting the mood of society.

Principle 3: Conduct

> Parliament should agree upon a Code of Conduct that sets strict prescriptive standards of parliamentary behaviour inside the House and general personal behaviour outside, with a view to ensuring that its members act at all times with dignity and respect towards the public they represent.

Principle 4: International Relations

> Parliament should ensure that it plays an appropriate role in monitoring and assessing government decisions on international treaty-making, both before the act of signing and the act of ratification, ensuring that there is appropriate transparency during negotiations before signing and due public input at the treaty-examination stage before ratification.

Principle 5: Constitutional Status

> The status, role and functions of the NZ Parliament should be reflected in more a formal constitutional framework than the uncodified manner it has at present, following an appropriate public discussion and taking the form of a single written constitutional document.

These principles could take form as follows.

a. *Appropriate Representation*

1. *Societal Diversity:* Consideration should be given to whether time-bound aspirational targets should be set for gender balance, between male and female, across the total membership of Parliament (generally 120); it being left to the discretion of each political party as to its own balance of representation.
2. *Religious Equality:* The parliamentary Prayer could be subject to review by an independent commission, established by Parliament; a decision whether there is a prayer should not be subject to a decision by Members of Parliament, but put to a national referendum; the content of any Prayer should be the product of the commission, subject to adoption by the Parliament, according to a personal vote.

b. *Structural and Procedural Integrity*

3. *Complementary Function:* Parliament should more appropriately maintain two functions (debate and legislation) as separate and discrete, albeit inter-related. It could consider restoring an upper chamber, which would not have a role in the legislative process, but would act as a forum for a continuous General Debate. That debate could focus on cabinet portfolios: Public Accounts; Fiscal Policy; Monetary Policy; Foreign Affairs; Trade; Defence; Agriculture and Forestry; Climate Change; Education; Health; Transport. One theme could be debated for a full sitting day, by MPs who could select slots according to their own interest, responsibilities and commitments. The aim would be to provide opportunity for an exchange of broad political views across parties on relevant issues, but unconnected to the precise legislative provisions before the lower chamber.
4. *Physical Configuration:* The debating chamber of the House could be reconfigured, along the lines of most continental European and American parliaments, in a physical lay-out that is hemispherical with members surrounding the central podium, rather than the adversarial, opposing-trench lay-out that is characteristic of the Westminster system. Consideration could be given to having constituency MPs seated according to region, as is the case with Norway, (with list-MPs seated behind according to party). Members when speaking wold proceed to a podium and face colleagues, with the Speaker seated behind.

c. *Appropriate Behaviour and Conduct*

5. A code of conduct should be considered by a cross-party working group, setting standards for behaviour in the House and general conduct outside it. The draft could be compiled by a non-parliamentarian group of experts and civic leaders, then submitted to MPs for consideration.

d. *Global Responsibility*

6. *Treaty Transparency:* International treaties under negotiation should be tabled before Parliament, either in public session or in closed session as appropriate to the treaty, for debate and non-binding resolution, before being signed by the Government.

7. *Lawful Force:* No decision should be taken by the Government (the Executive) pertaining to deployment of New Zealand's armed forces overseas without a written paper by the Attorney-General, tabled in Parliament, affirming with supporting explanation that such deployment is in accordance with international law and in particular the UN Charter; the paper to be tabled by the Prime Minister and subject to a Parliamentary debate and non-binding resolution.

e. *Constitutional Integrity*

8. *Public Cognisance:* An independent institute could be established to underpin the democratic state of New Zealand, by promoting and maintaining a public conversation about the NZ constitution, and ways of modernising the NZ Parliament.
9. *Public Vigilance:* Public and parliamentary awareness of the need for constitutional clarity and integrity, including appropriate separation between the Executive and Legislature and comity between the Legislature and Judiciary, should be sanctioned by a guardian body with rights and responsibilities entrenched in domestic law. A central task could be to consider the entrenchment of the most important principles of New Zealand's constitution.

CONCLUSION

As with many mature democracies, the NZ Parliament would benefit from some modernisation. Striking the right balance between tradition and innovation is, as noted, a political art form. The first step is to engender a national discourse over what is demonstrably in need of change, and to move purposefully from there. This paper contains a raft of suggestions to that end; some may fall within that category.

How Well Do Parliamentary Committees Connect with the Public?

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ABSTRACT

Most political scientists regard parliamentary committees as one of the most successful aspects of parliamentary business, where MPs of all persuasions come together to analyse and investigate issues of public policy and governance. Whilst their recommendations are not always implemented, they do play a major role in informing parliamentary debates. Amongst the public however, the work of parliamentary committees remains unrecognised and underappreciated. Utilising a pilot study of Western Australian parliamentary committees, this paper looks at how these committees go about seeking public input into their inquiries, and whether they plan to broaden their methods of communicating with the public in the future. This analysis is placed in the context of evidence at the Commonwealth level in Australia, along with ideas from other jurisdictions internationally.

BACKGROUND: PARLIAMENT'S POOR STANDING WITH THE PUBLIC

This paper was produced with the 2015 Australasian Study of Parliament Group (ASPG) theme of "modernising parliament" in mind. Its origin derives from a disconnect between the public perception of parliament and the perception of its value held by those who intersect with parliamentary proceedings regularly, particularly those who take an interest in its operations beyond the public spectacle of Question Time.

It is frequently held that the public has a low opinion of parliament, and members of parliament in particular, and this has been demonstrated by polling conducted in a variety of ways. For instance, the Roy Morgan Image of Professions survey surveyed 598 people in 2015, asking them to rate people who worked in various professions on the issue of ethical standards and honesty. Out of 30 occupations State MPs came 23rd and Federal MPs 25th. Just 14% and 13% of respondents rated them as high or very high in those categories (Roy Morgan 2015). Similarly in 2013 when the Scanlon Foundation surveyed Australians and asked them to rank nine institutions and organisations in terms of trust and confidence, the bottom two spots were occupied by political parties and Federal parliament. Interestingly the same survey found that those who were born here or moved here prior to 2000 had the lowest level of trust

and confidence in these two institutions (Markus 2014). More recently, in February and March 2016, a survey of 1444 Australians by the Museum of Australian Democracy and the Institute for Governance and Policy Analysis found that levels of trust in government and politicians in Australia were at their lowest level since 1993 (Evans, Stoker and Halupka 2016). Such concerns around trust are not limited to the Australian context; there is much evidence in Europe and elsewhere that trust in the political class is in decline (Leston-Bandeira 2014).

A common sentiment expressed by those who are familiar with the workings of parliament, particularly those elected to sit in it, or people who are employed to support its functions, is that the public do not get to see parliament at its best, which is the work that goes unrecognised. The public see parliament through the theatrical performances that characterise Question Time, where the combatants wrestle for advantage, often by ridiculing the personalities and policies of their opponents. This process and others like it, such as parliamentary motions seeking to censure the government or opposition, are natural segments of what is by nature a competitive institution. Yet they serve to mask the more substantive contributions to public policy and public debate that parliament makes.

The aspect of parliamentary work which best exemplifies this more substantive contribution is the role played by parliamentary committees. In many ways parliamentary committees represent parliament at its best, and much of their work and the outcomes they achieve challenge assumptions made about parliament, such as the following:

- Parliament is always adversarial
- Parliament is inherently tribal, with members of opposing parties disliking one another and rarely working together
- Parliament focuses on political point scoring and not policy
- The processes of parliament are poor and do not stand up to serious scrutiny

It is not that all these assumptions are completely wrong, but rather that they only represent part of the story. The other part is that much of the time spent during parliamentary sittings, and committee sittings in particular, is spent on enacting legislation and raising issues of importance to members.

Parliamentary committees tell us a good story about parliament. Serious policy issues are discussed. The executive can be held to account. Parliamentarians of all political persuasions do work together and there is greater capacity to examine policy issues in depth.

This is not an attempt to eulogise parliamentary committees. They are not perfect. Sometimes the same issues are examined time and again without action. Sometimes partisanship very much exists, and occasionally political leaders do play politics around parliamentary inquiries, and their findings in particular can be questioned along party lines. Majority and minority reports though, provide useful outlets for managing such disagreements.

Parliamentary committees play a major role in scrutinising the policy settings and expenditure of government, the applicability of legislation, and the general examination of issues and controversies in the community. Central to their function however, is the notion of "taking parliament to the people", which is reiterated in the official literature surrounding its role (cf. Harris 2005; Evans and Laing 2012). Briefing papers and information sheets issued by parliament emphasise this tenet of their work. Despite this, 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. This is symptomatic of the disconnect outlined above.

If there is a lack of understanding or appreciation of the role of parliamentary committees amongst the public, it is natural to look at the relationship between the two. Just how much contact do our parliamentary committees have with the public? What kind of processes are in place to include public input when identifying the need for inquiries, and when gathering information during inquiries? What efforts are made to communicate the findings to the public?

Parliamentary committees have themselves been aware for some time of the need for the public to understand what they do, and to engage in their deliberations. A 1999 report by the House of Representatives Standing Committee on Procedure found that the Standing Orders for committees needed to be "more logical, intelligible and readable" (HORSCP 1999: 29). It also recommended the introduction of live broadcasts of proceedings, and better access to committee work through the Parliament's webpage (HORSCP 1999: 38). Importantly, there was a recommendation that committee chairs, deputy chairs and secretaries meet at least once in each term of Parliament to strategise how to promote committee work better (HORSCP 1999: 44). Other recommendations seem rather prescient in hindsight, such as developing effective feedback mechanisms for Parliament's online sites (HORSCP 1999: 48).

Further impetus for research into the relationship between parliamentary committees and the public comes from a report produced at the Commonwealth level in Australia in 2010 by the House of Representatives' Standing Committee on Procedure. It was entitled *Building a Modern committee system: an inquiry into the effectiveness of the House committee system* and provided an interesting insight into the issue. There was an acknowledgement that the current Commonwealth committee system was established in the 1980s when print and radio were dominant. This was why written submissions, and either public hearings or private briefings were used, with printed reports produced at the conclusions (HORSCOP 2010: 43). The report recognised that committees needed to communicate with the public more effectively, and that the changing media landscape offered new ways of gathering evidence, including better use of emerging information technology, both in the conduct of inquiries and a committee's private deliberations (HORSCOP 2010: 42). Suggestions in the report included teleconferencing, videoconferencing and online surveys. The report regarded the committee system as "the interface between the Parliament and the public" and suggested better use of resourcing to enable more extensive consultation processes.

PROJECT SCOPE AND METHODOLOGY

It is worthwhile considering what the current level of public engagement within parliamentary committees is like. For this reason in 2015 all parliamentary committees active in the current term of Western Australia's parliament (the 38th parliament, elected in 2013) were invited to participate in a survey focussing on their engagement with the public. The survey was sent to the chair of each parliamentary committee, with each chair being asked by the WA parliament's presiding officers to consult with their committee in devising their responses. As such, the survey results should be regarded as responses of the committee members, via their chair. Twelve of the fifteen committees in the 38th parliament participated in the survey. One further committee, the Select Committee on Aboriginal Constitutional Recognition, was no longer sitting at the time of the survey, but has published details about its methods of public consultation in its final report. The final results of the survey can be said to provide a comprehensive picture of the way public engagement is seen within parliamentary committees in WA.

There were seven questions in the survey, designed to shed light on three distinct research questions. The research questions underpinning the project were as follows :

- What specific level of public engagement do parliamentary committees engage in, both at the time of establishing public inquiries, and during their term of operation?
- What intention is there on behalf of parliamentary committees to broaden this level and extent of public engagement?
- What is the perception within parliamentary committees regarding their resourcing, and the level of public recognition for the work they do?

The specific questions asked in the survey were as follows:

- *(Q1) How many enquiries has this committee conducted during the current term of parliament, which sought information from the public?*
- *(Q2) Outline any methods of communication undertaken by the committee when seeking public input into inquiries.*
- *(Q3) What methods did the committee use to obtain information from the public during these inquiries?*
- *(Q4) Does the committee have plans to broaden its methods of public consultation in the future? If so, how?*
- *(Q5) In your opinion, does the committee have sufficient resources to obtain information from additional sources?*
- *(Q6) Do committees believe their work is sufficiently recognised in the public arena?*
- *(Q7) What other information would you like to add?*

Given the fact that parliamentary committees are made up of members of parliament, every effort was made to construct the survey questions in a general way, to avoid eliciting partisan responses. A summary of survey responses, and the identity of each committee chair are provided in Appendix A. This will provide further context if required,

regarding the interpretation of the survey questions by committee chairs. Each of the survey responses is analysed below, in conjunction with relevant contextual information, in order to generate a picture of public engagement at parliamentary committee level in Western Australia. Note that the data sample is still small, and is not designed to draw quantitative conclusions. A similar survey of Commonwealth parliamentary committees and other Australian jurisdictions (time and resources permitting) would complement the picture presented in this initial paper.

1. Number of Inquiries

Identifying the number of inquiries being undertaken is useful because there is a direct link between the level of public interaction one can expect from a committee, and the number of public enquiries it holds. During the current term of the WA parliament (the 38th Parliament, elected in 2013), the number of inquiries by each committee seeking public input varied considerably, from zero to eleven. Several committees, most notably those relating to matters of privilege, pointed out that seeking public input would not actually be appropriate for the types of inquiries they conduct. Neither the Committee on the Corruption and Crime Commission, nor the privileges committees in both houses had public inquiries. On the other end of the scale, the three committees which scrutinised legislation had a large number of inquiries, and more opportunities for public input. In the middle were policy-based committees, such as Community Development and Justice, Economics and Industry Committee, and the Environment Committee. Unsurprisingly those who had more public inquiries were most concerned about the issue of public input and how it could be broadened.

2. Communication from parliamentary committees when establishing committee inquiries

Obtaining a picture of the methods used by parliamentary committees to engage the public at the time of establishing a public inquiry is especially important, given that potential contributors needed to be aware that an inquiry is being held if they are to respond and participate. Of particular interest is the extent to which people and institutions most affected by a given issue are informed about a committee's investigation. As outlined in Appendix A, the committees tended to use similar processes. Typically these included advertising, especially in print media, and media releases. Most committees sent letters directly to stakeholders whom they knew would be interested. There was usually information available on the committee website. Several committees reported a limited use of Twitter and Facebook.

The processes reported by the committees exemplify the problem surrounding current approaches to public engagement. All of the processes reported by committees were good at reaching people who routinely participate in parliamentary inquiries, but not so useful in reaching different demographics, especially those who would be prepared to contribute for the first time. If an individual or organisation was already prominent in a given field it was very likely that they would be contacted. However, should they not have shown interest in the issue previously, it is likely they may not even be aware of

the inquiry. Whilst the move to use Twitter and Facebook is a step in the right direction, a quick search on the relevant Twitter accounts in September 2015 shows that the Legislative Assembly and Legislative Council of WA have approximately 1000 followers each, many of whom overlap. Clearly these accounts are yet to reach a broader audience. Further opportunities remain untapped in this space; Missingham (2010 and 2011) has explored the potential of Twitter and other forms of social media in Australia, both for politicians as individuals and parliaments as institutions. Whilst there are examples of significant social media mistakes made by politicians and institutions in all jurisdictions, its ability to connect with different demographics is clear.

3. Methods to obtain information during public inquiries

A second vital consideration was the methods through which the public is able to contribute to an inquiry. The breadth of consultation methods utilised by a committee is essential to participation, and determines the ability of those inquiring to receive information from a diverse range of sources. As Appendix A demonstrates, every committee which held public inquires used written submissions and public hearings as methods of receiving information from the public. The survey results indicate that these are the main forms of public contribution on which the Committees consistently relied. This reliance on public hearings and written submissions has both strengths and weaknesses. Written submissions afford interested stakeholders the opportunity to make a detailed and considered contribution to an inquiry. Often detailed data is provided which can support the various arguments advanced. Public hearings offer the opportunity for a dialogue, and the transparency involved allows observers to hold both committee members and contributors to account for their opinions. Often the lively encounters they generate are the source of media reports, which serve to highlight the issues under discussion. On the other hand, both these processes tend to be dominated by professional, articulate voices, those who have the resources, training and confidence to use the committee system forum to participate in public policy decisions. Often a single contributor will participate in both processes. The challenge is to preserve the strengths of this approach whilst also incorporating the views of those who are less frequently heard during policy debates, but who may be profoundly impacted by the issue. This might include the low-skilled worker made redundant by changing economic parameters, or the low income earner unable to access services due to changes in government policies.

It is important to acknowledge that there were other methods used by the committees, including briefings from departments, conferences, and research by parliamentary staff. Interestingly, half of the committees had engaged in site visits during public inquiries. Only one committee, the Economics and Industry Standing Committee, mentioned the use of specialist external consultants. In addition one committee, the Education and Health Standing Committee used an online survey (they reported low take-up) and another committee, the Community Development and Justice Standing Committee, used skype sessions, as did the Select Committee on Aboriginal Constitutional Recognition.

These methods are all legitimate and can add to the number of submission received, broaden the background of people appearing before hearings and increase the number of public hearings held. It is worth noting that no committee reported holding public meetings or forums on any issue they were investigating. Such a method, whilst expensive and time-consuming, has the potential to broaden the input received by allowing less professional members of the public a voice. It would also facilitate contributions from those affected by a given proposal.

4. Intention to broaden public communication in the future

A further aspect of interest was the perspective within parliamentary committees about the need to communicate with the public differently. Three of the ten committees who had held public inquiries expressed an interest in broadening methods of public communication in the future. Some of the suggestions they put forward included using Twitter, liaising with committees in the same or in other jurisdictions who held similar inquiries, and undertaking public forums. The remaining respondents said they were not considering new methods.

The challenges of seeking consultation from those most affected by the work of a committee were highlighted recently in the final report from the Select Committee on Aboriginal Constitutional Recognition (JSCACR 2015). The report admitted in Finding 2 that the Committee's level of consultation was limited. It explained that:

> The Committee … has attempted to undertake a broad consultation throughout its Inquiry. However, it has found that the Inquiry timeframe—itself limited—has coincided with the period in which Aboriginal communities and stakeholders are limited in their availability due to other obligations, including the South West native title settlement negotiations, school holidays, law business, and weather. (JSCACR 2015: 29)

In this instance, the problem was not as dire as it might have been because the Committee made it known that there had already been a broad level of consultation on the issue ahead of the introduction of the *Constitution Amendment (Recognition of Aboriginal People) Bill 2014* by the Member for Kimberley Ms Josie Farrer. Therefore, the Committee was able to focus on potential legal issues around recognition and what had occurred in other Australian states. Nevertheless, this example demonstrates the challenges surrounding consultation in a state like Western Australia, especially when seeking comment from people living in remote communities.

Another challenge in broadening methods of public consultation lies in its incorporation into a committee's deliberations. The survey response from Mr Ian Blayney MLA, who chaired the Committee of Economics and Industry, demonstrates this:

> Ensuring a broad range of stakeholder representation for each Inquiry is important, yet, in some cases more than others, can be difficult. The development of social media and new forms of communication can provide a new source of public input. However, there are difficulties associated with using this as 'evidence'.

Most evidence received through current methods is collected and published online. It is usually afforded parliamentary privilege, enabling contributors to speak freely. Public hearings are generally conducted using set processes, which facilitate the examination of topics and allow for orderly transmission of information. This raises the question of how the use of non-traditional evidence would affect such processes? As stated above, the use of public forums in particular would appear to have merit, and could facilitate a more diverse range of public participation. Committees would not be able to maintain the same standards though, when it comes to sorting through evidence. A transcript of every word spoken may not be possible, whilst the dissemination of such a transcript to all contributors could be particularly difficult; having such contributors clarify their statements would prove a logistical challenge. Another aspect implicit in all this is the credibility of the parliamentary process and how it could be affected by the use of non-traditional means of evidence. Online contributions for instance, can be anonymous or submitted under false identities, thus removing conventional aspects of transparency and accountability. In addition some committees such as the committee overseeing the Corruption and Crime Commission, would need to careful about its public communication and, for legal reasons, cautious about the types of evidence it accepts in its deliberations. If parliamentary committees are serious about increasing public engagement with the committee process, and about taking input from a more diverse range of stakeholders, some (non-legal) risks will have to be taken.

5. The resourcing of parliamentary committees

Broad public communication takes significant resources. The 2010 report by the House of Representatives Standing Committee on Procedure made a number of recommendations about better resourcing (especially resource sharing) because it saw resourcing as a potentially limiting factor on the ability of committees to engage with all stakeholders and interested members of the public in a more sustained, meaningful manner. All parliamentary committees in the survey stated that their committee had the resources it needed to obtain information from additional sources. They may well have responded in this way, because they have the ability to apply for more resources should they need them. What remains unclear is whether there are any financial barriers to undertaking more comprehensive forms of public interaction, whether this includes commissioning research, conducting surveys, hosting public forums, or other activities. Whilst parliament could expand such activities, there would be limits. Commissioning research, for instance, is expensive depending on the size of the research project. Another factor in effective consultation is how localised it is; constant trips around a state the size of Western Australia would result in large travel expenses. Committees may be reluctant to undertake such travel in a climate where their expenses are frequently questioned in the media.

6. Recognition in the public arena

One of the assumptions underpinning this research project was that the work of parliamentary committees is not fully understood in the public arena. Therefore the survey asked parliamentary committees what they thought about the level of public recognition of their work. As Appendix A shows the committees' responses were mixed, with three suggesting that it was, and others responding with "yes and no", depending on the nature of the inquiry. Several respondents suggested that if the inquiry related to matters that were controversial, there was more interest from media outlets, with some reporting on a committee's processes and findings. Such responses are understandable; there can be no doubt that prominent clashes during committee hearings can receive public exposure, and reports from some committees do receive a considerable attention at certain times.

Even when the media does cover committee proceedings, the real work of a committee in investigating the issues thoroughly is not sufficiently recognised, since the focus is on the "juicy" or politically damaging areas, rather than on the underlying issues that are frequently exposed through the committee process. A substantive appreciation or understanding of the work of committees involves an awareness of the extent of research undertaken, the full suite of public opinions canvassed, and the details that are uncovered. For instance, a recent parliamentary committee in Western Australia covered the response of police to an incident involving former WA Treasurer Troy Buswell. There was considerable media interest in the committee's deliberations, and the findings of that committee were the subject of intense political debate. Its processes and findings were heavily reported at the time. But the key issue which emerged from that inquiry, the extent to which public officials in the bureaucracy should or should not be made to co-operate with a parliamentary inquiry, was not fully explored. Some months on, it had not been resolved.

As Hon Margaret Quirk MLA, chair of the Community Development and Justice Standing Committee, pointed out, the impact of a committee's report partly lies in the response of government to its recommendations. If the Government response takes months, the newsworthiness of the issue may have passed. If it is buried during a busy news time or consumed by broader political considerations, it may not get the attention it otherwise would. There may be few opportunities to debate the policy issues underpinning the report. All this suggests that reliance on traditional media outlets to report on committee work presents problems. While the media will always remain an important conduit to broader awareness of parliamentary committees, other avenues must be pursued. Several respondents, when lamenting the lack of exposure afforded to committee work, questioned the role of the media, given that it is central to the information the public gets about parliament, its processes and its outcomes. The media, they argued, focuses on conflict and controversy, and is less interested in instances when parliamentarians work collaboratively to achieve good outcomes. Such progress is not seen as newsworthy. Such concerns are natural, and contain some truth. However there is more to public engagement than media exposure.

EDUCATION

One of the themes which emerged from the survey respondents feedback, was the need for people to be educated about what are the functions of parliamentary committees. It stands to reason that members of the public need an understanding of what committees do and why their work is important, if more of them are to participate. The public needs to understand what committees can and cannot realistically achieve, and how they intersect with government and the rest of parliament's processes. Expectations around findings need to be realistic, so that participants continue to contribute. An easy pitfall here is to assume that the value of committees lies entirely, or even principally, in the findings they make. In reality the exposure they give to an issue, and the opportunity they afford to give expression to different voices, is critical to their value.

The original 1999 report referred to earlier, focussed heavily on education. Among its recommendations was the creation of brochures by House of Representatives' committees, which provide information in simple terms for the purpose of informing the public (HORSCP 1999: 46). This has been undertaken for some years now, and it is clear that these brochures play a very useful role in educating students who are studying parliament at secondary and tertiary level. Whether there is sufficient uptake by the general public is another matter. Other recommendations focussed around creating audio-visual tools for schools and other groups, as well as a "fly on the wall" type of documentary for television screening (HORSCP 1999: 45, 47). There are now extensive examples of various parliaments around the world taking a pro-active approach to education (cf. Missingham 2011; Coleman 2004). Making people aware of committee work is just one of the many benefits arising from teaching civics within the school system.

WHAT DOES IT TAKE TO ENGAGE PEOPLE WITH THE WORK OF COMMITTEES?

From the case study of the Western Australian parliament, it is clear that more work needs to be done to raise awareness of the role of parliamentary committees and the value of the work they do. Parliamentarians have to take the lead on this, as this lack of public knowledge feeds popular misconceptions about our elected representatives in general. It is in part responsible for the sorts of survey results outlined above.

Morris and Power (2009) examined the factors which affect public participation within the Legal and Constitutional Affairs Committee at the Commonwealth level. They found that the length of an inquiry had little impact on the number of public participants, and they were unconvinced that advertising and publicity around public inquiries were decisive factors in determining this either. Central to participation, they argued, was the subject matter of the inquiry, with controversial topics receiving the greatest participation. Controversy, though, cannot be separated from issues of awareness more broadly, as the level of media coverage linked to controversies creates opportunities for different people to engage.

Awareness and participation in committee processes are interconnected. When people are involved in a consultation process they take an interest in the outcomes associated with it, regardless of the extent of media coverage. That is, if someone writes a submission relating to a parliamentary inquiry they will take a much stronger interest in what happens next. They will be interested in its findings. Even if those findings are not to their complete liking, they will be much more aware of what committees do, and how they operate.

The biggest challenge remains in getting the people most affected by a policy to participate in the discussion. This includes people with poor health outcomes participating in an inquiry on public health, people with low education levels participating in a conversation about improving the education system, homeless people participating in an inquiry on homelessness and the voice of victims being heard in relation to law and order issues.

Committees need to be better at telling the public that they are holding an inquiry, and they need to create more accessible ways for people to contribute to an inquiry. Such processes can no longer be restricted to those who are articulate, educated, and confident about participating. Their focus cannot be towards insiders, or those who are familiar with them, such as lobbyists. It is not the intention of this paper to target lobbyists; such people or groups do have the potential to (at times) facilitate the contribution of those who cannot contribute themselves. But committees need to find ways to listen to voices not usually heard. MacKenzie and Warren (2012) argue that accessing these voices requires competence building during the participation process, so that individuals are given the tools to communicate, as well as the forum to communicate in.

Whilst it is possible that the public is apathetic, there is evidence that the public is more than willing to participate in other opinion forums, especially when conducted online. Social media provides many examples of this, even if such willingness to participate may not be uniform across all demographics.

IDEAS FROM OTHER JURISDICTIONS

Very few good ideas have never been tried elsewhere, and committee chairs and parliamentary officers should look to other jurisdictions to see what can be achieved in WA. There are many examples of public engagement practices occurring within other jurisdictions in Australia and overseas. It is not the intention of this paper to list all of these, but a selection of such practices does expose gaps within the WA committee system.

Many jurisdictions hold online consultations. These offer opportunities to seek input from a wider variety of people, particularly those who cannot physically access public hearings. There are also opportunities to provide input in less formal ways. The challenges identified include an inability to always verify and locate participants.

To do so effectively, parliaments need to be familiar with online policy communities (Marsh 2006). There is also the challenge of maintaining parliamentary privilege. The House of Commons (UK) has been conducting online consultation for some years (since 2002), and has refined its rules according to the inquiry being conducted. They have developed a strict online registration process which discourages individuals from using multiple online identities (Russel et al 2013). Paradoxically though, such a process may prevent those "rarely heard" voices from contributing.

Another practice which is common at the Commonwealth level, and occurs in some state jurisdictions (cf. Parliament of NSW 2012), is the holding of public hearings in regional locations. This is already happening in some WA parliamentary committees, but the survey data indicates that this is very limited. Such an approach is particularly important in Western Australia, given the broad distances involved, and the resulting inability of some community members to travel to Perth.

Parliaments can also ensure that the information in their reports is produced in a format which is accessible and readable for as many people as possible. Scotland's parliament publishes short summaries of reports in plain language, which are designed to accompany longer, more detailed findings (Halpin et al 2012; Davidson and Stark 2011). Such summaries also make it clear that committee views are only recommendations to government, and are separate from actions of the executive. These summaries are designed to be more accessible to the public.

Parliaments can also develop websites and mobile phone applications which target specific demographics. In British Columbia's Legislative Assembly, one committee developed a website targeting local youth during an inquiry into childhood obesity (Leyne 2008). Rather than listing terms of reference, it posed a series of questions to be answered by participants.

Another approach common in other jurisdictions is to employ specialist assistance in an advisory capacity, for the express purpose of engaging additional non-traditional voices. One obvious example would be a translator for those who wish to participate but have a poor grasp of English. But more broadly, individuals with specific skills-sets could be employed to help address issues where such expertise is invaluable. In the Australian context it is widely held that the current research assistance provided to committees is excellent, but there are still gaps which could be filled on a short term basis for the purpose of a specific inquiry. This suggestion formed part of the framework explored by MacKenzie and Warren (2009) when designing more inclusive processes. At the very least, parliamentary committees should be open to this idea.

A different strategy tried in the Parliament of Scotland is the use of peer education (cf. Sutherland 2011). This involves getting young people to educate other young people. Groups of young people act as ambassadors for parliament, conducting various information sessions, going into schools, and running social media commentary on parliamentary proceedings. In Scotland's case, the initiative has been part of broader efforts to encourage younger people to take an interest in its deliberations (cf. Bonney 2003).

CONCLUSION

The survey of parliamentary committees, which underpins this paper, reveals that most committees in Western Australia rely heavily on traditional forms of communication with the public. Notification of public inquiries usually takes place via advertisements in the print media, and media releases, along with letters to known stakeholders. Public input into inquiries occurs primarily through written submissions and public hearings. Reports are usually tabled in parliament and published on the parliament's website. Unsurprisingly some committees are frustrated with the lack of attention their inquiries receive, and there are some complaints that executive government is not responsive to the recommendation their reports contain. There are some examples of more innovative approaches to public engagement, such as the use of social media to announce certain inquiries, site visits, external consultants, skype sessions, and an online survey. On the whole though, it is evident from the examples of other jurisdictions that much more is possible. A summary of the different approaches elsewhere reveals some common principles. Firstly, they involve making parliament in general more accessible, not merely the work of committees. Secondly they focus on targeting specific groups which are currently somewhat disengaged, such as regional citizens and young people. Thirdly, they focus on bringing in different types of human resources to assist in the process, whether this is in an advisory or deliberative capacity. Lack of understanding about what parliament does is a longstanding and challenging problem. While none of these suggestions will, by themselves, solve the identified problems they can provide a basis for positive change. At the very least, they represent a step in the right direction.

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APPENDIX A

Summary of responses by WA Parliamentary Committees

Committee	Committee type	House	Chair	Response	Q1	Q2	Q3	Q4	Q5	Q6	Q7
Chair – Committee on the Commissioner for Children and Young People	Standing	Joint	Lisa Baker MLA (Labor party)	yes	1	Public hearings, written submissions, briefings, site visits, conferences, research	no	yes, committee can apply for resources when required	adverts, media releases, letters to stakeholders, committee website	committee's role is to report to parliament	public given an opportunity to have input through the submissions process
Chair – Committee on the Corruption and Crime Commission	Standing	Joint	Nick Goiran MLC (Liberal)	yes	0	Public hearings, written submissions, briefings, site visits, investigative travel, conferences, research, closed hearings	no	N/A	media releases. These are not issued to seek input into inquiries, but to advise the public what the Committee is doing.	No, unless the report is on a controversial matter. Secrecy of evidence is paramount	
Chair – Community Development and Justice Standing Committee	Standing	Assembly	Margaret Quirk MLA (Labor)	yes	4	Hearings, written submissions, academic research, media reports, reports of parliamentary committees, site visits, conferences. skype video.	yes, maybe twitter	yes	Adverts, committee website, Parliament, letter to stakeholders. Hearings are almost always public and journalists frequently attend	No, can depend on government response, which can take a long time	Committee work is critical, given lack of other means of investigation

Committee	Committee type	House	Chair	Response	Q1	Q2	Q3	Q4	Q5	Q6	Q7
Chair – Delegated Legislation Committee	Standing	Joint	Peter Abetz MLA (Liberal)	yes	5	public hearings, written submissions, scrutiny of instruments clarified by Premier's Circular 2014/01	no	yes	letters to stakeholders, adverts, media releases, website and facebook	no	N/A
Chair – Economics and Industry Standing Committee	Standing	Assembly	Ian Blayney MLA (Liberal)	yes	3	Public hearings, written submissions, briefings, site visits, investigative travel, use of consultants, conferences, research, written request for information, issuing of a summons	no	yes, committee can apply for resources when required	adverts, media releases, letters to stakeholders, twitter, committee website	yes and no. Only those who have an interest or participate know. Media may report if controversial	hard to get a broad range of representation, social media could help but would be difficult to use as evidence
Chair – Education and Health Standing Committee	Standing	Assembly	Graham Jacobs MLA (Liberal)	yes	3	written submissions followed by Public hearings, departmental information, site visits, online survey (survey monkey – low uptake), released a discussion paper, conferences	maybe liaison with other committees in other jurisdictions?	Perhaps, some technical matters require input of experts	adverts, including regional for FIFO reports, emailing stakeholders	yes, lots of interest from media during recent FIFO and Fiona Stanley inquiries	More public input into committees would be a good thing

Committee	Committee type	House	Chair	Response	Q1	Q2	Q3	Q4	Q5	Q6	Q7
Chair – Environment and Public Affairs Committee	Standing	Council	Simon O'Brien MLC (Liberal)	yes	2	Public hearings, written submissions	no	yes	adverts, media releases, letters to stakeholders, facebook site, committee website	yes	N/A
Chair – Estimates and Financial Operations Committee	Standing	Council	Ken Travers MLC (Labor)	no							
Chair – Joint Audit Committee	Standing	Joint	Ken Travers MLC (Labor)	no							
Chair – Legislation Committee	Standing	Council	Robyn McSweeney MLC (Liberal)	yes	5	Public hearings, written submissions, adverts, committee resources	no	yes	identify key stakeholders, adverts	yes, but depends on level of public interest in a particular inquiry	
Chair – Procedure and Privileges Committee	Standing	Assembly	Michael Sutherland MLA (Liberal)	yes	0	Mainly written submissions, rarely public hearings	no	yes	adverts, media, but not since 2008	press often picks up reports	seeking public input would rarely be appropriate
Chair – Procedure and Privileges Committee (Council)	Standing	Council	Barry House MLC (Liberal)	yes	0	rarely needed	no	yes	adverts for written submissions when required	no, lack of public understanding	This committee's work doesn't lend itself much to input from the public
Chair – Public Accounts Committee	Standing	Assembly	Sean L'Estrange MLA (Liberal)	yes	1	Written submissions, public hearings, private briefings, independent research (incl. lit reviews)	possibly, could do site visits, surveys, or public forums	yes, incl specialist consultants if needed	letters to stakeholders adverts, media releases, tweets, webpage	possibly, only covered by the media when controversial issues discussed	

Committee	Committee type	House	Chair	Response	Q1	Q2	Q3	Q4	Q5	Q6	Q7
Chair – Public Administration Committee	Standing	Council	Liz Behjat MLC	no							
Chair – Select Committee on Aboriginal Constitutional Recognition	Select	Joint	Michael Mischin MLC	directed to final Committee report							
Chair – Uniform Legislation and Statutes Review Committee	Standing	Council	Kate Doust MLC	yes	11	Public hearings, written submissions, Written adverts, research	no	yes	adverts, media releases, letters to stakeholders, committee website	depends on the inquiry	

Petitioning the Australian Parliament: Reviving a Dying Democratic Tradition

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ABSTRACT

The right to petition Parliament for redress of grievances spans many centuries. For much of this time, petitions served a key role in bringing the concerns of the people directly before Parliament for consideration and debate. In the Australian Parliament, petitioning has long been in decline. This led to reforms in 2008, including the establishment of a Petitions Committee and an expectation that Ministers will respond to petitions within 90 days. However, these have had limited success, and the process remains moribund. By contrast, other jurisdictions such as the United Kingdom, Scotland, Canada, and several Australian states and a territory have reformed their petitioning processes with greater success. This article examines the right to petition in Australia's federal Parliament with a view to determining whether reforms like those undertaken in other jurisdictions should be adopted.

INTRODUCTION

Parliamentary petitions serve a unique purpose in Australia and other Westminster democracies, offering the only formal avenue by which community concerns can be conveyed directly to Parliament outside of elections. A petition is a document signed by members of the public that requests Parliament to undertake action such as amending a law or asks the government to perform some administrative action. At the federal level in Australia, if a petition is found to comply with procedural requirements, its title is read out in the House of Representatives or Senate by a parliamentarian and the full text of the petition is recorded into Hansard. Often, the petitioners will later receive a letter from a Minister outlining the government's position on the issue, typically explaining why it cannot or will not accede to the petitioners' request.[1]

For the past thirty years, the number of petitions lodged in the federal Parliament has been in decline. In 1986, 5,528 petitions were presented in the House of Representatives. By 2015, that number had fallen to 105. This reflects a widely

1 Standing Committee on Petitions, Parliament of Australia, *The Work of the Petitions Committee: 2010–2013 – An Established Part of the Democratic Process* (2013) 2.29.

held perception that petitions are not particularly effective, or worse, 'a waste of time and paper'.[2] General awareness of petitions also appears to be low, with little recent academic commentary on the subject and very few responses being made to parliamentary inquiries on how petitioning might be reformed. As one Senator bluntly put it: 'No one takes any notice of petitions. They have no effect at all on governments.'[3]

The contemporary irrelevance of petitions in the federal Parliament sits uneasily with the long and often effective record of the device. In 17th century England they were thought so important that the right to petition was included in the *Bill of Rights 1689*. By the 18th and 19th centuries, petitions had come to play a very significant role in civic society, generating substantial amounts of parliamentary debate and frequently resulting in new legislation. Indeed, by 1842 they dominated parliamentary business, causing the House of Commons to adopt a series of standing orders banning debate on petitions except in rare cases. This had the intended effect of stymying the influence of petitions in Victorian England.

The fact that the petition has fallen well short of its potential in Australia's federal Parliament has been widely recognised. Since 1986, the problem has been analysed by a series of parliamentary standing committees in eleven separate reports, resulting in recommendations for reform that have at times been adopted by the government of the day, and in turn enacted by Parliament. The most important of these was a set of reforms enacted in 2008, which among other things set an expectation that Ministers would respond to petitions within 90 days, and established a new Petitions Committee to receive and process petitions lodged in the House of Representatives and to inquire into matters relating to them. While these reforms have yielded some benefits, such as improved Ministerial responsiveness, they have not succeeded in halting the decline of petitions.

Other jurisdictions have also reformed their petition processes in the past decade, including the United Kingdom, Scotland, Canada, Germany as well as subnational jurisdictions in Australia, namely Queensland, Tasmania, NSW and the ACT. Of these, the most instructive is the United Kingdom, as its suite of reforms in mid-2015 has recast the role of petitions in modern British society, leading to a surge in petitioning, Ministerial responses, parliamentary inquiries and debates. The result has been renewed popular engagement in the work of Parliament.

Our aim in this article is to determine whether the right of petition in Australia's federal Parliament can be further reformed and improved. We first set out the history of the device, before exploring the experience of petitions and their recent decline in the Australian Parliament. Finally, we look to other jurisdictions for guidance as to how the tradition might be revived.

2 Rosalind Berry, Submission No 5 to House of Representatives Standing Committee on Procedure, *Making a Difference: Petitioning the House of Representatives*, 8 February 2007, 1.

3 Commonwealth, *Parliamentary Debates*, Senate, 29 April 1982, 1684–5 (Robert Ray).

HISTORY

Petitions have a long and diverse history that spans many societies. Their usage can be traced as far back as Ancient Rome, in the form of the 'epistolary supplication': a practice whereby Roman citizens could send written pleas, requests and complaints to their emperor.[4] For example, in 238BC, the residents of the Thracian village of Skaptopara petitioned Emperor Gordian, complaining of exploitation by itinerant soldiers who demanded their hospitality free of charge, and alleging that their local governors had been ineffective at curbing the extortion. They sought an imperial ruling, to be engraved on stone and prominently displayed, which would 'compel every person to keep to the route prescribed for him and not, by leaving other villages, to invade our village nor to compel us to supply him with necessities gratuitously'.[5] Perhaps disappointingly for the petitioners, the Emperor delegated the issue back to the governors.

In England, petitions emerged during the reign of King Edward I (1272–1302), and were originally addressed to the sovereign (although were still submitted to the Commons in writing, and then sorted by 'Receivers' and heard by parliamentary committees known as 'Triers'). In 1305, nearly five hundred such petitions were presented.[6] Over time, as the power of the sovereign was eclipsed by that of Parliament, the form of the petition changed such that it came to be directed not to the sovereign, but to Parliament.[7] This shift also came to reflect the notion that in a democracy, parliament is answerable to the people. Such ideas have deep roots in the evolution of these institutions. An early form of parliamentary petition comes from the Tynwald – the legislature of the Isle of Man and the oldest continuous parliament in the world. Each year on Tynwald Day (which began in 1417), a citizen may approach Tynwald Hill and present a petition for redress of grievance, which a member of the Tynwald may request the legislature to consider.[8]

In the English Parliament, from the 14th century onwards petitions were used to initiate legislation, and indeed a large number of statutes originated as Commons' petitions. Petitions would be received and considered by the House of Commons and, if deemed suitable, judges would draft a statute by combining the petition with its response from the King.[9] As a British parliamentary committee recently noted, the 'importance of the practice of petitioning cannot be overstressed, as it was from medieval petitioning that gradually there emerged the procedure of legislation by both public and private bills'.[10]

4 Fred Naiden, *Ancient Supplication* (Oxford, 2006) 385.

5 Allan Johnson, Paul Coleman-Norton and Frank Bourne, *Ancient Roman Statutes* (Austin, 1961) 230–231.

6 Sir Gilbert Campion, *An Introduction to the Procedure of the House of Commons* (Macmillan, 2nd ed, 1947) 11.

7 Robin Handley, 'Petitioning Parliament' (1993) 21 *Federal Law Review* 290.

8 Standing Committee on Petitions, Parliament of Australia, *Making a Difference: Petitioning the House of Representatives* (August 2007) 50.

9 Campion, above n 5.

10 Select Committee on Procedure, *Second Report from the Select Committee on Procedure*, House of Commons Paper No 202, Session 1972–73 (1972) Appendix I.

This is reflected in the practices of the House of Commons today, whereby private bills, while now uncommon, are still raised by means of a petition.[11]

By the 17th century, petitioning had become a fixture of parliamentary life, so much so that the House of Commons formally recognised the right to petition in a pair of resolutions passed in 1669:

> That it is an inherent right of every Commoner of England to prepare and present petitions to the House in case of grievance; and of the House of Commons to receive them;
>
> That it is the undoubted right and privilege of the House of Commons to adjudge and determine, touching the nature and matter of such Petitions, how far they are fit and unfit to be received.[12]

Soon after, the right to petition was codified in the *Bill of Rights 1689*, which further secured the right by adding that 'all commitments and prosecutions for such petitioning are illegal'.[13]

Over the next two centuries, the number of petitions presented to Parliament grew, as petitioning came to be seen as an indispensable link between the people and their government, and indeed the only way by which commoners could place their concerns before their representatives. An example of a petition that succeeded in bringing a serious grievance to the attention of Parliament was lodged in the House of Commons in 1736 by 'Druggists, and other dealers in Tea … complaining of the unequal Duties upon Tea and the pernicious Practice of Smuggling.' In relation to the latter of those concerns, the petition alleged:

> [N]otwithstanding the regulations made by [an earlier tea excise Act], and the many penalties the smugglers of Tea and their accomplices were liable to by law, the Petitioners had fatally experienced, the clandestine importation of that commodity was so far from being prevented that it was carried on to such a degree, that the Petitioners had the strongest reasons to believe, near one half of the Tea consumed in this kingdom paid no duty.[14]

The petition continued that:

> [U]nless some remedy should be applied effectually to prevent that known evil, the Petitioners and all fair traders would be under extreme difficulties in carrying on their trade, by reason of the disadvantages they were under, from the practices

11 William McKay et al (eds), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 23rd ed, 2004) 969. Each year the House receives about one or two such bills, which are typically promoted by local councils or cities requesting expanded powers: see further United Kingdom Parliament, Private Bills <www.parliament.uk/about/how/laws/bills/private/>.

12 Sir Donald Limon and W R McKay (eds), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 22nd ed, 1997) 809.

13 *Bill of Rights 1689*, 1 Will & Mar, sess 2 c 2.

14 William Cobbett, *Cobbett's Parliamentary History of England: From the Norman Conquest in 1066 to the Year 1803* (T C Hansard, 1811) vol IX, 1045.

> of smuggling… [The petitioners therefore pray to] the House to take the premises into consideration, and give the Petitioners such relief, as to the House should seem meet.[15]

Once the petition had been read out, the House decided to 'resolve itself into a Committee of the whole House, to consider of the most effectual means to put a stop to the great and growing evil arising from the unwarrantable and illegal methods of importing Tea and other goods into this kingdom'.[16] Less than two months later, a bill establishing a comprehensive regime to prevent smuggling was introduced into the House of Commons. It was passed with amendments soon after as the *Offences against Customs and Excise Laws Act 1737*.[17]

As time went on, petitions became a victim of their own success. In the early 19th century, as political scientist Professor Colin Leys notes, 'petitions enjoyed an unprecedented boom as a political implement in the general conditions of rapid economic change, agricultural unrest, popular radicalism and incipient working class organisation'.[18] Whereas in the five-year period of 1785–89 an average of 176 petitions had been presented each year, in the five years 1840–44, an average of 18,636 flooded in annually, including massive petitions on the Corn Laws, the Poor Laws, Factory Legislation, and the enactment of a 'People's Charter'.[19] Because of a convention of parliamentary practice whereby petitions were presented at the beginning of each sitting of the House, the debating of petitions quickly came to dominate parliamentary business, thereby frustrating the programme of the government.

This state of affairs did not commend itself to the leaders of either of the two main political parties at the time, the Whigs and the Tories. In order to limit the extent of popular control of the legislative agenda, they embarked upon a campaign to tighten the regulations governing the presentation of petitions.[20] This culminated in a series of standing orders in 1842, preventing the presentation of petitions from giving rise to debate (except in rare cases).[21] Unwittingly, petitioners had contributed to the demise of their own favoured instrument, as 'the glut of petitions, many thousands in excess of what the tactical situation in Parliament required, created a climate of opinion in Parliament in which the "gag" rule and other expedients for side-tracking petitions were permitted to become established'.[22] This succeeded in demoting the petition to a mostly symbolic role to which, for the most part, it has been consigned ever since.

15 Ibid 1045–6.

16 Ibid 1046.

17 9 Geo 2, c 35.

18 Colin Leys, 'Petitioning in the 19th and 20th Centuries' (1955) 3 *Political Studies* 45.

19 David Judge, 'Public Petitions and the UK House of Commons' (1978) 31(4) *Parliamentary Affairs* 391, 392.

20 Ibid 393.

21 Ibid.

22 Leys, above n 17.

THE AUSTRALIAN EXPERIENCE

For most of the first sixty years of Australia's federal Parliament, petitions were a mere footnote. While 100 to 200 per year were presented in each of its Houses in the years following 1901, this quickly tapered off. Between 1908 and the end of the Second World War, the number of petitions per annum presented to the House of Representatives never surpassed 16,[23] while in the Senate, in thirty of the years between 1901 and 1968, no petitions were presented at all.[24]

This changed in the late 1960s when each of the Houses experienced a surge in the number of petitions being received annually, with thousands being presented in the House of Representatives and hundreds in the Senate. This continued for roughly the next 20 years. The variety of these petitions is almost as remarkable as their quantity, as Paula Waring recounts in her description of the period:

> There were petitions on the perceived evils of new technologies from television violence and mobile phone towers to internet gambling and pornography. There were calls for research into solar energy, learning disabilities, breast cancer, chronic fatigue syndrome and white tail spider bites. Petitioners asserted the need for political rights, land rights, humanitarian rights, children's rights, a bill of rights and plant variety rights. They took up the cause of political prisoners in Chile, logging in Sarawak, famine in the Ukraine and huskies in Antarctica.[25]

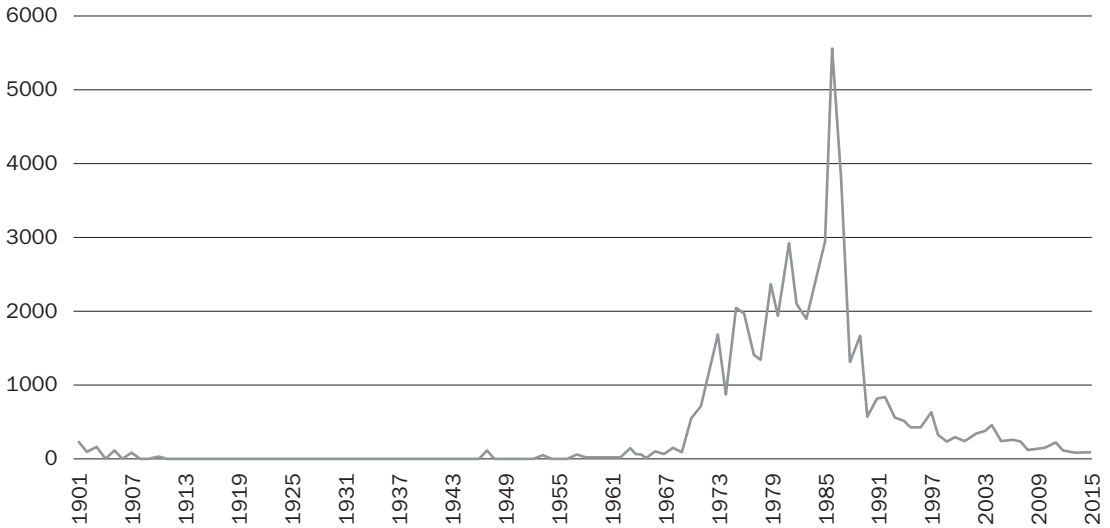
Then at the start of the 1990s, just as quickly as petitions had burst onto the parliamentary stage, they all but disappeared. The sudden nature of both the rise and fall of petitions can be seen in the following figure:

23 Sonia A Palmieri, 'Petition Effectiveness: Improving Citizens' Direct Access to Parliament' (Paper presented to the ASPG Conference, 23–25 August 2007, Adelaide).

24 Paula Waring, 'Is It Futile to Petition the Australian Senate?' (Papers on Parliament No 59, Parliamentary Library, Senate, 2013).

25 Ibid.

Figure 1: Number of petitions presented in the House of Representatives, 1901–2015



Several explanations have been offered for the rapid decline. One is that in the House of Representatives there had been a practice amongst petitioners of forwarding their petition to multiple MPs on multiple occasions, with a view to amplifying the impact of the petition in question, but also having the consequence of increasing the reported number of 'presentations' of petitions in the House.[26] This precipitated a rule that petitions could only be introduced on one day of the sitting week, thus leading to bigger groupings of sheets of petitions and lower reported numbers of presentations. However, even given such factors, it is clear that petitioning the federal Parliament dramatically went out of fashion. The annual rate of petitions dropped from 5,528 in 1986 to exactly 104 in each of the last three years.[27]

This decline was likely driven by factors such as disillusion with the effectiveness of petitions, general disengagement from the political process, and the proliferation of other means for obtaining redress, such as ombudsmen and administrative tribunals. Negative perceptions of petitions were evident even during their heyday, as is evident from Hansard. In April 1982, following a year in which the Senate had received its highest ever number of petitions, Senator Colin Mason said in debate, 'we all know that when petitions hit this place no further action is taken about them.'[28] Senator Robert Ray added his voice to this sentiment two days later:

> If people bring me a petition and say that they want to send a petition to parliament I simply say to them that it will be ineffective.[29]

26 I C Harris (ed), *House of Representatives Practice* (4th ed, Department of the House of Representatives, 2001) 595.

27 Chamber Research Office, Parliament of Australia, *House of Representatives: Petitions Presented Since 1973* (3 December 2015).

28 Commonwealth, *Parliamentary Debates*, Senate, 27 April 1982, 1544 (Colin Mason).

29 Commonwealth, *Parliamentary Debates*, Senate, 29 April 1982, 1684–5 (Robert Ray).

Such views have not gone away. As Senator Bob Brown observed in 1997:

> An enormous amount of effort goes into signing petitions, some of them with tens of thousands of signatures. Yet at the end of the day they have little above zero impact on the thinking of we senators.[30]

More recently still, in response to the Procedure Committee's inquiry into petitions in 2007, Rosalind Berry, who professed to being a serial petitioner, wrote in her submission that petitions 'seem to disappear into the bowels of Parliament House and, although we know they are presented to the House by the relevant Member, there is little or no feedback'.[31] The statistics support her concerns. From 1999 to 2007, 2,589 petitions were received by the House of Representatives, but only three ministerial responses were lodged with the Clerk.[32]

Parliamentary committees have been tasked with identifying the causes of, and solutions to, the decline of petitions in Australia. Eleven reports have been produced since the downturn began, most of them by the House of Representatives Standing Committee on Procedure.[33] These reports have led to a variety of recommendations, to which governmental responses have been mixed. Broadly speaking, proposals of a procedural nature have been adopted: for instance, most of the recommendations in the Procedure Committee's *Days and Hours* report in 1986, which were to do with the formal rules relating to how petitions should be presented, were implemented.[34]

By contrast, recommendations of a substantive nature have been largely ignored. A case in point is the proposal for an inter-committee referral power. In 1986 the Standing Committee on Procedure suggested that a power be given to consider the terms of petitions received and to make recommendations that petitions be referred to other House committees for further consideration. That recommendation was rejected on the ground that 'programming ought to remain the prerogative of the Government'.[35] In 1990, the Committee undertook a more concerted inquiry entitled *Responses to Petitions*, arguing again for an inter-committee referral power, as well as for a power to refer petitions to Ministers, with a requirement that a response be given within 21 sitting days. These recommendations were not adopted.

In 1996, the Committee renewed its recommendations from the previous report. The government did not respond. In 1998, another recommendation for an inter-committee referral power was, again, not adopted. That report, in examining the responsiveness of successive governments to reports on petitions and other reports of the Committee, noted politely that:

30 Commonwealth, *Parliamentary Debates*, Senate, 6 March 1997, 1426 (Bob Brown).

31 Berry, above n 1.

32 Standing Committee on Petitions, above n 7, 8.

33 Ibid, Appendix D.

34 Ibid.

35 Standing Committee on Petitions, Parliament of Australia, *Making a Difference: Petitioning the House of Representatives* (August 2007) 64.

> Members and others associated with committee inquiries expressed concern at the current procedures for responding to committee reports. Given the effort and expense involved in preparing submissions it was frustrating and disappointing that governments did not respond to reports in a proper and timely manner.[36]

Then in 1999, another in-depth appraisal of petitions was undertaken in the *It's Your House* report, again advocating for an inter-committee referral power. A first-term Howard government rejected the recommendation in terms that reaffirmed underlying problems with the petitioning process:

> The time and resources available for committees to undertake inquiries into matters is limited. Requiring specific references ensures that committee activities are not directed to matters which are not relevant to the priorities of the House or the Government, and which have little prospect of being acted on.[37]

No major inquiries took place in the following eight years. In 2007, however, in response to a wide-ranging terms of reference to inquire into 'all aspects of the petitioning process', the Committee handed down its landmark *Making a Difference* report. The report was so named in order to acknowledge that if petitions could not be expected to make a difference, then it would be better for the House to refuse to receive them, rather than 'raise false expectations'.[38] That report made sweeping recommendations for reform to the House of Representatives petitions process, of which the first two were the most significant:

> Recommendation 1: The Committee recommends that a petitions committee be established to receive and process petitions and to inquire into and report on any possible action to be taken in response to them.
>
> Recommendation 2: The committee recommends that where a petition has been referred to a Minister for response, the Minister be expected to table a response in the House within 90 days of its presentation.[39]

In January 2008, the newly elected Rudd government adopted these recommendations, as well as the majority of the other (more procedural) suggestions. The last recommendation, however, that an 'electronic petitioning system be introduced in the House of Representatives', was not adopted. In a nice piece of symmetry, the new Petitions Committee made only two substantive recommendations for reform in its first

36 Standing Committee on Petitions, Parliament of Australia, *Ten Years On: A Review of the House of Representatives Committee System* (1998) 4.16.

37 Australian Government, 'Government Response to the Report of the House of Representatives Standing Committee on Procedure: "It's Your House: Community Involvement in the Procedures and Practices of the House of Representatives and its Committees"' (October 2000) 2.

38 Standing Committee on Petitions, above n 7, vii.

39 Ibid xi.

three years of operation. The first was for the introduction of an electronic petitioning system;[40] the second was for an inter-committee referral power.[41] Neither was adopted.

Now in its ninth year of operation, the Petitions Committee can lay claim to a limited measure of success. Most significantly, Ministerial responsiveness has dramatically improved, with 65% of petitions presented since 2008 having received a response, compared to 0.001% in the decade before that.[42] It has also held 'round table' meetings with petitioners, and these meetings have sometimes been attended by government employees. The Committee has also succeeded in simplifying the process for submitting petitions by providing guidance on the formal requirements of petitions online and to anyone who contacts the Committee directly.

Nevertheless, the impact of these reforms should not be overstated. Petitions are still rarely, if ever, debated in Parliament. The number of petitions presented annually has continued to decline, and now at 104 per year is the lowest it has been since 1969.[43] Public interest in, and awareness of, petitions is also low. For instance, when the Committee set out in March 2010 to undertake a review of the petitions system since its inception, it announced the inquiry on its website, called for submissions by sending letters to all Members of the House of Representatives as well as to academics and other stakeholders, and placed an advertisement in *The Australian*. Despite this, the Committee received only one submission.[44] It came from the Clerk of the House. Even Ministerial responses, though more frequent, typically serve only to explain the government's reasons for refusing the request. As the Committee has noted: 'It is rare for the actions sought in petitions to be achieved.'[45]

The state of petitioning in the Senate is even more dismal. Its historical record of petitions has a similar contour to that of the House of Representatives, although it has dropped lower still: since 2007 the annual number of petitions presented has remained in the double digits, last year's tally being 25.[46] While in 1970 the Clerk of the House, James Odgers, recommended the creation of a Senate Petitions Committee 'with the special function of seriously considering petitions and the grievances of petitioners', that recommendation has never been adopted.[47] While the Senate also lacks a dedicated online page for filing electronic petitions, it does allow petitioners to print

40 Standing Committee on Petitions, Parliament of Australia, *Electronic Petitioning to the House of Representatives* (October 2009) xii.

41 Standing Committee on Petitions, Parliament of Australia, *The Work of the First Petitions Committee: 2008–2010* (June 2010) ix.

42 Calculations by authors based on data in Chamber Research Office, above n 26.

43 House of Representatives, Parliament of Australia, *House of Representatives Practice* (Department of the House of Representatives, 6th ed, 2012) Appendix 20.

44 Standing Committee on Petitions, above n 39, 4.

45 Ibid 1.4.

46 Parliament of Australia, *Petitions 2015* <http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/documents/pets/2015>.

47 Standing Orders Committee, *Report from the Standing Orders Committee Relating to Standing Committees* (Parliamentary Paper No 2, 1970) 19.

out and lodge petitions that have been collected on third-party websites.[48] However, given the low volume of petitions to the Senate generally, this allowance has clearly not restored the popularity of Senate petitions. A comprehensive analysis of Senate petitioning by Paula Waring in 2013 concluded that 'their impact is undeniably small'.[49]

LESSONS AND REFORMS

Australia's recent federal experience of petitions begs the question: if petitions rarely succeed in achieving substantive outcomes, and if people have lost faith in them as a useful tool for making their voices heard, then what ongoing purpose do they serve? Or in other words, why not abolish them? The answer is to be found in an evaluation not of the recent performance of petitions in Australia, but rather their potential. To arrive at this, it is necessary first to pause and consider the nature of the federal Parliament within Australia's constitutional framework. Of the three branches of government, it alone has an expressly democratic foundation, with ss 7 and 24 of the *Constitution* requiring that its members be 'directly chosen by the people'. Its purpose derives from, and its legitimacy depends on, its ability to represent the common will of the people. In turn, it confers that legitimacy onto the other branches of the government by virtue of their accountability to Parliament: the Executive through the notion of responsible government, and the Judiciary through its duty to interpret and apply legislation and through Parliament's power to remove federal judges.

In spite of this, there is a well-documented disjunction between the democratic ideals that Parliament ought to embody, and the way that it is operates and is perceived to operate in practice.[50] The legislature has been called inaccessible to outsiders,[51] unresponsive to the day-to-day needs of ordinary people,[52] and weak with respect to resisting the demands of the Executive and in holding that arm of government to account.[53] Petitions in their present form do nothing to ameliorate this impression, and if anything exacerbate community concerns about the unresponsiveness of Parliament. On the other hand, petitions could play a remedial role in this context, as a more effective system could give members of the public the chance to meaningfully raise their concerns for consideration by their elected representatives. A more effective

48 Parliament of Australia, *How to Lodge a Petition to the Senate* <http://www.aph.gov.au/Parliamentary_Business/Petitions/Senate_Petitions/senators>.

49 Waring, above n 24.

50 Janette Hartz-Karp and Lyn Carson, 'Putting the People into Politics: The Australian Citizens' Parliament' (2009) 3(1) *International Journal of Public Participation* 9.

51 Julian Glover, 'Time for a People's Parliament', *The Guardian* (online), 15 April 2002 <http://www.theguardian.com/politics/2002/apr/15/openup.parliament6>.

52 Simon Tatz, 'There's a Reason Our Political Class is Out of Touch', *ABC* (online), 21 August 2015 <http://www.abc.net.au/news/2015-08-21/tatz-there's-a-reason-our-political-class-is-'out-of-touch'/6713982>.

53 John Warhurst, 'What's the Matter with Parliament?', (Order of Australia Association-Australian National University Lecture, delivered 31 October 2011) <http://www.theorderofaustralia.asn.au/downloads/ACT20111031-OAA-ANULectureNotes.pdf>.

petitioning process could contribute to a perception that parliamentarians do in fact listen to electors, and not only at election time.

Such potential is being realised in other jurisdictions that have until recently experienced a similar public indifference to petitions. The best example – because the improvement has been the most pronounced – is the United Kingdom. Before 2015, petitions to the UK's House of Commons had been relegated to a parliamentary backwater: in 1998–99 for example, only 99 petitions were lodged, 34 of which called for a ban on fox-hunting, while the remainder were predominantly concerned with local issues. [54] These petitions were often not read on the floor until late at night, and then hurriedly.[55] As in Australia, Members were precluded from debating petitions (except under very unusual circumstances), and Ministers were not required to respond.[56] A report of the House of Commons Procedure Committee in 2008 noted that 'very often the outcome of the procedure is perceived by petitioners to be inadequate'.[57]

In May 2014, after a decade of false starts, the House of Commons agreed to a motion supporting the establishment of a 'collaborative' e-petition system, the mechanics of which were worked out over the following year.[58] The central feature of an 'e-petition' or 'electronic petition' system is that members of the public may visit a purpose-built website allowing them to create a petition online, with supporters adding their assent by visiting the page for the particular petition and 'signing' it (by entering their name, email address and postcode). The UK system is collaborative in the sense that it is jointly hosted by Parliament and the Executive, subsuming an earlier 'No. 10 e-petition site' which enabled online petitions to the government only. The new system is overseen by a purpose-created Petitions Committee, which has a substantive role to play in determining how petitions ought to be progressed. Under this system, any petition receiving 10,000 signatures is guaranteed a response by the relevant Minister, while any petition receiving 100,000 signatures is considered for parliamentary debate.[59]

The results so far have been striking. Since the new site went live on 20 July 2015 until early June 2016, 10,512 petitions have been submitted online. If this rate continues, it will equate to nearly 12,000 petitions per year, compared to an average of 316 per year between 1989–2010.[60] The only figures comparable to these in the history of the

54 Robert Blackburn and Andrew Kennon, *Parliament: Functions, Practice and Procedures* (Sweet & Maxwell, 2nd ed, 2003) 538.

55 Ibid.

56 Ibid 381.

57 UK House of Commons Procedure Committee, *Public Petitions and Early Day Motions* (First Report of Sessions, 2006–07) 8.

58 House of Commons Procedure Committee, *E-Petitions: A Collaborative System*, House of Commons Paper No 235, Session 2014–15 (2014) 3.

59 Ibid 20.

60 Calculations by authors based on House of Commons Information Office, Public Petitions, Factsheet P7 (August 2010) <http://www.parliament.uk/documents/commons-information-office/P07.pdf>.

House of Commons are those of the mid-19th century.[61] Since the reforms, there have been 228 petitions which, by virtue of amassing enough signatures, have received a Ministerial response, while 26 have been debated in Parliament, the most famous example being the petition to ban Donald Trump from entering the UK. While it is too early to assess public attitudes to the new petitions model, the enormous rise in the extent of engagement shows a high level of public willingness to engage in this channel of communication. It demonstrates just how effective a petitioning system can be as a form of civic expression in a Westminster democracy.

Australia can learn three lessons from the experience of the UK (and other jurisdictions that have adopted elements of the British strategy). First, an e-petition system, ideally hosted jointly by the House of Representatives and the Senate, is long overdue. As many other jurisdictions have already realised – including Scotland, Germany, Canada, Queensland, Tasmania and the ACT – a move from written to electronic petitions (usually with provision for the old method still to be followed by those who prefer it) can deliver a boost to petition activity and substantially reinvigorate public engagement in parliamentary affairs, particularly among young people. This can have a wider benefit: modern parliaments that fail to keep up with technology risk exacerbating the impression that they are 'out of touch' with the people.[62]

Queensland provides an example of this. Its Parliament in 2002 became the first jurisdiction in Australia to introduce an e-petition system. From early on, the system enjoyed a 'high level of support … in the community and among Members of Parliament'.[63] As the Clerk of the Queensland Parliament attested in his submission to the federal Petitions Committee in 2009, the number of petitions lodged annually, as well as the number of signatures each petition received, began to increase once the new system was introduced.[64] It is worth noting that this increase applied to both written and electronic petitions, suggesting that the introduction of an e-petition system can have a spill-over effect on traditional petitioning. Similarly, the assessment offered by Paul Williams of Griffith University at the time of the Petitions Committee's inquiry was that e-petitions were 'growing, undermining the claim that Queenslanders feel so disenfranchised that they are "dropping out" of the political system', and that they had become 'effective instruments for voicing public opinion on executive policy'.[65] Two years after the Queensland system began, Tasmania followed suit with

61 House of Commons Information Office, *Public Petitions*, Factsheet P7 (August 2010) <http://www.parliament.uk/documents/commons-information-office/P07.pdf> 7.

62 Sonia Palmieri, 'Petition Effectiveness: Improving Citizens' Direct Access to Parliament' (2008) 23(1) *Australasian Parliamentary Review* 121, 132.

63 Michelle Hogan, Natalie Cook and Monika Henderson, 'The Queensland Government's E-Democracy Agenda' (Paper presented at the Australian Electronic Governance Conference, 14 April 2004) 8.

64 Standing Committee on Petitions, above n 38, 6.2–6.4.

65 Ibid 6.9, 6.11.

a system expressly modelled on that of its northern counterpart, even using the same software.[66] In 2013, the ACT introduced an e-petitions system of its own.[67]

The state of the website for the Australian Parliament strengthens the case for an e-petitioning system, along with other changes that would make the process more accessible.[68] On the homepage of the Australian Parliament, the link to the Petitions part of the site is buried at the foot of the page among 45 other links. Once reached, the Petitions page provides links to various further resources, including a guide on 'How to Petition the Senate', but no corresponding guide for the House of Representatives. For that, the user must click on a link to the 'House of Representatives Petitions' page, which resembles a heading to a paragraph of descriptive text rather than a link. That page then offers a large volume of petition-related information in small text, as well as ten links to other petitions resources, which are scattered around the page. The system is so difficult to navigate that one might even wonder whether its inaccessibility is designed to discourage would-be petitioners.

The exceptional position of the federal Parliament has perhaps become so stark that changes are afoot. In February 2015 the Australian government finally responded to a report of the Petitions Committee, tabled some six years earlier, that had recommended the adoption of an e-petitions system.[69] The government stated that it 'supports the recommendation in principle, but notes that there may be resource implications'.[70] Any such reform though has still not eventuated. An update from the Speaker of the House on 22 October 2015 did at least indicate:

> I inform the House that the Department of the House of Representatives will work with the Department of Parliamentary Services to develop an electronic petitions website and system for the House… I anticipate that the electronic petition system will be available early in the new year. The work will be done within existing resources and will involve consultation with the petitions committee and the secretariat to ensure that the system meets requirements. Once the system is developed, I will update the House. The House will need to consider amendments to the standing orders to establish an e-petitions system for the House.[71]

This will be a useful improvement to the federal petitioning process. Ideally, such a system should be jointly hosted by both houses of Parliament rather than just the House of Representatives, as the Senate, though accepting electronic petitions from

66 Palmieri, above n 22, 12.

67 ACT Legislative Assembly, Parliament of the Australian Capital Territory, *Petitions* <http://www.parliament.act.gov.au/learn-about-the-assembly/fact-sheets/petitions>.

68 Parliament of Australia, *Welcome to the Parliament of Australia* <http://www.aph.gov.au/>.

69 Standing Committee on Petitions, Parliament of Australia, *Electronic Petitioning to the House of Representatives* (October 2009).

70 Letter from Christopher Pyne MP to Dr Dennis Jensen MP, 10 February 2015 <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=petitions/epetitioning/govresponse-e-petitioning.pdf> 2.

71 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 2015, 6009 (Tony Hawthorn).

third-party websites (which it expects to be printed out and delivered to a Senator), also lacks its own locally hosted e-petitions tool.[72] A harmonised system shared by the two Houses could no doubt reduce the possibility of confusion and thereby make the system simpler and more accessible. There are good reasons to expect that the community would use such a system. There is a growing public appetite for online petitioning options, as evidenced by the rapid growth of e-petitioning organisations such as GetUp! and Change.org: indeed a survey conducted last federal election recorded that 29% of Australians had signed an electronic petition in the past five years, more than double the percentage a decade earlier.[73]

The second lesson that Australia can learn from the UK system and its counterparts is the value of giving the Petitions Committee substantive work to do. The House of Representatives Petitions Committee has a remit under the Standing Orders to 'receive and process petitions, and to inquire into and report to the House on any matter relating to petitions and the petitions system'.[74] It might have been thought that a power to inquire into 'any matter relating to petitions' would be broad enough to enable the Committee to consider the actual terms of petitions, and produce reports offering suggestions as to what substantive action should be taken in response to the concerns of petitioners. As the Committee has noted, 'the Standing Orders bind the Committee to operate within the formal arrangements of the House but they do not prescribe how it should conduct its business', but rather, leave it with the 'latitude to determine how it would fulfil its role most effectively'.[75]

Instead of availing of itself of this latitude, the Committee has interpreted its functions narrowly in favour of a confined, mechanical role:

> The fundamental role of receiving and processing petitions remains the most significant part of the current Committee's work, with most private meeting time devoted to assessing petitions for compliance and deliberating over correspondence on petitions.[76]

As for its power of inquiry, the Committee has interpreted this as enabling 'the Committee to review and report on *its activities*' and 'to inquire into specific aspects of *the petitioning system*'.[77] It does not see its power of inquiry as extending to the issues that petitioners raise. Indeed, the Committee has made explicit that it 'cannot … resolve matters raised in petitions', and 'the Committee Chair regularly advises witnesses at round table meetings and the House that this is beyond the role of the

72 Senate, Parliament of Australia, *Senate Petitions* <http://www.aph.gov.au/Parliamentary_Business/Petitions/Senate_Petitions>.

73 Ian McAllister and Sarah M Cameron, *Trends in Australian Political Opinion: Results from the Election Study 1987–2013* (Australian National University, 2014) <www.ada.edu.au/documents/aes-trends-pdf>.

74 Standing Committee on Petitions, above n 39, 2.1.

75 Standing Committee on Petitions, Parliament of Australia, *The Work of the Petitions Committee: 2010–2013 – An Established Part of the Democratic Process* (2013) 7–8.

76 Ibid 2.7.

77 Ibid 2.8 (emphasis added).

Committee'.[78] Similarly, the weekly statement given to the House by the Chair of the Committee on Monday evenings is a mundane affair, with the titles of that week's petitions read out, alongside the occasional update on petitioning statistics generally – but with no petitions read out in full, and with no further material that has any connection to the petitioners' concerns.

There is more that Petitions Committees can do. For example, the remit of Scotland's Public Petitions Committee (PPC) is to 'consider and report on – whether a public petition is admissible; and what action is to be taken upon the petition'.[79] It has a wide range of actions it may pursue for those ends:

> The Committee may consult the Executive and/or other public bodies to request additional information or clarification, or to request that a minister or other official appear before the Committee to give evidence. It may refer petitions to relevant subject committees for information, consideration or action; or it may recommend that a petition be debated in Parliament.[80]

As a matter of course, the PPC normally begins its consideration of new petitions by taking further evidence from the lead petitioner and other witnesses.[81] For example, in July 2011 the PPC received a petition lodged by Martin Crewe calling on the Scottish Parliament to 'commission new research on the nature and scope of child sexual exploitation in Scotland' and to develop 'new guidelines' on tackling that problem.[82] Two months later, the Committee took evidence from the chief petitioner and another witness, agreeing at that meeting to 'write to the Scottish Government, Child Exploitation and Online Protection Centre, Association of Chief Police Officers Scotland (ACPOS), a selection of local authorities (Glasgow, Edinburgh, Highland) and NHS Scotland seeking responses to points raised in the petition and during the discussion'.[83] It followed this up with further letters the following month. After taking additional evidence and producing a scoping paper on the issue, it launched a public inquiry, involving the convening of public panels, two tranches of evidence, the production of an official committee report containing substantive recommendations for reform, and a series of responses from the Scottish government, including ultimately the creation of a National Action Plan on Child Sexual Exploitation.

78 Ibid 2.9.

79 Public Petitions Committee, The Scottish Parliament, *Remit & Responsibilities* <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29875.aspx>.

80 Karen Ellingford, 'The Purpose, Practice and Effects of Petitioning the Victorian Parliament' (2008) 23(2) *Australasian Parliamentary Review* 86, 109.

81 Professor Derek Birrell, Written Submission to the Committee on Procedures, *Review of Public Petitions Procedures*, 2014, <http://www.niassembly.gov.uk/globalassets/documents/procedures/inquiries/public-petitions-procedures/6.-professor-derek-birrell---university-of-ulster.pdf>

82 Public Petitions Committee, The Scottish Parliament, *PE01393: Cut Them Free: Tackling Child Sexual Exploitation in Scotland* <http://www.scottish.parliament.uk/GettingInvolved/Petitions/PE01393>.

83 Ibid.

Whatever the merits of the policy involved in that plan and any subsequent legislation, a petitioner in that situation would be hard-pressed to feel that their concerns had not been taken seriously. As the Scottish Parliament's Presiding Officer, Mr George Reid MSP, has stated in regard to the PPC's process: 'This is a very innovative way of engaging with the public. The agenda … is set entirely by the public and I think that's one of the best things that it has in its favour.' [84] Similarly, the UK Petitions Committee has a broad remit: for instance, it announced an inquiry into funding for research into brain tumours on 20 October 2015.[85] An enlargement of the Australian Petitions Committee's remit to a level approximating that of its contemporaries would have significant potential to breathe new life into the petitions process in Australia. At the very least, the Petitions Committee should be granted the inter-committee referral power that it, and the Procedure Committee before it, has been requesting now for 30 years.

The third and final lesson from other jurisdictions is the value of having guaranteed outcomes for petitions that reach certain thresholds of signatures. As mentioned above, the UK is the leading model in this respect, with its promise that any petition receiving 10,000 signatures will 'get a response from the government', while any petition receiving 100,000 signatures 'will be considered for a debate in Parliament'.[86] Compliance with the first requirement has been high, with 93% of petitions that contain 10,000 signatures so far having received responses, and more than two thirds of those on the waiting list having been on it for less than a month.[87]

While the words 'will be considered for a debate in Parliament' do not appear to offer much of a guarantee, the Committee in practice has been predisposed in favour of holding debates. Indeed, of the 41 petitions that have passed the threshold so far, 26 have led to a debate, while for three petitions a debate has been scheduled.[88] To date, there have been ten petitions that the Committee has decided not to debate, representing slightly less than a quarter of all petitions passing the signature threshold. This is in line with Committee policy, which states:

> Petitions which reach 100,000 signatures are almost always debated. But we may decide not to put a petition forward for debate if the issue has already been debated recently or there's a debate scheduled for the near future. If that's the case, we'll tell you how you can find out more about parliamentary debates on the issue raised by your petition.[89]

84 Ellingford, above n 66, 109.

85 Petitions Committee, Parliament of the United Kingdom, *Funding for Research into Brain Tumours* <http://www.parliament.uk/business/committees/committees-a-z/commons-select/petitions-committee/inquiries/parliament-2015/funding-for-research-into-brain-tumours/>.

86 Ibid 20.

87 UK Government and Parliament, *Petitions* <https://petition.parliament.uk/petitions?state=awaiting_response>.

88 There are a further two petitions that have passed the threshold and on which a debate decision is pending.

89 UK Government and Parliament, *How Petitions Work* <https://petition.parliament.uk/help>.

A recent example is a petition received in 2015 (bearing 111,129 signatures) which called for the UK government to scrap its plans to force small businesses and self-employed people to complete quarterly tax returns.[90] That petition came before Parliament on 25 January 2016 in a debate lasting over three hours. The tone of the debate, which can be viewed online,[91] was respectful. Some 20 Members spoke, and the quality of speeches was of a generally high standard. Again, whatever the ultimate outcome, there is value in serious public deliberation of this kind on issues of concern to a broad segment of the community.

NSW also introduced a system in 2013 whereby Ministers are required to lodge a response to any petition with 500 or more signatures, while Parliament is required to debate any petition with 10,000 or more signatures.[92] Such a debate was held on 13 August 2015 after 12,400 petitioners called on the Parliament to ban single-use plastic bags in New South Wales on environmental grounds. Of particular note was the positive contribution of the Minister for the Environment, Mark Speakman SC MP, who embraced the issue, stating that 'the Government is committed to addressing this challenge', and detailing the next steps that it would take.[93]

By contrast, at the federal level in Australia there are no guaranteed outcomes for any petitions, regardless of how many signatures they receive. The expectation that Ministers will respond to all petitions within 90 days is only that: an expectation. Although there has been significant improvement since 2008, some 35% of petitions since then have received no response.[94] Nor are there debates on petitions, as Standing Order 119(a) provides that 'no discussion upon the subject matter of a petition is allowed at the time of its presentation'. This prohibition can be lifted if leave is granted or the standing order suspended, however it appears that this has never occurred.

During its 2010 inquiry, a Member suggested introducing a measure providing 'opportunities for backbench Members to debate petitions in the House or in the Main Committee'. The Committee declined to recommend such a reform, as it 'might subject Members to unreasonable pressure from petitioners to propose a motion and to advocate a particular stance'.[95] Similarly, the Committee's 2013 report mentions the idea of a signature threshold beyond which debate would be considered. It rejected the idea, suggesting instead that a future incarnation of the Petitions Committee could begin writing regularly to the Selection Committee to notify it of petitions received in

90 UK Government and Parliament, *Petition: Scrap Plans Forcing Self Employed & Small Business to Do 4 Tax Returns Yearly* <https://petition.parliament.uk/petitions/115895#debate-threshold>.

91 Parliamentlive.tv, *Monday 25 January 2016* <http://parliamentlive.tv/Event/Index/33734d0f-5461-4fa4-9c1c-3d0db3798d55>.

92 Legislative Assembly, Parliament of New South Wales, *Petitions* <https://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/FactSheetNo16>.

93 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 August 2015, 2653 (Mark Speakman).

94 Above n 40.

95 Standing Committee on Petitions, above n 39, 3.17–3.18.

the last month, allowing the latter Committee to allocate times for the discussion of petitions during private Members' business. Such a mechanism would 'avoid the need to include elaborate mechanisms in the Standing Orders directly linked to petitions... [and] the potential for disappointment and manipulation if particular numbers of signatories, for example, were set as guaranteeing some kind of debate'.[96] Such responses are unpersuasive in light of the successful, recent experience of other jurisdictions, especially the UK.

The promise of substantive engagement from the Executive and Parliament is a goal of all petitions, yet the national system provides no guarantees of this happening. Not surprisingly, many see petitioning as a 'waste of time' because 'petitioners spend a considerable amount of time and effort in preparing and circulating petitions, only to receive nothing in return'.[97] Likewise, in a debate on petitions in the Canadian House of Commons in 1994, it was argued that the fact that petitions were being dismissed regardless of the number of signatories or the importance of the issue was 'really a slap in the face for both the signatories and for democracy'.[98] Providing clear pathways and outcomes by way of executive responses and parliamentary deliberation is the appropriate way of responding to such concerns.

CONCLUSION

The right of petitioning Australia's federal Parliament is in a poor state. Engagement with the process is at a low ebb, and there is much cynicism about what, if any, utility petitions now have. The few petitions that are lodged with the Petitions Committee are never debated, rarely acted upon, and frequently not even responded to by government.

The reality of petitioning the federal Parliament belies its potential. The mechanism can play an important and useful role in Australian democracy by connecting the community with their elected representatives and government. At a symbolic level, petitions are a manifestation of the principle that the legitimacy of Parliament derives from the will of the people. Practically speaking, they are the only formal avenue by which the popular will can be conveyed directly to Parliament outside of elections. History shows that they can be a highly effective way of doing this, generating substantial debate and catalysing new legislation. However, history also shows that where the influence of petitions becomes too great, there is a risk of Executive pushback and a disabling of the mechanism entirely.

In Westminster-tradition jurisdictions where Executives not infrequently exercise a dominating influence over parliaments, recent comparative experience shows that petitions have the potential to restore public enthusiasm for engagement with Parliament. Jurisdictions within Australia and abroad have wagered successfully that

96 Standing Committee on Petitions, above n 62, 3.41.

97 Ellingford, above n 66, 112.

98 Canada, *Parliamentary Debates*, House of Commons, 21 February 1994, 1583 (Ian McClelland).

giving petitions a more significant role would signal to members of the public that Parliament and the Executive are prepared to hear their grievances, and to respond meaningfully to them. Similarly, creating online tools that enable petitioning has succeeded in enhancing the utility of the device and transparency in how the legislature deals with issues raised.

Our exploration of this issue has shown that the current moribund status of petitioning in the federal Parliament can be remedied. In particular, the experience of comparable jurisdictions supports the need for the following reforms:

1. Establishing a joint e-petition system for the House of Representatives and Senate;
2. Empowering the Petitions Committee to inquire into and engage substantively with the issues raised in petitions; and
3. Setting signature thresholds beyond which petitioners can expect a Ministerial response or the holding of a parliamentary debate.

These reforms offer the promise of reviving the dying democratic tradition of the petition in Australia's federal Parliament. At a time when disenchantment with politics is high, this would be a welcome development. It would provide a more effective means by which members of the public can have their voice heard in Parliament and by government. This might assist in building confidence in the role of Parliament and more broadly Australia's democratic traditions. It might also alleviate the frustration and anger felt in sections of the community that their concerns are being ignored, and that there is no effective way of bringing these to the attention of their elected representatives.

Minority Government: Non-ministerial Members Speak about Governing and Democracy

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ABSTRACT

The complex composition of the Australian Senate, along with the relative influence of micro-parties on legislative outcomes, has recently resulted in renewed major party calls for electoral reform. However, government majority to pass legislation through both houses of parliament without negotiation with smaller parties or independents has been rare in Australia over the last three decades. What then is the view of those outside of the leadership but inside of the legislature in relation to minority arrangements? This paper interviews experienced parliamentarians from across the political spectrum about their views on minority government and democracy in Australia. Hence, the paper provides suggestions on what it takes to make minority government work, as well as views on the urgency for electoral reform. In doing so, it also reveals varied interpretations of the relationship between the executive and the parliament within the Westminster model. Such insights will be of interest to both those working within parliament, those pursuing parliamentary reform and those seeking a more thorough understanding of minority government in Australia and other Commonwealth nations.

INTRODUCTION

Australia has experienced minority government in at least one house of parliament for all but three of the last thirty years. During this time, minority government has been presented in the media as an unwelcome obstruction[5, 7] and linked to a broader disillusionment with politics and democracy.[16, 20] Recently, political leaders have stated that the need to negotiate with parliamentarians outside of the major parties is a sign of government illegitimacy[1, 2, 19]. Meanwhile, Australian cartoonists have sketched 'balance of power' MPs as clowns[12], cowboys[11] and colossuses[10]. If one accepts the underlying assumption of these popular depictions, then the only good government is one that has majority in both houses and does not need to negotiate outside of its major party.

Such views are consistent with the principles of the Westminster model, which is often used to refer to the Australian parliamentary system. This model emerged in the late 19th Century as a conceptual framework to describe a political system taking

shape in Great Britain. Since that time, this model has evolved to become a normative measure of how parliaments should operate and how political leaders should relate to citizens in Commonwealth nations[9]. Central to this model is achieving strong and stable government through one party majority, strict party discipline and ministerial responsibility[8, 13]. In this model, parliamentary sovereignty is ceded to the government executive with the role of the non-ministerial parliamentarian being one primarily of scrutiny and review[9]. Further, political scientists have identified Duverger's Law at work in Westminster models. This is a principle that emphasises that 'first past the post' (FPP) systems will develop into two-party systems[3]. The assumed outcome of this is the reduction of the number of seats accessible to (and hence influence of) minor parties or independent parliamentarians[15]. Hence, it depicts an approach to making parliament more governable and protecting it from competing individual interests[13]. In theory, there should be little to no place for non-major party parliamentarians in legislating or policymaking within the Westminster model.

Although Australia has preferential voting in the House and proportional representation in the Senate (rather than FPP systems), the Westminster model has still been used to describe and assess the Australian parliament[17]. In this view, the democratic role of parliamentarians is to recognise the mandate of government, which is to deliver the policy that it promised when it won the support of the majority of the citizenry at the federal election. However in practice, minor parties and independents have extracted legislative and policy outcomes from government in exchange for their vote over the last thirty years[16, 18]. This raises important questions for the Westminster model as a comprehensive descriptive tool in the growing number of Commonwealth nations that experience minority government in some form[17]. For instance in Australia, given the significant autonomy and legislative powers of its Senate[14], does a majority in the House of Representatives represent a mandate across the parliament? To what extent is the role of parliament to facilitate the legitimacy and efficiency of the executive or is it to promote democratic representation[9]? Where do non-ministerial parliamentarians see their place within a Westminster-style system? In this paper, we draw on interviews with seven former federal parliamentarians to consider these questions and provide some insight into how they understood and approached their role within minority government in Australia.

METHODOLOGY

Central to the selection of participants in this study were their conforming to the characteristics of the 'marginal member', who is "the non-ministerial member of parliament whose discretionary support is needed to turn the governments' policy ideas into the laws of the land that shape public policy action"[16:9]. This definition is built on median voter theory which assumes that the major party's public positions will gravitate toward the mid point of voter attitudes, which in the context of minority or slim majority government, will give the deciding vote to those on the margins of the bell curve. Marginal members are non-ministerial members and may be on the inside margin of a

major party (where crossing the floor results in a change of outcome) or they may be a crossbencher outside the major parties (where a single vote may be decisive). They may include members of caucus policy committees, backbenchers in parliamentary committees, opposition members, members of minor parties, independent members, and even former ministers—all of whom can play a determining role in supporting, stalling or stymieing the legislation that underpins public policy. Importantly, marginal members may or may not be in marginal seats because their marginality comes from their place in relation to major party policy positions, rather than their margin in their electorate.

To recruit participants we used our existing networks to identify federal parliamentarians that fitted the above definition. Participants were invited from across the political spectrum[22] to counter for party bias or over-emphasis on the influence of non-major party members. All participants were former parliamentarians, which enabled responses that were less tainted by the need to address contemporary political demands (such as getting re-elected). All were invited by direct email and only one potential participant (Labor) withdrew due to family commitments. Semi-structured interviews were conducted between August 2013 and November 2014 according to a set interview protocol (see Appendix 1) and interviews lasted between one and two hours. Although much of our focus was the 43rd and 44th Parliaments, participants were free to reflect on their experiences. The resultant interviews were professionally transcribed and the transcription sent to the participants for consideration and editing before analysis.

Once returned, the transcripts were subjected to two rounds of thematic coding. The first round was deductive and identified extracts that matched their potential role in relation to minority government as described by the boxes of the marginal member heuristic (see Appendix 2). The first part of the results section is the product of the findings from this analysis. The second round of analysis was inductive and grouped extracts around common themes across the transcripts. This is examined in the subsequent part of the results section as part of a consideration of marginal member views on governance, representation and democracy.

RESULTS

Marginal members on their role in parliament

The formal avenue for marginal members to create policy is through Private Members Bills (PMBs). Since 1985, there have been only twelve PMBs that have passed both houses of federal parliament, which makes this largely unsuccessful as a direct strategy. However, two crossbench PMBs received Royal Assent in the 43rd Parliament, which former Independent MP, Rob Oakeshott, saw as an important achievement:

> So in the lower house, I hope people look at that private motions and bills that were put up, but also that were voted on, and I think it's somewhere around the 130 were

> actually voted on. That's unheard of in recent majority parliaments. But there was not only private members' time that was genuine, with genuine bills being brought in, but that they were also brought to their conclusion, and some were successful.

As several of our interviewees noted, PMBs can also have an important role in indirectly shaping policy through the media. Meanwhile, former Coalition Senator Judith Troeth recalled two examples of how cross-party PMBs can be used effectively by marginal members:

> I can give you instances of where cross-party legislation was important in getting things through: for example, the availability of the RU486 abortion drug to women in Australia, which had previously always been vetoed by the Health Minister. Myself, a National Party Senator, a Labor Party Senator and a Democrat Senator put forward a private member's bill [in 2005] that shifted authority for [approval of] RU486 to the Therapeutic Goods Administration, rather than the Minister. People thought we would never get it through. I think the Prime Minister was confident it would not get through the Lower House. [However] it passed the Upper House and it passed the Lower House. We achieved that through cross-party action.

Another cross-party avenue available to marginal members is through parliamentary committees. Former backbench ALP MP, John Langmore, reflected on his role in establishing house committees:

> When I'd been working with [Prime Minister] Gough [Whitlam] in 76 and 77, we had talked then about [setting up committees] in the House. In fact, [Prime Minister] Hawke put in the policy speech in 87 that we would introduce a comprehensive committee system and I picked that up and ran with it. When I was chairing the Environment Committee we agreed that we would look at what was happening in research and the big idea we took up was the adequacy of the Protected Area system… the question was, were all the major ecosystems in Australia represented in sufficient size to ensure their survival in Australia? That's quite a technical scientific question so we got various scientists to help articulate what sort of principles we should be attempting to use and then we used one or two of them in help draft the relevant section of the report. It got a moderately good reception from both parties, and the size of the protected area system has increased significantly since then, not just because we recommended it of course, because lots of people have been pushing for it, but that was an attempt to try and get [an] orderly scientifically sound basis for that system. So there were many issues that one could take up through committees if one was kept out of the Ministry, but it was a way of stirring the pot a bit.

Troeth saw several avenues of influence for backbench marginal members through parliamentary committees:

> Committees usually debate draft legislation. I think there is an instance quite recently of a backbench committee rejecting something the Minister brought to them [i.e., changes to Medicare co-payment legislation]. That is exactly the sort

> of thing that I mean. I thought that was extremely courageous given the heat in this argument.

Oakeshott also discussed the unique house committee arrangements within the minority parliament under Prime Minister Gillard:

> So I got deeply involved in any committee I could get my hands on for that reason. It was nuts, but it actually worked to my advantage in the end. After about a year of that nuttiness, I was pretty confident I knew more about what was going on than most, because I was seeing issues from more than just one angle as they progressed through the parliament. So, you know, I was getting some early intel from conversations with government of picking up what was happening through the bipartisan committee structure, I was participating in negotiations on the floor of the parliament, and then I was listening and hearing what was happening in the media and in the corridors. And in fact after about a year I found I was providing information to key decision makers, rather than them providing me information at times.

Tony Windsor had this to offer:

> I think that's the seventh or eighth parliament I've been in... and I've never been in a parliament where the committee system has worked so effectively.
>
> And there's a reason for that. I think the hung parliament and the fact that the executive wasn't able to direct the outcomes of committees empowered everybody, irrespective of what political party they were involved in. It gave them some degree of power that "We really might be able to do something about this issue".
>
> The Senate Committee, because of that hung nature too, I think they can probably even be more constructive, you know, in the normal parliament.

Former Democrats' leader, Andrew Bartlett, offered this insight on Senate Committees:

> I mean you know there's the mechanism of the Senate Committee Inquiry, of course, and getting agreement to that, and raising awareness amongst the other parties about issues they mightn't know much about, and convincing them of the need for action and stuff like that. Which is really behind the scenes, but it's sort of a different mechanism to try and get action. I mean the one that actually sticks out for me was Andrew Murray's work on the forgotten Australians and kids in institutions. That pulled in and captured the attention of others.

The more conventional pathway for marginal members to shape policy is by amending legislation, or more influentially insisting on changes in return for their support. There is no need for numerous examples of this strategy in action. However, what should be noted was the agreement around an underlying principle of genuine and trusting relationships with ministers and between parliamentarians. Brown, Oakeshott and Windsor all made note of this in their interviews. Further, Oakeshott also observed that effective governments provided information and negotiated changes with marginal members before legislation was introduced.

Former National Party Senator Ron Boswell also stressed how he sought to give voice to those working at the coalface of regional industry and explained how the members of a minor party partner could have influence within a coalition:

> I think anyone has freedom to express their views either in the Liberal or the National Party. I always took my arguments into the party room and argued them on the floor of the party room, and then tried to influence that way… I mean, you've got tremendous clout in the [joint] party room where you can get up and actually shift opinion… you don't have the numbers, but Cabinet is supposed to be a non-political thing where you can just argue the merits of the case.

Often the strategy of marginal members is to take the direction of a particular piece of legislation and extend it to be more inclusive or comprehensive. Brown described this strategy in relation to indigenous issues:

> I know Labor and Liberal had been talking about this for years but there was no action, and there was to be no sign of action on the Constitutional process for recognising Indigenous Australians and getting rid of discrimination against them. But I, in the process of negotiation with Julia Gillard, moved strongly to get up the process of moving towards modernising as best we could, the Constitution of relegating Aborigines to second place, to second-class citizenship.
>
> It wasn't cleared up by the 1967 Referendum when giving Aboriginal people the vote and it needed clearing out. And she took that on board. It was Labor policy, but there was no way that it was going to be moving towards a Referendum as we have now, except I insisted on it as part of that negotiation.

What is clear here is that an important feature of extending or diverting a policy agenda is knowing how and where. As Oakeshott confessed:

> And that's why at the start of this process I took a very pragmatic position, and that was to really only push reforms that both major parties were locked into. That was the whole point of the group hug the day before the formation of government. You know that the ideas were theirs, rather than some snotty crossbench trying to control the agenda.

Both Windsor and the Greens claimed credit for extending (or some would say diverting) the Labor policy agenda into carbon pricing. Windsor admitted:

> You know, I've often said that I'm as responsible as the Greens for something having to be done in terms of climate change issue, because it was a determiner in my mind of choice in relation to who could form a Government. If she {Prime Minister Gillard} wanted to form a Government, she would have to do something in terms of direct pricing on carbon or she would not have got my support.

Brown recalled:

> The Prime Minister had said in the run to the election, a week before the election, there will be no carbon tax and there will be no carbon pricing until after the 2013

> election. So we were left with a void period of three years. But we were keen; the carbon price was our top priority.
>
> She'd made the commitment, we had gone to the election committed to a carbon price. The gap was closed when both the Prime Minister and I, at the behest of Christine Milne who'd come up with the idea suggested a carbon price committee, look at how we might move forward. And the rest is history.

That said, Boswell recalled how he put resistance to the carbon pricing on the Coalition agenda:

> Well I was the first one to go out against the carbon tax… and I wrote to all the Business Council of Australia, I went out and campaigned around all—and wrote to all the industry groups—I took it to the party room, gradually I got more and more support, and so there's an example… of one person trying.

In the light of this, it is important to note that sometimes extending policy can just mean keeping something on the agenda, or protecting it from being cut. Windsor recalled:

> Obviously if there were regional implications of a possible change in policy, a lot of that was handled in the back rooms and a lot of those things didn't happen. You know, Caring for Our Country, for instance, it's, I think about two and a half billion-dollar budget item. I think normal parliaments, with a majority Government, it would have been part of the budget axing. It would have been heavily reduced. So, there were quite a lot of policies that weren't touched, because of the regional players. Now, a lot didn't even come to discussion, you know, it was inherent in the arrangement.

While crossbench marginal members were more likely to talk about creating or shaping legislation to improve policy, backbench marginal members seemed more at ease talking about stalling or stopping it. On reflection, this trend is perhaps what should be expected. In the major parties, there are party processes of policy development for MPs to utilise[6]. However, it is when the leadership takes a new policy direction that is undesirable to the backbench marginal member that they are more likely to flex their political muscle.

For backbench members of government, there are party committees that can be used as avenues of influence. As Langmore recalls:

> If you get issues on to the agenda at Caucus committees you can go and see the relevant Ministers, and you can talk to your colleagues to try and build up support for a point of view. When I was campaigning to stop the cuts in aid that Keating was making I organised a seminar in Parliament House and got quite a lot of N.G.O's to come and we got various speakers to address it. Most of the cuts to aid were made in one or two years and then it stopped. I think it stopped partly because there was this mobilised opposition to what the government was doing.

Meanwhile, Troeth observed (in late 2014) that there is significant power in the backbench.

> I think I can judge from what I'm reading in the papers and a couple of comments I've had from former colleagues that the backbench is starting to flex its muscles on some issues. Once they discover their own strengths—and there obviously needs to be more than one voice—I think they will find they can influence the direction much further. I mean you don't want to turn it into an internal argument between backbench and ministry, but it's also incumbent on the ministry to massage this and help [its policy agenda] through.

This was an astute insight given that it was made less than three months before the Coalition backbench launched a leadership challenge against first term Prime Minister Tony Abbott.

Troeth can speak on such matters with some authority. She blocked her own government's Bill at a time when the former Howard Government held a majority in both houses.

> In 2006, when my party was in government, we had a majority of one in the Senate. Now it's important to understand that in the Senate if the votes are equal the President does not have a casting vote and the result is determined in the negative. So that meant that [only] one person would need to change their vote. We were dealing with some migration legislation that would ensure that all incoming asylum seekers would be sent to Nauru.
>
> At the time, along with a number of colleagues in the House of Representatives, I was very upset and angry that my party would inflict such a fate on people and crack down on some of the freedoms and liberties that would be available to them in Nauru. The legislation progressed through the parliament and by August it was due to come to the Senate. After thinking about it long and hard, I decided that I would vote with the Labor Party and vote against my own party's legislation.
>
> I had an interview with the Prime Minister on the morning that the legislation was due to go into the House and I told him my views. Three hours later, he rang me and said that he was calling a party meeting to say that the legislation would not be going into the Senate and the legislation would be withdrawn.
>
> Now events since then have moved far beyond. But in that one instance I was able to say, 'No, this won't happen,' and it didn't happen.

And while the above examples adhere to our definition of marginal member (and their capacity to stop legislation), the line between this and the conventional role of a backbench government MP is less clear. A clear example of the use of committees to derail policy can be found when minor party backbenchers are in opposition. Senator Boswell noted that parliamentary committees were an important avenue for his influence:

> Well I've used them [committees] to influence… The Rural and Regional Affairs Committee, we've had a lot of input into that. I was able to hold out banana

> imports [into Queensland] because I was able to get the committee to agree that there was a risk of disease if we imported them, all that was done through a committee system…

Of course, committees are an important avenue for the crossbench marginal member; however, they also have other important avenues of influence. In the words of Windsor, one of the most powerful cards that the independent marginal members had to play in the 43rd Parliament was the capacity to '*block bad bills*'. Such strategies are dependent on having the numbers at the right time (in a constantly shifting environment).

Sometime the decision to destroy a policy is not always immediately apparent. Oakeshott recalls:

> We were all on-board with media law reform, but the government threw up a proposal, which was a long way from where they started. That's a good example… the key officials and staff came to Port Macquarie one summer, and spent a lot of time going through a really good reform agenda, and then Cabinet mobsters have to agree on it, and Conroy throws up a take it or leave it option on the back of that.
>
> And so, you know, you agreed on one thing, then Cabinet did a job of watering down those proposals, removing things like the privacy laws for example… which Dreyfus is now saying is going to be an election item (laughs), something they're going to promise for the next election!
>
> So they put up a bit of a blancmange proposal, and then people like myself having to spear it on the floor of parliament.

However, the numbers are not always there, but as Oakeshott's PMB on Bali demonstrates, the purpose is to make different policy positions more transparent:

> Then the other was the Bali Bill, to try and be a circuit breaker on the asylum seeker issue. It got through the House of Reps by one, and then died in the Senate. But at least it flushed out some of the shameless politics.
>
> This was the point of that Bali Bill was I felt some people were trading unethically, and it was either to flush that out and force them to vote against what they were saying publicly, or for them to explain, why they… or just to get them to explain why on the one hand they're saying one thing, but on the other they're voting a different way.

Senator Bartlett summarised the minority government situation from the perspective of non-ministerial members as such:

> You know opportunities in the parliament don't necessarily appear every day, sometimes they come up once and that's it. And even though you think they might come back again with some other piece of legislation, you know numbers are different, or dynamics are different, or the issues are different or whatever and you can't have another crack at it. So… you've got to grab those opportunities to use that influence where you can.

Marginal views on governance, representation and democracy

Boswell's response was clear when asked about Australian's declining confidence in democracy and the federal government.

> Has anyone come up with a better way? It is all right to say it doesn't work and there's a bunch of no-hopers in politics and the system is not working but can anyone tell me, is there a better way? Because I cannot see a better way...

However, as the 2013 Federal Election demonstrated, any potential concern about the role of minor parties has not stopped the shift away from major parties[16]. Further, the resulting complex array of minor parties has led some to call for electoral reform with no one clearer than Boswell:

> I think there's got to be room for anyone in Parliament that can get sufficient votes to get there, but the system is wrong if you are getting it on .025 of a vote. That has got to be changed and quickly. That is my view. I am not against independents. I think democracy needs someone that feels that they want to have a go, but by getting a reasonable percentage of the original vote. Not by just working off a system and going in a raffle, I mean, that is what it is at the moment and that is not democracy at all.

Windsor's view was open to both sides of the argument:

> So, I have two minds about it... I probably have a bit of a layman's view on this that, I think if you're going to have political parties or groupings that are above the line, they've got to prove that they've got some real bona fides, rather than just be invented for the sake of it.
>
> Now, how you do that? There's a number of ways. Personally, I think probably there's a need for mini quotas before we can have any real involvement. But if you start to go down that road though, you really do cut out minority groups, so in that sense I agree with George Brandis' hypocrisy of saying "It's good to have diversity". I think we've got to be careful that we don't react to, you know, the kangaroo poo man and others, and that we don't over-react to it.

In effect, these views were driven by public perceptions of chaos, first in the minority parliament under Gillard, and subsequently with the new minority configuration of the Senate. As Oakeshott observed:

> I think that the 43rd Parliament was a mirror not only on all of us within the parliament, but also within Australia. And I actually think what was—has been exposed—is a deep lack of united vision in Australia. I think we have enormous unfinished business on a national agenda on population, on multiculturalism, on tax reform.
>
> [We need] government and the people very much working to a very clear framework agreed on as a reform agenda. I think it's really lacking at the moment. And that's where all the politics is, and that's actually marginal politics.

> And so I think the focus was the median more than ever before, but I'm not sure whether the median itself realises what it actually wants.

Windsor agreed that the role of the crossbench marginal member was not just representing the minority:

> Over 80% of the general public wanted something done with the Murray-Darling. Over 80%, if not 100%, wanted something done in terms of modern technology, you know, broadband, how it impacts on health, education, competitiveness of productivity, all those issues that the majority of the population would have agreed with. So, I'd say that the parliament represented the majority of people.

In general, these participants saw that the role of parliament, and particularly the Senate, was to represent all Australians and not just act as a place of review. Yet, this could cause difficulties with public perception. Boswell again:

B: People get confused. They can't really understand politics. They think they voted for a government, the government has won, but it can't achieve what it says it will do. So, they get frustrated and think politics doesn't work…

> [But] if someone like Xenophon gets a quota, then obviously he has every right to be in parliament. So was Harradine and those people, they got quotas to get them into parliament and they have enough votes so they are there to represent the people who voted for them…

Int: But what is their responsibility to a government that has a mandate in the lower house if those things are in conflict?

B: Well, I think, they have the vote; they can do what they like with it.

However, these views did not extend to the need for parliamentary reform, which has been noted that a common feature of state and territory minority government agreements for two decades[18, 21]. Recently, the prominent Australian Capital Territory independent MP, Michael Moore, made this observation of the last three federal parliaments:

> I organised a meeting of independents in Canberra, I think in 2000, and we had a few Greens there as well, but by and large it was independents and the major question we were trying to ask was "What do you do if you find yourself in the balance of power position?"
>
> We actually drew up a series of things that were based on what Clover Moore, Peter McDonald and other independents demanded in New South Wales. The first and the most important of them was fixed four-year terms, so I was really disappointed when Nick Xenophon, Rob Oakeshott and Tony Windsor didn't demand four-year fixed terms, particularly as Tony Windsor and Rob Oakeshott had been at that meeting… And you know I actually even wrote to them at the time and reminded them of that outcome, but who knows what went on in the negotiations[16:169].

Tony Windsor reflects on how to he approached this responsibility:

> ...in some people's minds the definition of an independent is they stand for this open, transparent—you know, lovely descriptors—but I didn't get into parliament for those reasons. I tell you, I think inherently those sorts of things should happen, but they're not my reason for being there.
>
> I think a lot of city-based Independents over the years have seen their role as making sure there is accountability and transparency. I'm not saying these things aren't important, but I didn't see them as being the most important things about the formation of a minority government. They're important in terms of transparency of our democratic processes, but they should be part of parliament anyway without having to take advantage of a hung parliament to create them.
>
> But, the things that tend to get created in a hung parliament, in that context, the two major parties rub them out as soon as they can anyway. So when this hung parliament came up and a number of people were talking about the functionality of the parliament and the accountability, those sorts of things, I didn't get that excited about all of that, because I knew as soon as there was a majority government it'd go out the gate anyway…
>
> You know, all of us have to remember that we are single members in a parliament of 150. I remember saying to Oakeshott at the start of it, and to Katter and Wilkie and company, I said: One of the things we've got to be wary of here is trying to become the Government. You know, what we're actually doing is making a choice, if there was one that could be made, as to who could form a Government.'
>
> Now, some people like to, sort of, re-create history and say, 'Oh well, the place was chaotic because these Independents and others were telling the Government what to do all the time.' That's not the case as far as I'm concerned anyway.

Oakeshott made this observation:

> In many ways, my judgement call on Julia Gillard and Tony Abbott [for prime minister] in 2010 was that that moment in time needed transactional leadership, and my judgement call was she was a better transactional leader than he was. It is now a known fact that the Greens are going to be in the Senate, so a transactional leader is going to be needed for anything to happen.

Brown reflected on the formation of the 43rd Parliament in this way:

> Julia Gillard was forming government in a businesslike fashion, taking in to account that while she had given that commitment before the election, government was predicated on getting a commitment from the Greens who went to the election with a diametrically opposed point of view. And she was finding a path through to allow for the seemingly... well, totally opposite outcomes. And she got government through that. But of course the rest is history. With the Murdoch media and Abbott then gunning all the way down the line and the whole Ju(liar) process, which led to... it was relentless and it was aimed at Gillard.

> But I have to say that that arrangement came about because we had a Labor leader who was committed to carrying through with an arrangement she'd struck with me and you had a Greens leader who had known from previous experience that the arrangement made with government, you make them public, or you won't reach them. And we accommodated each other and the rest is history.

Such views emphasise the importance of negotiation as part of leadership. As Oakeshott explained:

> I don't like the words hung parliament or even minority parliament… it's just a parliament. I consider myself doing nothing other than staying true to the original model, and that was you get elected and you represent the best you can, and then you know you win some, you lose some, and the collective decision of the parliament is where hopefully the best decisions come from.
>
> The fact though that now both major political parties in Australia are saying they will only deal with and work with their own, or they won't play, you know 'my way or the highway' politics, I think is hugely problematic for those that want to see a reform agenda for Australia. Compromise and negotiation in politics is a strength, not a weakness.

Brown also explains:

> I knew that there was some things that we just couldn't… that would be inimical to the safety of the Gillard government. [But] things that were possible – that you may not think of and weren't on the agenda could be brought on to the agenda like that and carried through to fruition. And is ICAC still on its way, not there yet, was another one. Having had such long experience in balance of power, politics and what's feasible and what's not, and knowing that you have to act in the first year. And I've seen this time and again, leave it to the second or third year, allow governments to push an agenda out to then, without a set timetable and you'll get dudded. That's just the way things are. It's a lesson that we'll see other people in the balance of power learning forever. But they should know, once you get up, upfront is what you get, and you have to make it public at the time. Because taking the public into account is the binding stuff of an agreement with a government that needs you to assure it of a majority.

However, taking the final vote and ensuring it had influence was not certain. As Oakeshott observed:

> [But] you know, and I hate to admit it, it's that club which sits around and drinks whisky at the end of the day. And I always struggled with that. But I became very aware of it and its power over the last three years. You can have a formal agreement that looks bipartisan, but the real politics is happening somewhere else.

In the eyes of Senator Bartlett, this resistance by the power brokers has taken a different form with the new Abbott Government:

> Unfortunately it feels a bit old fashioned these days to think of a Liberal Government minister that actually was happy to talk to people, rather than... just insist on their omniscience on everything, and all of that sort of stuff... It's almost like it's stayed where it was from the end of the Howard era and just sort of festered and, yeah, soured over the whole time Gillard was there, and then they're just sort of back... back in that same groove, almost like they never left, but just sort of snarkier and more convinced of the... you know all powerful... but maybe I'm wrong. I'm probably just glorifying the old days.

However, Troeth suggested that things might not have changed as much as Bartlett recalls:

> There were ministers—who I won't name—who were quite supercilious towards backbench committees. They won't appear themselves and they just send their staff to deal with [them]. Now you've got to do better than that. All ministers have been backbenchers at some stage and personally, as Parliamentary Secretary, I never forgot that. You are all in the parliamentary group together. If you don't do your job well that can be an element in a government's downfall.

DISCUSSION

It should come as no surprise to discover that federal parliamentarians do not think of themselves as irrelevant, accidents or incidents. Rather, they have their own philosophies, priorities and practical insights that inform their actions within minority arrangements. Notable amongst these is the view that the Senate is autonomous and independently accountable. Hence, there is a view that the onus in on the executive to make minority government work. With this broadly in mind, there are three specific themes within the responses of the participants in this study. First, is an emphasis on respectful and trusting relationships, both between parties and between individual MPs. Behind the growing public veneer of political conflict, parliament continues to rely on the bonds formed between politicians who are sincerely seeking to do the best for their party and constituency. Second, is an open attitude to negotiation, and particularly the need for party leaders to adopt a transactional approach. Beyond this, the responses of the participants indicated that central to securing and keeping the role of Prime Minister is confidence amongst fellow parliamentarians (within and outside their party) in a leader's commitment to seeking consensus. The third pillar of successful minority government was consistency by MPs to keep their word and hold to their policy positions. If crossbenchers "backflip" it undermines their credibility, while if governments abandon commitments it undermines their capacity to negotiate in the future. Overall, in the view of these participants, the practicalities of minority government were not unworkable they were just hard work.

In relation to the issue of electoral reform there was a range of views, but all participants agreed that some consideration needed to be given to the electoral success and relative influence of micro parties. That said, there was also a view that

recognition of diversity needed to be maintained, particularly where non-major party candidates had earned significant electoral support. Some put this in terms of an independent mandate that could be legitimately pursued within the parliament even if it frustrated government. Hence, electoral reform was not viewed as a means to limit smaller political competitors; to maintain the major party duopoly. What was clear was the view that while the recent emergence of micro parties was an aberration that needed consideration, the presence and legitimacy of smaller parties should be protected in any future electoral reform.

This leads to the third of the key questions considered by this paper, namely the extent that the role of parliament is to facilitate the legitimacy of government and support effective executive action or to promote and enhance democratic representation? Here, the participants answered 'both'. The role of parliamentary committees, party committees and backbench activity was emphasised for both the accountability of the executive and getting issues on the agenda. Central to this was the view that information must be shared clearly, regularly and openly with MPs because trying to tactically withhold or misrepresent information was counterproductive and just created resentment and opposition. These participants also noted the range of other important roles of non-ministerial MPs in Westminster-style systems[13]), but added legislator and democratic representative to these roles. What was notable was that the minor party and independent MPs articulated the key principle of Westminster as responsibility to the electorate (representation) rather than deference to the government or executive (effectiveness). As Kelso[9] argues in her overview of the development of Westminster, the view that the role of parliament is to promote democracy (rather than to legitimate executive decisions) has no historical precedent in the UK. Hence, what we may be seeing here is a re-articulation of the Westminster model in the Australian context, including a reversal in emphasis from political parties protecting against the interests of individuals, to individuals protecting against party political interest. At a time where some have identified the need to defend democracy from a tide of disengagement and disillusionment[4], it may be these non-ministerial marginal members who become the new champions of democracy.

CONCLUSION

It is our view that one of intriguing aspects of Australian political science and policy studies literature is the relative lack of inclusion of voices from experienced politicians[16]. If this is the case with prominent political leaders, we suggest it will be even more so with crossbench and backbench members. In this article, we have sought to shed light on these potentially under-represented perspectives. In doing so, we have found two things. First, if one looks past parliamentary theatre, media representation and public commentary to the views of experienced non-ministerial members, then it is clear that the increasingly complex minority arrangements of the last decade in the Australian parliament can and have been functional. Second, it is evident that these

members not only see themselves as effective scrutineers and reviewers, but also as legislators, policymakers and representatives, which reveals a different understanding of the Westminster model. In the context of ongoing minority government and renewed calls for electoral reform, we believe that these two insights will be of interest to those dedicated to the study of parliamentary representation and democracy in Australia and other Commonwealth nations.

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APPENDIX 1

Interview protocol

1. We are interested in occasions (in parliament or political parties) where one person, with one vote, can make a big difference. Would you recall a time (or times) when you have been that person?
2. If you were to list two or three of your biggest contributions to lawmaking and public policy, what would they be? What did you do to exercise influence?
3. Usually, the media want to focus on the theatre of parliament and the role of high profile crossbenchers. However, important influences often occur in gradual ways that never make it to the front pages of the papers. Would you recount such examples of your influence on the policy agenda?
4. Often, the floor of parliament is not the only place where law and policy is forged. Senate committees, party committees and networks amongst parliamentarians can also be very important. How have you seen parliamentarians use these avenues to shape lawmaking and public policy?
5. The resources available to Ministers are very different to those available to backbenchers, minor parties and independents. What sources of information did you find yourself relying on the most, and particularly, what strategies of influence used by different groups did you find most effective?
6. Over the years, you have seen minor parties and independents come and go, including the departure of Pauline Hanson, but most recently the arrival of Palmer United. What do you think is the message that the emergence of these parliamentarians sends to the major parties? How should they respond to the balance of power?
7. Recent surveys show a decline in Australian's confidence in democracy and that federal government is the lowest regarded tier in Australia. What do you think is behind these survey results and what message do they send to federal parliamentarians?
8. Having considered our marginal member heuristic, is there anything else that you would like to add in relation to our theme that individual or groups of parliamentarians in the right place at the right time can have significant influence?

APPENDIX 2

The marginal member heuristic

	Community	Parties & Committees	Social and Popular Media	News and Current Affairs	Other Parliaments/ Members of Parliament	Parliament Committee	Parliament
Construction	Market / Issue networks	Politicised peak bodies	Everyday makers	Media reports	Parliamentary networks	Committee references	Policy cycles / Policy learning
Improvement	Policy communities	Party consultation	Virtual communities	Media expose	Cooperative federalism	Expert contribution	Legislative amendment
Extension	Advocacy coalitions	Caucus advocacy groups	Online advocacy forums	Promotional peak bodies	Inter-parliamentary coalitions	New terms of reference	'Balance of power' demands
Diversion	Local issue campaign groups	Factional agendas	Populist discourses	Media single-issue groups	Single-parliament agendas	Cycles of review	New coalitions
De-stabilisation	Marginal seat protest groups	Factional division	Cross-over campaigns	Conflicting media accounts	Competitive federalism	Unintended consequences	Parliamentary delay
Destruction	Median voter group opposition	Caucus opposition	Everyday opposers	Negative media reports	Jurisdictional opposition	Discredited expertise	Defeat legislation
Aversion	Adverse national polling	Multi-peak body opposition	Online outrage	Moral panic	Constitutional challenges	Major party division	Dissolution triggers

Portfolios, Departments and Agencies: Tinkering with the Machinery-of-Government Map

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ABSTRACT

In Australian machinery-of-government terminology, a fairly well settled view of the role of portfolios, departments, ministers and agencies and their inter-relationships has long existed, based on Westminster-system foundations. There have, however, been some challenges to that view in recent years arising from the practice of some government leaders in establishing their new governments, and, in one particular case, a Commission of Audit report.

This article looks particularly at how the traditional machinery-of-government understandings have been affected by such new government formations and Commission of Audit reporting. It finds that there has been some innovative 'tinkering' taking place. There is room for speculation as to how much this terminological experimentation will affect actual practice.

INTRODUCTION

This article reviews some recent interesting innovations in Australia in the way the machinery of government is conceived, arising both from the actual process of forming new governments and from understandings from bodies such as Commissions of Audit. While the focus in the main part of the article is on instruments establishing portfolios and departments and the relationship between these types of structures, this discussion inevitably touches on the role of agencies. This leads on to the second, smaller section of the article, which considers how agencies are treated in these instruments, and asks whether there is much that is new in this treatment.

The focus here is on conceptions of the various types of structures involved and their inter-relationships. Another article would be required to explore related accountability issues and consider how all the variations noted affect observance of the traditional Westminster principle of ministerial responsibility.

PROLOGUE: MAJOR MACHINERY-OF-GOVERNMENT TERMS

A difficulty in arriving at clear understandings about machinery-of-government issues comes from the terminological slipperiness often encountered, so that a beginning attempt to explain how the main terms have generally been used in the practice and the study of the machinery of government is needed. My explanations relate to the Australian situation, but they will be found to apply fairly generally throughout the world of Westminster-style administrative systems.

The term 'machinery of government' relates to a broad structure that embraces the whole apparatus of governing, with the machine analogy – 'government as machine' – suggesting order, stability, predictability and the like. Contemporary discussion generally accepts that the change process is a long and drawn-out one, but that it can be disruptive for public servants and for those to whom they relate (Bridgman 2015a: 1–3). I have chosen the word 'tinkering' for this article because it suggests a sort of middle-way understanding – so much of the machine survives the political 'disruptions' it experiences with changes of government and the like, but it also embraces significant change in parts of its working that are affected by those disruptions and need to be accommodated by the whole.

Portfolios and departments[1] are the main organizing features of any government of the type we are used to, and are identified and delineated in the Australian jurisdictions in an Administrative Arrangements Order (AAO) or equivalent promulgated by incoming heads of government.[2] They will have chosen the supporters to whom they wish to attach responsibility for some part of the operations of the government they are forming, and after formal appointment they become ministers. Those parts furnish the ministerial titles (e.g. Treasurer, Minister for Agriculture), and become known as portfolios (or sometimes as ministries).

The incoming head of government will also need to coordinate this exercise with attention to the related public service organisation and, as the usually detailed statement which does this, the AAO lists the relevant ministers, portfolios, and public service departments — and shows their formal inter-relationships. A portfolio (or ministry) may contain just one such department, or it may contain a main department and one or more other departments. In this scheme, the portfolio-ministry is the first-order structure closely associated with the minister's primary function; as the second-order structure, the department is that part of the public service charged with assisting the particular minister in the performance of his functions.

In cases where ministers command more than one portfolio, or department, there have been experiments in providing them with coordinating secretariats spanning the whole ministerial jurisdiction, sometimes themselves referred to as 'ministries' (Wettenhall 1986: esp. chs 1, 8). The other qualification needed is to recognise that, while the chief executive officer of the department (traditionally known as the departmental secretary) functions as the minister's principal servant and adviser, most ministers

now also have private offices to do the more obviously political work: they stand apart from the departmental organisation.

In virtually all governments today, the apparatus of portfolios and departments is supplemented by a considerable number of miscellaneous bodies also standing outside the departments, going by a variety of class-names such as board, commission, statutory authority, public entity, NDPB (non-departmental public body), government-owned company (or government-business enterprise), quango (from quasi-autonomous non-government organisation), and most recently arm's length body, with the cover-all title 'agency' — hence the word 'agencification' — widely used in the relevant literature. Most portfolios have such agencies: the group has grown rapidly over the years notwithstanding not-so-infrequent attempts to reduce its size, and taken together its members sometimes employ more staff than the departmental cores themselves. As is well known, a major branch of machinery-of-government studies now focuses on mapping its membership and exploring its relationship with the departmental cores and the reasons for its popularity.[3]

The minister is, of course, titular head of the whole portfolio: he has direct control of the department and arm's length relationships with the agencies as defined by their creating legislation. This legislation too can be seen as part of the portfolio: thus a guide published by the Victorian Public Sector Commission in 2010 extended this idea of the portfolio to include the statutes as well as 'the department and public entities' that the minister administers (VPSC 2010).

So to recent developments which affect the portfolio/department relationships as envisaged in these understandings.

RETHINKING PORTFOLIOS

The situations of newly established Premiers and of reporting bodies like Commissions of Audits are, of course, very different. The Commissions of Audit are appointed by governments already in office and, however immature those governments may be, the commission reports are public documents and accessible as such.[4] What Premiers do themselves in constituting their governments is murkier territory: sometimes opposition groups hopeful of winning office might equip themselves with a well-resourced planning and reporting apparatus, but in any case resulting reports would be private documents. When governments come to office unexpectedly – as happened in the most recent cases of Victoria and Queensland – there may be very little in the way of serious documentation about plans of the parties and leaders involved; such planning may, indeed, be virtually non-existent.

The NSW Commission of Audit, appointed in late 2011 by the O'Farrell Liberal-National Coalition Government, a government already in office and hoping to continue in office after the next election, comprised people acceptable to the government and regarded by it as having expertise in relevant fields. Its reports were readily available.[5]

In Victoria, however, the new Australian Labor Party (ALP) government, headed by Daniel Andrews and sworn in in December 2014, found itself thrust into office without serious pre-election planning for the sorts of administrative arrangements it would need in the event that it did achieve office. As a result, explanatory documents about the arrangements it did make were virtually non-existent. The situation of the Palaszczuk Labor Government coming to office in Queensland in February 2015 was similar.

It could not be said that the Abbott Liberal-National Coalition Government, formed at the Commonwealth level in September 2013, was as roughly hewn as its Victorian and Queensland counterparts; nonetheless there were features about it that are relevant to this discussion, and I begin by drawing attention to those features.

The Commonwealth: a variety of portfolio arrangements

A review of the AAO formally constituting the Abbott Government, issued on 18 September 2013, showed a variety of portfolio designs. The document (Abbott 2013) was arranged in boxes, each box said to represent a portfolio. All of them – 16 -- listed principal portfolio ministers and assistants such as assistant ministers, ministers assisting and/or parliamentary secretaries. For seven, however, there was a second first-order minister, and it is here that complexity arises. In some cases, a separate public service structure was provided for that minister, in others not so. It is not possible to assert that these seven constituted a set, because there was little or no regularity.

In two cases (Attorney-General and The Arts, and Health and Sport), two separate ministerial positions were shown, but they were occupied by a single minister and accompanied by only a single (apparently quite small) section in a quite large multi-section department – but more on The Arts below. In two cases (Small Business and Trade & Investment), there were second ministers in the Departments of Treasury and Foreign Affairs, with the public service presence as part of an integrated department — in the latter case reinforced by the government's decision to bring the former arm's length AusAID into the Department. In another case with two ministers, and attracting high policy space (Indigenous Affairs), a special 'Group' was established within the Department of Prime Minister & Cabinet. And in two other cases with two ministers (Social Services and Defence), there were separate dedicated departments, Human Services and Veterans' Affairs respectively.

The case of The Arts claims further distinctiveness. While the separate position of Minister for The Arts was very clear in the AAO in a portfolio shared with the position of Attorney-General (though the same minister occupied both positions), there was no Department of the Arts in the public service lists to match the Attorney-General's Department. What had happened here? A quick check shows that a distinctively named 'Ministry for the Arts' was one of several branches of the Attorney-General's Department, alongside half-a-dozen other branches or divisions none of which was labelled a ministry. This 'ministry' was part of a portfolio and a branch of a department, neither a portfolio nor a department in its own right (AGD 2013a, 2013b). When the Turnbull Government replaced the Abbott Government in September 2015,

the 'Ministry for the Arts' continued as part of the new 'Department of Communications and the Arts', with one minister holding appointments to two separate portfolios: Communications, and The Arts.[6]

Arrangements such as these are at the discretion of the incoming Prime Minister, based on his personal and political/policy preferences. Sometimes, however, the changing circumstances of the area being administered may explain the appearance or disappearance of portfolios. One such case was revealed recently by a study of Australia's external territories,[7] which showed that the inhabitants of the Indian Ocean territories of Christmas Island and the Cocos (Keeling) Islands were experiencing much difficulty in their dealings with officials of related Commonwealth departments and long delays in getting responses to reports, correspondence and so on. As reported by a parliamentary committee, there was a 'high level of frustration with the current system of governance, which has many layers of bureaucracy and unclear delineations of responsibility' (Brown 2015). One can have sympathy here with residents of the island territories, but one can also have sympathy with the officials they were dealing with, who had been subjected to a series of quick movements from one department to another as a progression of governments adjusted their portfolio lists and required a multitude of consequential changes from the officials of various parts of those departments. There was once, when territories like Papua New Guinea and Nauru occupied much policy space, a single, easily identifiable Minister and Department of Territories (or External Territories) – a portfolio in the traditional sense. In the period of the late Howard, Rudd, Gillard and Abbott Governments, however, less policy space was required and the territories function was truncated. It came to be treated as a part of a series of mostly short-lived multi-functional departments as indicated in the following list, and the title Minister for Territories disappeared along with the named portfolio and department (Commonwealth Government 2013). Thus the much-reduced function has come to be performed by a small and apparently badly digested part of one or other of several large multi-functional departments, whose titles (as shown in the table) have included the word 'regional'.

DEPARTMENT EMBRACING TERRITORIES FUNCTION

Date established	Department name
21.10.1998	Transport and Regional Services
3.12.2007	Infrastructure, Transport, Regional Development and Local Government (part of the Prime Minister & Cabinet portfolio)
14.9.2010	Regional Australia, Regional Development, and Local Government
9.2.2012	Regional Australia, Local Government, Arts and Sport
18.9.2013	Infrastructure and Regional Development

The Commonwealth had long adhered to a one-minister one-department principle (with occasional exceptions), but that organisational order was challenged when the Hawke Labor Government introduced a general two-tier ministerial structure in 1987, with most departments gaining cabinet representation through a senior (or portfolio) minister, assisted by one or more junior ministers with supervisory functions limited to parts of the department's jurisdiction. There was a multi-portfolio implication, with the term 'mega-department' emerging as a descriptor for some of the newly-established larger multi-functional departments; this went with an assumption that, in future, the government-forming exercise would be easier and less disruptive because, with them now in existence, there was much more room for Prime Ministers to accommodate ministerial and functional change without resorting to frequent major revision of the AAO for the purpose of departmental formation and change. By the time of the Rudd and Gillard Labor Governments, however, whatever advantage there had been here was lost. The department and portfolio forming process had gone far to establishing first-order structures that recognised contemporary policy issues and associations and were likely to change frequently as those issues changed, as in so-called 'mickey mouse departments' such as the short-lived Departments of Broadband, Communications & the Digital Economy and Climate Change & Energy Efficiency. Wonderful acronyms now applied to many departmental titles: each change was accompanied by large administrative costs and, as indicated by the case of the old territories portfolio noted above, much effort would be required by the public servants caught up in these changes to sort themselves out before they could begin to operate smoothly again (for general discussion, see Nethercote 2012; Waterford 2013; Wettenhall 2014: 82–85).

Since Commissions of Audit occupy some space in this discussion, it is reasonable to ask whether the Commission set up by the Abbott Coalition Government after its election in October 2013 and chaired by Tony Shepherd, President of the Business Council of Australia, offered any words of wisdom on the matters canvassed in this article. A reading of its voluminous and ill-edited report issued in May 2014 (Shepherd 2014) suggests that its dominant concern was in locating functions and organisations that might be abandoned in accordance with the government's much publicized small government policies.

The report was released concurrently with a 'ministerial statement' by Finance Minister Mathias Cormann (2014), and these instruments together formed the basis for the 'Smaller Government Initiative' announced by Treasurer Hockey in his 2014–2015 Budget presentation (Hockey 2014). Taken together, they amounted to an outright attack on the traditional Australian public administration system, and they were seen as such by many of the leading political commentators of the day. Privatization, outsourcing and devolution to the states were major themes, with little consideration given, for example, to the likelihood of efficient management of devolved functions by the states. Much press comment highlighted what were widely seen to be other insufficiently considered propositions such as rolling the Public Service Commission

into the Employment Department or selling off the Mint (e.g. Thompson 2014; Taylor 2014; Maiden 2014).

Retrenchment was clearly the primary message: what the press highlighted as one of the principal budget features was that the 'axe falls on 70 federal agencies', this followed with lists of those to be sold, abolished, folded into departments, merged and so on (Crowe 2014). The related ministerial statement, borrowing from the Commission of Audit report, highlighted proposals for, again, abolitions, mergers, absorptions into departments, privatizations and the like (Cormann 2014 & appendices). A strong liking was expressed for 'shared services', the combining of the 'back office functions' of several agencies, or departments and agencies, into a single office as a way of cutting back the administrative work of individual bodies. Cormann advised that action was already under way to give effect to some of these changes (Shepherd 2014: phase one; Cormann 2014: 4–6, 15–16; see also Reid & Wettenhall 2015 for discussion of shared services).

In machinery-of-government matters, the Commission generally assumed a two-way distinction between 'portfolio departments' and 'agencies', with the departments doing the policy work and agencies delivering programs and services; and, wherever possible, it wanted agencies that could not be disposed of absorbed in departments (Shepherd 2014: phase one p.204). Portfolios in the old-fashioned sense were sacrosanct: the Audit Commission was a creature of the government in office, and it was not asked, nor was it likely, to challenge the structure of government itself. This lack of interest in the more conceptual side of the machinery-of-government question contrasted, however, with the interest shown by the Commission of Audit appointed by the O'Farrell Liberal-National Coalition Government in New South Wales (NSW) after its election in 2011. This article now turns to consider what that Commission proposed in relation to ministers, departments and portfolios. In NSW there was wide agreement that the machinery of government was in a mess, and there was no way a Commission of Audit could have avoided looking at such relationships.

New South Wales: 'Clusters'

A series of amendments to the NSW Public Sector Management legislation in the 1990s and early 2000s did little to establish order in the state's machinery of government. A leading analyst saw one outcome as the creation of a 'new Government Service of NSW' (Di Francesco 2012: 92), but the terminological underpinnings were convoluted. Through this parade of legislative changes, the terms public service and public sector were not clearly differentiated, and what was quite radical was recognition of government service as an apparent third organisational category (though the term had surfaced earlier in Tasmania).[8] For example, in the definitions offered in the 2002 NSW *Public Sector Employment and Management Act*, 'public sector agency' referred to the whole or any part of a 'public sector service', which included 'a division of the government service' (obviously including departments but much more); 'the Public Service comprised the Divisions of the Government Service' specified in a schedule

to the Act; and the 'public sector service' meant any of Government Service, Teaching Service, NSW Police Force, NSW Health Service, Transport Service, parliamentary services, 'any other service of the Crown (including the service of any NSW Government agency'), and 'the service of any other person or body constituted by or under an Act or exercising public functions (such as a State owned corporation)…'(from *PSEMA* 2002, Part 1.1, s.3 Definitions). It was surely a confusing bag of organisational terms, making the understanding of this government machine more difficult than most, and leading to further complex descriptive and classificatory exercises to come.

The NSW Commission of Audit operated in two stages, the first chaired by Acting Treasury Secretary Michael Lambert and the second by Managing Director of Sydney Water Dr Kerry Schott; there was also an advisory council chaired by David Gonski who was contemporaneously conducting a review of school funding for the Commonwealth government. Two reports were submitted, and the 'interim' one offered views on several machinery issues that could be expected to have their own trajectory and practical influence separately from the expenditure-related recommendations in the final report (Schott 2012). Given the cacophony of titles and definitions in the 2002 NSW legislation, it was virtually inevitable that some of that would carry forward to influence this exercise. Thus the interim report noted that the 'NSW Government is a very large and diverse organisation conducting a wide mix of services'[9] and that, to that end, it has 'over 4,400 entities, 22 Ministers, nine Directors-General and hundreds of Chief Executives and other senior executives'. The report also expressed the need for clearer roles and responsibilities at ministerial and administrative levels, and for simplification of accountabilities and management reporting needs and the roles of central agencies.

At its core, the report addressed the development in NSW of what it described as 'clusters' seeking to overcome some of the adverse effects of the proliferation of entities. Although the report did not say so, the clusters it deals with have some of the attributes of the 'portfolio' as understood by previous generations of machinery-of-government practitioners and commentators, but they were scheduled for much tighter organisation and management than the traditional portfolios; this report described them as 'pivotal in improving service delivery' (Schott 2012: 11–12, 20–23, Appendix 2).

The report noted nine clusters currently existing in NSW. Each had a Coordinating Minister (who was distinguished from Portfolio Ministers within the clusters), and a Principal Department (which was a legal entity)[10] and a Director-General.who could be responsible to a number of ministers. 'Subsidiary entities within the cluster' were headed by chief executives who reported in the first instance to the portfolio ministers. 'Entity types' were also identified, and divided into 'tiers'. The clusters themselves varied in almost astronomical terms, containing from one to nine ministers, 400 to 96,000 staff, $2.1bn to $15.3bn budgets and 15 to 384 entities, and this report constituted a plea for simplification. There was, the Commission said, 'no single source of truth' providing up-to-date information on all this, and it complained, in what might be considered a classic understatement, that '(c)urrent governance arrangements in NSW

do not provide a complete, well-understood and consistent governance framework' (Schott 2012: 12–16, 20). Developing the cluster arrangement was seen as an important step towards improving this situation.

Arising from the Audit Commission report, a new Public Service Commission (PSC) was asked to review the public sector and develop structural reform proposals. The outcome of this review was the *Government Sector Employment Act* 2013 (*GSE Act*), which replaced the 2002 legislation and was claimed to be a simplification (NSW PSC 2013a). An accompanying commentary said of it, not in my view very helpfully, that it was 'designed to reduce the complexity of the structure found in the PSEMA (*Public Sector Employment and Management Act*), … by establishing a system with only two distinct structures, being the government sector and the public service, as opposed to the current system which consists of the government service, the public sector, the public sector services and the public service of the Crown' (Belling & Parker 2013: 2).

Some simplified thinking was needed, and the term 'cluster' is now down-played. As the PSC itself points out, the *GSE Act* does not refer to it even though it is 'currently used to describe the administrative arrangements by which the NSW Government Service is configured into nine groups of agencies to allow for coordination of related services … each cluster including a Department (which may, at an administrative level, include other entities), Public Service executive agencies related to a Department and, in some cases, one or more separate Public Service agencies' (NSW PSC 2013b: 6–7).

This has been a useful and interesting addition to our collective thinking about machinery-of-government matters, but whether it will have much practical effect is doubtful. The notion of clusters gained no formal documented recognition either in any restructuring of the O'Farrell Government, which had received the Audit Commission report in 2012, or in the constituting of the Baird Coalition Governments which replaced the O'Farrell Government in April 2014 and April 2015. The strong impression is that cabinet formation and departmental alignments continue to be shaped largely by sometimes clashing policy agendas and by the usual jockeying for advantage by party factions and ministerial hopefuls; to an extent the hoped-for logic behind the cluster arrangement is in play, but it is unlikely to be the primary consideration (see e.g. Nicholls 2015).

Agencies present special issues and they are further discussed below. However it is appropriate to note here that a huge spread in the notion of agencies and their relationship with departments is apparent in the lists presented by the NSW Commission of Audit and in associated documents, with several categories of agencies and many staff groups recognised separately from their employing authorities. Thus, while the Art Gallery of New South Wales Trust is a familiar statutory body with corporate status and is so recognised, the relevant staff group is legally branded 'Art Gallery of New South Wales Trust Staff Agency' and counts as a separate executive agency.[11] This pattern is repeated for dozens of other statutory bodies and their related staff groups.

Victoria: Departments above portfolios?

As noted above, the traditional Australian (and we might say traditional Westminster) pattern is to connect portfolios with ministers in forming the top level of administration, with departments (one or more) within a portfolio and forming a second strata of administrative organisations, and agencies effectively forming a third layer as varied as they may be. What was so unusual in the structural arrangements announced for the Victorian Labor Government formed by Premier Daniel Andrews in December 2014 was the seeming reversal of the departmental and portfolio roles. These arrangements were announced in the Victorian equivalent of the Administrative Arrangements Order[12] and in various reports presenting those arrangements to the Victorian public. In these descriptions of the Victorian arrangements, in organisational terms portfolios were organisationally subordinate to departments!

There had been no Commission of Audit or similar inquiry report to guide new Premier Andrews in designing his government machinery. There was a leadership team that came to office more-or-less unexpectedly, like that in Queensland a few months later, and with inadequate planning for accession to office — though former Victorian Labor Premier Steve Bracks was, among others, acknowledged as having given advice about preparing for the transition to government (Coghill 2015). This detachment from things official may help explain why the designers of the Andrews arrangements ignored the definition supplied in the 2010 Victorian Public Sector Commission guide (VPSC 2010).

Several passages all seeming to subordinate portfolios to departments illustrate this feature of the Victorian arrangements (taken from Willingham & Cowie 2014):

> The Department of Premier and Cabinet … will be taking on a lot of new work, assuming responsibility for the new portfolios of Equity and the Prevention of Family Violence, as well as providing assistance to a host of agencies… It will remain to be seen, however, whether the unprecedented number of portfolios being held by the Premier's department – ranging from community development to infrastructure planning and delivery to integrity functions – will allow it to continue its traditional responsibility of policy co-ordination and advice to the best of its abilities'. [Another listing indicates that this department will support 'the following portfolios': Premier, Deputy Premier, Special Minister of State, Aboriginal Affairs, Equality, Multicultural Affairs, Prevention of Family Violence, Veterans.]
>
> The new Department of Economic Development, Jobs, Transport and Resources will bring together a large range of portfolios contributing to the state's economic development… The new mega-department will include portfolios as diverse as agriculture, public transport, arts, energy, ports, tourism and roads as well as small business.
>
> The new Department of Education and Training will … support the following portfolios: (includes Education, Training and Skills, Families and Children) …

> The new Department of Environment, Land, Water and Planning will … support the following portfolios: (includes Environment, Climate Change and Water, Local Government, Planning) …
>
> The new Department of Health and Human Services will … support the following portfolios: (includes Health, Ambulance Services, Families and Children, Housing, Disability and Aged, Mental Health, Sport (except for major sporting events), Youth Affairs…
>
> The new Department of Justice and Regulation will … support the following portfolios: (includes Attorney-General, Consumer Affairs, Gaming and Liquor Regulation, Corrections, Emergency Services, Police, Racing).

To repeat: this appeared to be the new Victorian approach, and it represented a striking reversal in what we have long understood about machinery-of-government arrangements. Whether it will much influence how we think about the ways governments are structured is for the future to decide. It may be that it will prove to be a semantic shift that does not much affect the way those working in the administration go about their dealings with each other. Dr Ken Coghill, Director of Monash University's Governance Research Unit (who, as a former ALP State member and Speaker, is very well informed about such matters in Victoria) confirms that there has been 'a deadly silence' about this aspect of the governmental change (Coghill 2015), and observers need to be patient before forming judgments about its effects.

Certainly other features of the arrangements made by the Victorian government established in December 2014 received much more public notice. The portfolios-within-departments aspect was matched closely with, and seemingly placed in a supporting position to, the determination to establish 'mega-departments' or 'super-departments', so realigning 'departmental structures and reporting lines to better reflect ministerial responsibilities' and reducing the number of departments, now pared back from nine to seven. This 'dramatic shake-up', the new Premier announced, was intended to 'revitalise' the public service, with Coghill advising that this was 'a way of co-ordinating the direction of overall policy objectives such as economic development'. Coghill noted that the creation of super-departments was a trend being followed by governments around the world, with Australia prominent in the development of this model (quotations from Willingham & Cowie 2014: 1–2; also Donaldson 2014).

The Andrews Government was also hailed for its elevation of nine women into the cabinet of 22, claimed to be the biggest proportion of women in any Australian government.[13] And there were some significant policy developments already planned before the accession to government, such as bringing 'community portfolios' together in the Department of Premier and Cabinet, establishing new portfolios to be headed by Ministers for Equity and for the Prevention of Family Violence (an Australian first in this area), creation of new bodies to plan major capital projects and to undertake anti-corruption activity, and sale of the Port of Melbourne (drawn from Willingham & Cowie 2014: 1–2). All these features of the new

government and its machinery arrangements received much more notice than the portfolios-within-departments aspect.

Queensland: In this matter, an unconscious return to tradition

The recent Queensland experience offers interesting points of contrast. First, there was a Commission of Audit appointed by the then-established Newman Liberal-National Coalition Government in 2012. And second, with the fall of that government, a new government – the Palaszczuk Labor Government – emerged in February 2015 as a generally unexpected election winner.

The Commission of Audit, chaired by Peter Costello who had been Treasurer in the Howard Commonwealth Coalition Government, was tasked with reviewing the Queensland government's financial position. It presented an Interim Report in June 2012 and a Final Report in February 2013, at which time a formal response from the government it was reporting to was also released. While the role of the state in service delivery was certainly addressed, the whole tenor of the reports and the response to them was retrenchment: the essential message was that the state had to advance by disposing of public enterprises and reducing debt, and there was little interest in machinery-of-government issues such as those considered in this article.[14]

Of the Palaszczuk Labor Government, it can be said that few governments have been elected to office with less preparation, and the circumstances of its arrival provide a remarkable case study of a group unprepared for government having to create a government virtually overnight. In the days after the initial swearing in on 14 February 2015, observers (Scott 2015a, b; Killoran & Wardill 2015; Warhurst 2015; King 2015) spoke of its 'totally unexpected elevation to government', 'a leadership team somewhat surprised at the rapidity of its success', 'elation among ministers tempered by awareness of their limitations', the 'naivety of the new cabinet', and its 'modest aspirations'. The Commission of Audit report was for the previous government, not this one. Initially there were only three ministers, while those three cast around for others to appoint (of course, this soon followed). The new Premier promised to keep changes to a minimum, but there had been a pre-election commitment to reduce the number of ministers and within a few days Queensland saw a reduction from 19 to 14 and a sweeping realignment of portfolios, with incoming directors-general facing 'a challenging amalgam of functions' and some 'apparently incongruous pairings' like Training & Skills with Attorney-General. There was a demand for loyalty from all directors-general, and they were under notice that the reasons for their original selection (by the previous government) would be examined in the context of 'merit selection'. What is relevant here, however, is that, while this strategy was largely unplanned in a Westminster sense and hardly a ticket for a smooth transition in the classic Westminster tradition, it treated portfolios and departments in the traditional way.[15]

Digesting developments in using portfolios, ministries and departments

As with the clusters in the NSW context, the new readiness illustrated in the Victorian case to view departments as hierarchically superior to portfolios across the whole government system deserves notice as a significant addition to our thinking about machinery-of-government matters. It has the potential to attract much more attention in the future. In the Commonwealth, this reversal of the traditional style emerges very occasionally (notably in The Arts Ministry case), but that points to a somewhat undisciplined mix, as 'portfolio', 'ministry', 'department', 'branch' and 'division' vie for recognition in the organisational statements. What this might suggest is that, as with Queensland, the Commonwealth system is generally predisposed to remain with portfolios and departments in the traditional way. We should also be aware that this organisational slipperiness has consequences for the way we now approach accountability issues. Full application of the Westminster principle of ministerial responsibility requires clear lines of reporting and accounting from departments to ministers, and those clear lines are now increasingly threatened. Thus it is not far-fetched today to ask whether departments are still ministerial.[16]

THE AGENCY DIMENSION: BIGGER OR SMALLER?

In one way or another, agencies have surfaced in all the commission reports and ministerial pronouncements noted above. A feature of modern public administration in many countries has been the growth in the number of agencies alongside pressures to reduce their number: the growth usually takes place in piecemeal fashion, with new agencies appearing individually or in small groups as new projects or enterprises are advocated and the disadvantages of close ministerial control urged; the demands for reduction in their number come collectively as retrenchment campaigns are orchestrated by conservative governments. The Commissions of Audit discussed above, all appointed by conservative governments, have all sought to reduce the number of agencies, and they share this approach with other inquiry-and-report instruments of conservative governments such as those of Bland and Uhrig in the Victorian and Commonwealth jurisdictions (on which see Wettenhall 2005, Wettenhall & Gourley 2009). The NSW Commission was unusual because, although it did this, it did more in its conceptualizing of clusters.

In traditional machinery-of-government practice, agencies have generally been given staffing autonomy and excluded from the coverage of *Public Service Acts*, which have been designed to provide a general employment framework for departments. In keeping with this construct, departments and agencies have been seen as together constituting the public sector, whereas a public service is made up of the departments only. With the growth of agencies, however, this distinction has been difficult to maintain, so that increasingly many agencies have come under coverage of the *Public Service Acts*. Machinery-of-government designers and analysts have been challenged to find working

systems and explanatory systems that account for the varying practices. Recognition of this problem is evident in many of the developments reported above.

The Australian experience mirrors that of comparable countries such as Britain, where the use of arm's length bodies has been marked by 'an ebb and flow of centralising and decentralising initiatives … since the seventeenth and eighteenth centuries' (Dommett *et al* 2015: 3; see also esp. Hood 1980). Leading British machinery-of-government researcher Matthew Flinders and his colleagues have, over several decades, recorded the ups and downs of popularity of non-departmental bodies in British public administration, and in recent works (e.g. Dommett *et al* 2015) they have demonstrated that, while non-Labour governments have been pursuing policies loosely described as 'quangocide' and actually eliminating some such bodies, they have usually been fringe bodies and not ones of major policy or budget significance.

For the latter, rather they have been engaged in different strategies of reform such as changing methods of control of on-going bodies, making some efforts to overcome cronyism in appointment to their boards, and shuffling bodies between departments or to new statuses such as executive agencies or government companies or even third-sector 'mutuals' (hence bureau-shuffling'). Such reforms, these analysts report, 'are unlikely to deliver significant benefits in terms of ''shrinking the state" in relation either to spending or personnel'. It would seem that Prime Minister David Cameron, unlike his conservative predecessors, is addressing the relevant reform by accepting the usefulness of much of the quango sector and its relevance to 'the Big Society', and then simply checking on its efficiency and accountability (Dommett *et al* 2015: 7, 9).

Flinders and his associates (Dommett *et al* 2015: 4–7) accept that this is now the dominant position: as the 'default organisational form for functions placed beyond ministerial departments', arm's- length bodies – or 'delegated governance' – are here to stay. They are an important and virtually inevitable part of the structure of the state, and the suggestion is that 'a governance-focused', rather than an 'abolition-focused', approach to them is gaining fairly wide acceptance. This somewhat softer approach is associated with a theoretical development which proposes that the use of agencies does not generate a democratic deficit and that it takes us rather towards a polycentric or pluralist form of democracy in which the agency boards (if properly constituted) are themselves accountable to their particular constituencies and thus part of the broader democratic society (Durose *et al* 2015: 141ff).

Though theoretical development has been slow, such views had earlier expression in Australia. As already noted, the centralizing/decentralizing 'ebb and flow' has been marked by the creation of a multitude of arm's length bodies in the Commonwealth and the states, and numerous public inquiries mostly recommending – but not very successfully – a return to ministerial government. Though not always stated very clearly, the notion of a more direct democracy being served by the agencies was often present in critiques of the inquiry reports. Thus, in response to Sir Henry Bland's 1970s attack on the Victorian liking for statutory authorities, Jean Holmes of the University of Melbourne argued strongly that the boards of the various authorities, being

representative of the interests most directly involved in the running of those authorities and as such 'direct agencies of government', were instruments of democracy in a much more direct sense than is offered in departments by the line of accountability through ministers to the legislature (Holmes 1975, 1978; Wettenhall 1986: 110–116).

So what is revealed in the Australian sources used as the basis for this article? As noted above, the Commissions of Audit, reporting to conservative governments, show an inclination to stress the large number of arm's length bodies in their jurisdictions and to make autonomy-curtailing recommendations, with a number of possible strategies available to them: for example mergers into departments, subjection to shared-service arrangements, increased ministerial controls and outright privatization. They provide us with lists of these bodies that are so long that they will generally surprise, and their classifying efforts focus on these disempowering strategies. The statute book is usually messy in these areas, and some cleaning up will be an advantage. Given the retrenchment bias, however, there will be plenty of criticisms of various, towards-cutting-back, reports. The governments they report to usually begin implementation of the recommendations, and some changes occur in the agency map. However there is little or no evidence of any thinking, either in the reports of the Commissions of Audit or the accepting dialogue those reports attract, along the lines of that now developing in Britain and noted above; and without it we can say that these reporting bodies and the governments they report to operate in a pre-modern world as they face the issue of 'delegated governance'.

Agencies also feature in the arrangements made to structure new governments, but the two that form case studies in this article are Labor governments and they are not characterized by the retrenchment commitments of the Commissions of Audit and their receivers. Some new agencies appear (such as a new Anti-Corruption Commission in Victoria), others move between portfolios, some even disappear -- but this is in accordance with long-standing practice in the development of the machinery of government and is determined mostly by judgments about efficiency, cost effectiveness and ministerial comfort.

In a technical organisational sense rather than a sense that is concerned with democratic implications, it is likely that one of the most significant changes now occurring in this field is that which is witnessing mergers of arm's length bodies with their associated departments. We are seeing this process at work in the Commonwealth jurisdiction, with its implications still to be fully assessed, as the now-giant Department of Human Services is absorbing CentreLink, Medicare and some smaller bodies, as the Department of Foreign Affairs is absorbing AusAid, and – in a reversal determined by the size of the structures concerned – the Customs and Border Control agency is absorbing the department that now carries the same name.

FINAL WORD

This article has looked at developments in machinery-of-government thinking and practice in the past few years in Australia as seen particularly in a set of Commission of Audit reports, in what Premiers have done in setting up new governments, and in some related literature. As Weller (2014: 56) and Bridgman (2015a: 1–2) have pointed out, the word 'mogging' has emerged in this period to describe such attention to the machinery of government. So just how significant has the mogging effect been during the period under review?

There have been interesting developments in terminology relating to portfolios and departments, but little evidence so far to suggest that they will significantly affect the way we go about building these main elements of government formation. As Bridgman notes, 'Governments result from political processes, and politics takes place in the context of stakeholders' (Bridgman 2015a: 14). The expectation is that these 'stakeholders' will always have top priority when government structures are determined, whatever underlying rationales may exist.

It may well be that the agency arena is where most of the real action takes place. Privatization, where it occurs, will certainly remove some of the agencies from the public sector. But it depends on swings of the political pendulum, and its effects – both ways – can be exaggerated. In 'mogging' terms, one of the most robust long-term effects may be the joining of public and private effort in joint ventures and public-private partnerships (PPPs), and it is timely that our research effort should look very seriously at world experience to date with these forms of mixed-ownership administration and the possibilities demonstrated by that experience.

NOTES:

1 See Wettenhall 1970 and 1986 for a detailed exploration. For a very recent Australian (Queensland) document that supports my explanations, see Bridgman 2015a. Portfolios are sometimes described as 'ministries', as in Ministry of Health – but in this sense they are still portfolios. 'Ministry' has another and more common use as a descriptor for the total group of ministers constituting a particular government, e.g. Whitlam Ministry, Abbott Ministry as alternatives for Whitlam Government, Abbott Government.

2 Procedures surrounding the preparation and implementation of *Administrative Arrangements Orders* received serious study by several groups in the lead-up to the formation of the Gillard Government in 2011: see Wettenhall 2014: 82–85.

3 For a recent international treatment, see Verhoest *et al* 2012, which contains a chapter on the Australian experience (Aulich & Wettenhall 2012). Sometimes it will be found that departments are also included in lists of agencies, but understanding of the machinery of government is helped by keeping this agency group conceptually separate: more recently the new class-name *arm's length body* has emerged in another effort to comprehend the difference between departments and non-departmental bodies.

4 On the Australian Commissions of Audit generally, see Jones & Prasser 2013, Weight 2014.

5 Likewise the Commonwealth's Commission of Audit appointed by the Abbott Government after its election in 2013 was charged with examining and reporting on policy options to guide that government as it moved into its period of office. There was planning machinery aplenty, and the Commission then produced public and, eventually, easily accessible even if badly edited and difficult-to-deal-with documents. However they had little to do with the portfolio/department tinkering development to be noted shortly.

6 There is another irregularity: some of these ministers are cabinet ministers, others are not.

7 Jon Stanhope, Roger Wettenhall & Thaneshwar Bhusal, 'Governance Challenge: Australia's Indian Ocean Island Territories', 2016.

8 See below for discussion of the general problem of fitting agencies into the machinery of government as a whole. New Zealand pioneered in the Antipodean world in 1962 in formally establishing a *state services* system to ensure that public personnel policies were reasonably coordinated overall; in Tasmania in 1981 an inquiry report, with legislation to follow, used the terms *crown service* and *government service* with a similar purpose. For exploration, see Wettenhall 1997.

9 A commentary issued in June 2013 asserts that the Government of the State of New South Wales and its agencies together constitute 'Australia's largest employer': Belling & Parker 2013: 1.

10 'Departments' are currently provided for under Part 4 of the *Government Sector Employment Act 2013*, though the term 'principal department' is not used there.

11 The statutory corporation is created by *Art Gallery of New South Wales Act 1980*, s.5, with the Staff Agency gaining most recent statutory recognition in Schedule 2, Part 2 of the *Administrative Arrangements Order 2014*.

12 In this case Victoria's *General Order Dated 4 December 2014* assigned ministerial responsibilities, with an associated *Administrative Arrangements Order* detailing the legislation falling within each 'portfolio'.

13 An Australian 'government' now generally includes assistant ministers as well as the ministers proper; they may or may not be regarded as part of the cabinet. A ministry may thus be said to include 22 ministers but have only seven full ministers.

14 Documents available on Queensland Commission of Audit website.

15 Scott 2015a, 2015b, 2015c; Bridgman 2005b. I am grateful to Professor Roger Scott, chair of the TJ Ryan Foundation, for making available relevant commentary.

16 See discussion in Wettenhall 2014: 85–87.

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Electoral Reform and Party System Volatility: The Consequences of the Group Vote Ticket on Australian Senate Elections

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ABSTRACT

This article explores the relationship between the reform of Australia's Senate voting system that included the introduction in 1984 of the Group Vote Ticket (GVT) (also known as 'above the line voting') and the diversification of party representation in the upper house that has occurred since. It argues that the GVT has made a major contribution to this change by re-enfranchising large numbers of voters, by providing the basis upon which cross-preference arrangements between minor parties can be entered in to, and by providing an incentive for the formation of parties ahead of elections. It further finds that the reform was brought in by the Labor party and the Australian Democrats party in the pursuit of partisan advantage, but that the consequences of the change in voting system has actually been to the cost of these parties, at least in terms of representational outcomes.

INTRODUCTION

In 1983, the *Commonwealth Electoral Act (1918)* was overhauled by the newly elected Australian Labor Party (ALP, or Labor) government led by Prime Minister Bob Hawke. The process had commenced with a Joint Standing Committee on Electoral Matters (JSCEM) inquiry into the dynamics of the election held that year and from which a number of reforms were recommended to the new government (JSCEM 1983:201–222; Rydon 1985; Farrell and McAllister 2003). The inquiry was wide-ranging as were the recommended reforms. In amongst these was a proposal to alter the way electors could vote for the Senate. The Electoral Office (the forerunner to the Australian Electoral Commission (AEC)) proposed to the JSCEM what would become known as the 'Group Vote Ticket' (GVT), where voters could either cast a single primary vote for a party list (with that option appearing above a thick black line on top of the Senate ballot paper), and this vote would assume to be counted according to the allocation of preferences for all candidates as lodged by the political parties with the electoral authority, or voters could fill in their own preferences under the black line (see JSCEM 1983:64–65; Farrell and McAllister 2006; Bennett 1996:12). As Rydon (1988) noted soon after its adoption, the new system had the effect of modifying the Single Transferrable Vote (STV) system to be more similar to the sort of party list system used in Europe.

Table 1: Minor Parties in the Senate party system 1949 to 2013

Minor parties elected to the Senate 1949 to 1983	Minor parties elected to the Senate 1984 to 2013
Democratic Labor Party (1955 to 1974)	Australian Democrats (1984 to 2001)
Liberal Movement (1974)	Nuclear Disarmament Party (1984 and 1987)
Australian Democrats (1977 to 1983)	Valentine Peace Group (1987)
	West Australian Greens (1990)
	Australian Greens (1996 to 2013)
	Pauline Hanson's One Nation (1998)
	Family First (2004 and 2013)
	Democratic Labor Party (2010)
	Australian Sports Party (2013) [1]
	Australian Motoring Enthusiasts Party (2013)
	Palmer United Party (2013)

One of the reasons given for modifying the Senate system in this way was the need to address the incidence of high rates of informal voting in Senate elections since the introduction of proportional representation in time for the 1949 election. As Hughes once noted (1983), a strong case could be made for arguing that it was the ALP that tended to be most disadvantaged by persistent high rates of informality. Thus a sense of partisan advantage was implicit in the Hawke Labor government's willingness to institute the reform recommended by the JSCEM, although, as this article will show, Labor's representational aspirations in Senate contests since the 1983 reforms have not been met, even though a significant fall in informal voting rates in the Senate has been achieved.

Senate outcomes since 1984 have been characterised by an increasing diversity in 'minor' party success. This period contrasts with the era between 1949 and 1983 (see table 1) in which Senate outcomes were dominated by the major parties with only a few exceptions usually in the form of secessionist minor parties, such as the Democratic Labor Party (DLP) and the Liberal Movement (LM) securing seats. This changing pattern has been the source of great controversy, especially given that some of these 'minor' party successes have occurred often on the basis of a very small share of the primary

1 This data includes the declared result for the Senate in Western Australia in the 2013. This was the result, after the re-count, of the votes cast at the general election after which the Australian Sports Party was found to have won a seat rather than the Palmer United Party, and that the Greens won a seat rather than the Labor Party. This result was later overturned by the High Court sitting as the Court of Disputed Returns. In the subsequent by-election the Palmer United Party, the Greens, one Labor and three Liberal senators were returned.

vote. Lijphart (1986) once wrote that assessments of the extent to which outcomes in STV elections are proportional must address the vote after distribution of surplus and preferences, but there has been a tendency in Australian political commentary to focus on the primary vote, leading to laments that the GVT system has resulted in unfair outcomes. Of particular concern to critics has been the capacity the GVT system provided for party secretariats to seek to either freeze out other parties or enter in to cross-preference deals, the consequence of which led analysts to allege that party participants were seeking to 'game' Senate contests (Green 2005, and see JSCEM 2014:18–25).

This article seeks to account for the change that has occurred in the Senate party system by identifying the causal relationship between reforming electoral systems and representational outcomes and serves to remind us that, sometimes, changes to electoral systems can result in outcomes not intended or foreseen by those undertaking reform. It argues that the Senate voting reforms bought in by Labor and supported by one of these minor parties – the Australian Democrats – were partly driven by the pursuit of partisan advantage. The consequences, however, have not included any such advantage for either party. In Senate contests since 1984, Labor has never won a majority (the Coalition, on the other hand, did secure a Senate majority after the 2004 election) (see Economou 2006, Simms and Warhurst 2005:7) and the Australian Democrats party lost its parliamentary presence after the 2007 election. Instead of a Labor majority and/or a Democrats presence, the Senate has been populated by an increasing number of new minor parties, starting with the Greens and reaching a particular high-point in 2013 with no less than five parties in addition to Labor, Liberal and the Nationals winning Senate representation

This article argues that the changes occurring in Senate representational outcomes and the Senate-based party system have been influenced by the GVT in four ways: first, the GVT process succeeded in addressing the problem of voting informality with the result that significant numbers of voters have been re-enfranchised (although Labor's hope that this would result in an increase in its primary vote across all states has not been met); second, the GVT system was enthusiastically and comprehensively embraced by the Australian voter and this resulted in a fall in support for the major parties (especially Labor) and a big increase in support for 'others'; and, third, as a consequence of the second point, a hitherto unrealised capacity for political actors to use the GVT to try to impact on outcomes arose and was exploited initially by the major parties but then, later, by 'minor' party actors as well. In other words, the GVT system enhanced the politics of what Mayer once described as 'preference wheeling and dealing' (Mayer 1980), although it is also interesting to note that this has not necessarily been to the advantage of the two parties that oversaw the passage of reform legislation back in 1983. Finally, the dynamics associated with the politics of preference dealing under the GVT has acted as an incentive for the formation of Senate parties. The rate of party formation and nomination has increased since 1984, with the rate of party formation increasing quite dramatically ahead of the contest to such an extent that it actually impacted upon the result.

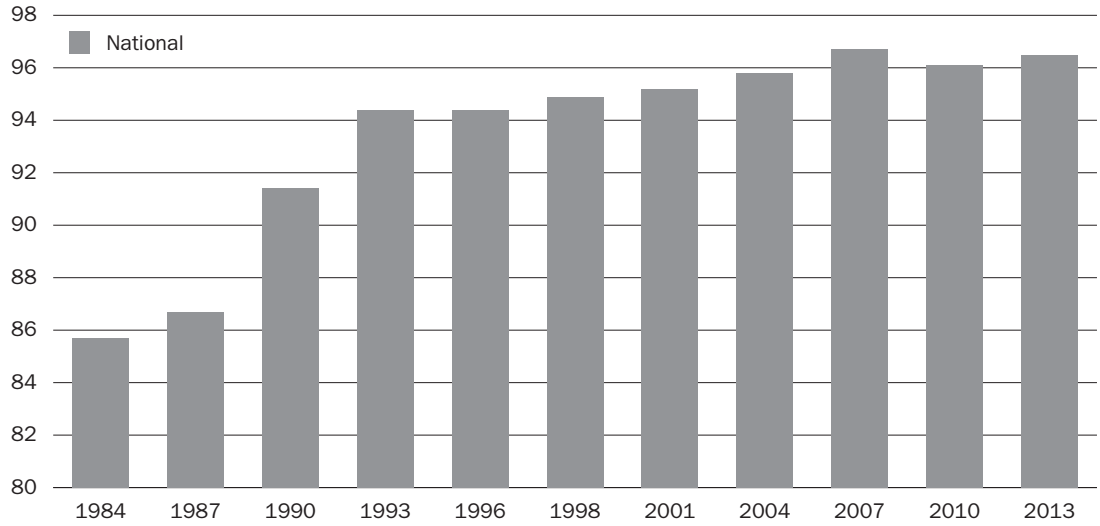
SENATE REFORM AND PARTISAN INTEREST

The adoption of the GVT system occurred as part of the general suite of changes to the electoral act that included the provision of public funding for elections, an increase in the size of both the House of Representatives and the Senate (with consequences for the size of the quota candidates needed to achieve to win an upper house seat), and the inclusion of the party affiliation of candidates (see Rydon 1984). This change, and the GVT itself, were designed to assist voters in making choices in the Senate contest between competing party lists and to make the process as simple as possible so as to mitigate informality. If the assumption that less numerate and literate voters were being dis-enfranchised by the old system was correct, then it was also safe to assume that it was Labor that was the most likely to suffer as a result of endemic informality (Hughes 1983:312). Indeed, former chief electoral commissioner Colin Hughes once wrote that the abnormally high number of candidates in the 1974 Senate election in New South Wales had been responsible for a higher-than-usual informal vote, and that many of these voters had been trying to elect the Labor Senate ticket. Had these votes been formal, he estimated Labor would have won an extra seat in that state and the 1975 constitutional crisis might not have happened (see Hughes 1977:294–295). Thus the rationale for reforming the Senate voting system could be accounted for on partisan party lines: if Labor was being disadvantaged by a system that resulted in high levels of informal voting, the objective was to find a system that could seriously reduce that rate of informality.

The incentive for the Australian Democrats to support a reform based on simplifying voter choices lay in the consequence the GVT would have on the question of preference flows. The Democrat party ticket could always rely on a small contribution to the quest for a quota from the split-ticket phenomenon where electors voting for one or other of the major parties in the lower house would seek to ‘check and balance’ that choice in the upper house (see Bowler and Denemark 1993). However, this alone was not enough to secure a seat. The success of Australian Democrat candidates in Senate contests actually depended on being able to obtain a flow of surplus from the major parties (and especially from the Labor ticket), as there were very few instances of Democrat candidates being able to secure a quota in their own right.

This, in turn, would depend on one or both of the major parties advising their voters to place the Democrats as their next preferred set of candidates, but this could also be diminished as a consequence of high informal voting especially if (as was increasingly becoming the case) the Democrat ticket would be relying on surplus from the Labor ticket. The Democrats had an additional problem in that party rules forbade directing preferences to the major parties (Gauja 2005). The beauty of the GVT system was that the major parties would be disinclined to issue GVTs directing preferences to each other, whereas the Democrats could register two GVTs. In the case of the ALP in particular, the Democrats looked like a more palatable option than any of the more ideological minor parties of the left (back then, this included doctrinaire parties such as the Socialist Workers’ Party) or, indeed, the populist parties starting to emerge on the right (see Ghazarian 2015:130).

Figure 1: Use of GVT, Senate elections (national 1984 to 2013)

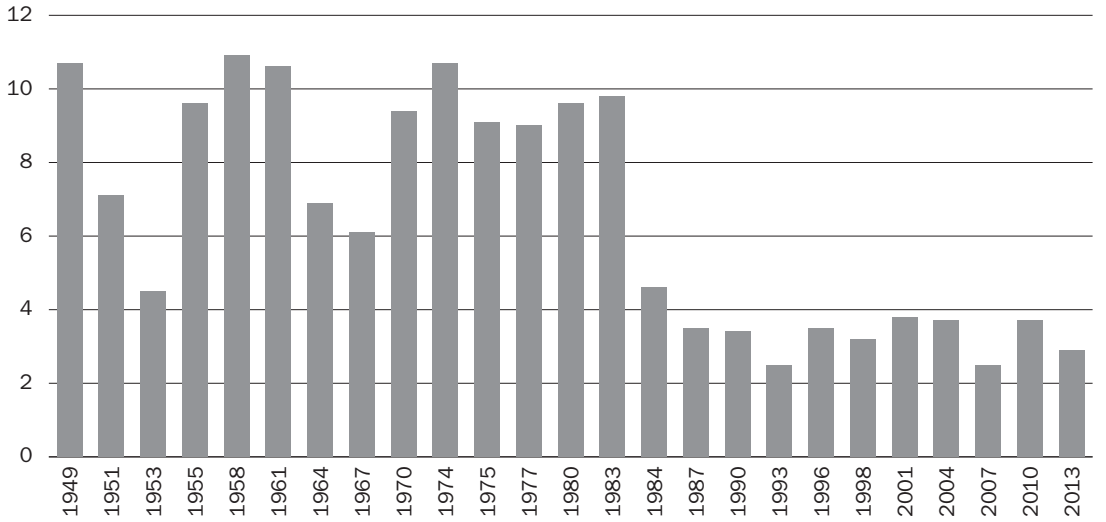


Source: http://www.aec.gov.au/About_AEC/Publications/electoral_pocketbook/2013/files/2013-electoral-pocketbook.pdf

The opposition of the Liberal and National parties to these reforms had focused mainly on the proposal to tighten campaign donation disclosure laws and the idea of using taxpayer funds to cross-subsidise election campaigning. The Liberal party was sanguine on the matter of the proposed GVT reform provided voters still had the option to fill in their own preferences should they wish to do so (JSCEM 1983:64). However, the Liberal member on the JSCEM, John Carrick, did voice his concern about the capacity the GVT system had to encourage the proliferation of minor parties in a dissenting report (although Carrick did think this would most likely be at the behest of major parties running 'dummy' candidates) (JSCEM 1983:225–226). Given that Australian Democrat senators held the balance of power in the Senate, any coalition opposition could be by-passed provided the Democrats were in favour of the reforms and this support was duly given.

Whatever the criticisms mounted of the GVT system (some of which will be highlighted below), the reform was a great success both in terms of its popularity amongst voters and its impact on the informal vote. Figure 1 tracks the national rate for use of the GVT by electors voting for the Senate. Initially being used by around 85 per cent of voters, the rate of GVT usage was to be above 90 per cent from 1990 and occasionally went over 96 per cent. While there are some regional variations to this trend (the rate of GVT usage tends to be a bit lower in Tasmania), the popularity of this option tended to be even stronger amongst those voting for the major parties themselves (often near 99 per cent).

Figure 2: National informal vote: the Senate 1949 to 2013



Source: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/FedElect/FedElecto

This is an important point, for in the event of one or other of the major parties failing to get their third-placed candidate elected, the consequent surplus that has been distributed has been responsible for the election of the sixth senator in each state. Between 1984 and 2004, this tended to be the lead candidate on the Australian Democrat ticket whose election would be secured by the flow of Labor surplus with the failure of the third Labor candidate to be elected. The recurrence of this pattern led Mackerras (1993:245) to conclude that half-Senate contests in which six senators were being returned per state would invariably result in three seats being won by the 'right of centre' (primarily the Coalition), and three by the 'left-of-centre' (meaning two Labor and one for the Democrats).

The impact of the GVT and other reforms designed to make voting choices easier for electors has been just as dramatic on the rate of informal voting for the Senate. Figure 2 tracks the national informal vote for Senate elections between 1949 and 2013. This graph demonstrates the impact the 1983 reforms had on informal voting, where the new GVT system combined with other changes, such as the use of party identification of candidates, has contributed to a halving of the rate of informal voting for the upper house. This point can be re-enforced by referring to averages: prior to 1984 the average national informal vote was 8.8 per cent per election, whereas since 1984 the average rate has been 3.3 per cent. Given that addressing the high rate of informal voting was one of the Hawke Government's main objectives in reforming the Senate voting procedure, the significant reduction in the rate of informal voting since 1984 is another endorsement of the success of the GVT system.

THE POLITICS OF PREFERENCING: THE IMPACT OF THE GVT

The notion that the GVT system's impact on informal voting, and the rate at which it was used by electors, constituted a successful reform, has been overshadowed by the controversies associated with some of the representational outcomes it was responsible for delivering. This was particularly the case where GVTs were at the centre of contentious representational outcomes, the most common being where a person was elected to the Senate despite winning only a very small share of the primary vote, or where the major parties used their GVTs to try and 'freeze out' a competitor minor party. There have been very many such controversies since 1984, but three have been particularly contentious. In 1984, the ALP used the GVT to block the parliamentary aspirations of Peter Garrett, the then lead candidate for the Nuclear Disarmament Party (NDP) in New South Wales. In 1998, Labor, Liberal, the Nationals and the Australian Democrats all placed One Nation candidates last in their respective GVTs thereby blocking One Nation aspirations in all states except Queensland where the lead candidate achieved a quota on primary votes. Finally, the election of Family First's Steve Fielding to the Senate with the assistance of Labor preferences in 2004 caused dismay on the left-of-centre given that this occurred at the expense of the Greens candidate who had polled a much greater primary vote than Mr Fielding (Economou 2006).

The use of the GVT to impact on the emergence of the NDP was a response by the Labor Party's NSW executive to the nomination of the then rock musician and anti-nuclear campaigner, Peter Garrett, as the lead candidate for the NDP ticket in that state. Similarly, the ALP's Victorian branch was keen to block the progress of former Labor senator and now lead NDP candidate Jean Melzer. In both cases the Labor GVT not only placed the Democrats ahead of the NDP in its preference ranking, but it also put the NDP last, thereby ensuring that if the NDP candidate failed to win a quota in his or her own right, they would fail to get in to the Senate altogether. A similar strategy was at work in the 1998 election – the sixth one at which the GVT was in use – although this time a number of parties adopted the strategy to try to block the progress of Pauline Hanson's One Nation Party (PHON). In the 1998 contest, it was PHON that had emerged as a challenge to the stability of the party system because of the threat it posed to the Liberal and National parties. Labor was always going to put One Nation to the bottom of its GVT, so it was the decision of the Liberal and National parties to also "put One Nation last" that stood out (see Goot 2006).

Table 2: NDP and PHON senate performances compared

Election	Party	NSW	VIC	QLD	WA	SA	TAS
1984	NDP						
	Vote %	9.7	7.3	4.4	6.8	4.6	2.9
	Quota	0.6	0.5	0.3	0.4	0.3	0.2
	Seats	0	0	0	1	0	0
1998	PHON						
	Vote %	9.6	4.2	14.8	10.3	4.5	3.7
	Quota	0.6	0.3	1.0	0.7	0.3	0.2
	Seats	0	0	1	0	0	0

Source: Quigley (1986): AEC 1998

The impact of the use of the GVT system by the major parties on representational outcomes as they pertained to both the NDP in 1984, and PHON in 1998, is observable in the nature of the results for the two minor parties in their respective elections (table 2). The ability of the major parties to freeze out the respective minor parties is evident in those instances in which a minor party secures a primary vote that results in it achieving a quota of 0.5 or more but fails to win the seat for want of a flow from major party surplus. The table shows that this was the case for the NDP in 1984 in both NSW and Victoria, and for PHON in 1998 in NSW and Western Australia (Green 2005). The instance of PHON's solitary success in 1998 was in Queensland where the total vote for the party exceeded the quota and thus did not require any assistance from the major parties (or, more specifically, the Liberal and National parties with whom the PHON had undertaken preference-swapping deals in the 1998 Queensland state election).

The other stand-out result in this table was the seat won by the NDP in 1984 in Western Australia with 6.8 per cent of the primary vote (for 0.4 of a quota). This outcome was achieved with the assistance of Labor surplus and, indeed, the NDP (later to be the Valentine Peace Group, then the West Australian Greens (WAG)) was to secure a Senate seat with the help of Labor surplus at the expense of the Australian Democrats in the half-Senate elections of 1990 and 1993 (the WAG also won a seat in the 1987 double dissolution election). Of these, the 1990 election was significant because this was the only contest where the WAG primary vote was lower than that of the Australian Democrats. Moreover, the WAG received the preferences of both Labor and the National Party as outlined by their respective GVTs. As Mackerras (1993:239) observed:

> The critical effect of big party preferences is illustrated by the re-election of (VPG candidate Jo) Vallentine … In each case it was the consequence of higher placement on the registered ticket. In other words, people who placed their '1' in the box above the ballot line for either Labor or National were ensuring the re-election of Vallentine …

The issue of how a major party (in this case, the Labor Party) chose to direct its preferences via the GVT was also at the centre of the controversy surrounding Family First's Steve Fielding's election in the 2004 half-Senate election. This was an important development, not only because of the way the result confirmed the dependent relationship of minor parties to the major parties if a minor party candidate failed to win a quota in her or his own right, but also because of the perception that Fielding had prevailed despite winning only a very small share of the primary vote (55,551 primaries, or 1.8 per cent). Up until this point, minor party successes at half-Senate elections had been based on winning a share of the primary vote that at least achieved the 4 per cent threshold required to qualify for public funding and a return of candidate deposits (the securing of a seat by the NDP in NSW in 1987 was done on the basis of only 1.7 per cent of the primary vote, but this was in a full Senate election). A party like the Australian Greens, which was now winning Senate representation, would do this on the basis of a primary vote well above 4 per cent and often bordering on nearly 10 per cent.

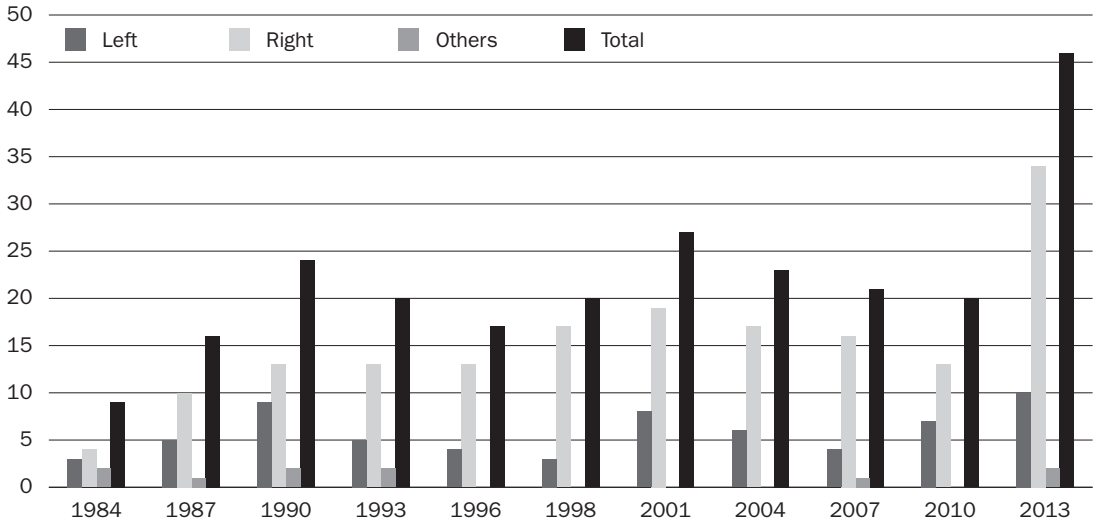
The participation of Family First in the co-ordinated cross-preference arrangements with a number of other minor parties, not all of whom were of a similar ideological disposition (in this election, for instance, the Australian Democrats party was part of the agreement), was the difference in the 2004 Senate contest. Fielding eventually secured the seat with Labor surplus, but before that could happen, he had to survive the elimination process of all the other minor party candidates who had polled less than 2 per cent of the primary vote. With each successive reallocation of preferences, Fielding's total vote was increasing to the point where he overtook those other minor party tickets. Fielding was thus the first candidate to demonstrate the capacity the GVT system could have to deliver a seat to a candidate outside of the main parties and with a comparative weak primary vote. The co-ordination of cross-preferencing amongst these minor parties was the key to this outcome.

To be able to explain what was happening to the general public, political commentators adopted two new terms to account for, first, the increase in the number of political parties being registered with the AEC (a trend that had been noticeable since 1984 but had been increasing since 1998), and, second, the co-ordinated cross-preference agreements that were being struck. For the former, commentators have been using the term 'micro-party' presumably to differentiate between those parties that are registered ahead of an election but whose claim to legitimately have 500 bone fide members is questionable, and more permanent and transparent parties such as the Greens. Moreover, the 'micro parties' tend to be associated with co-ordinated preference-swapping agreements, while clearly this is something in which the Greens do not participate. For this preference-swapping, analysts have coined the term 'preference harvesting' to explain how the executive officers of these micro parties come together to enter in to agreements to direct GVT preferences to each other (see Green 2006). A Mr Glen Druery is the person identified as being at the centre of preference harvesting process. Mr Druery had been a Liberals For Forests candidate for the Senate in NSW in 2001, and his success in getting a wide range of other micro-parties to enter into a cross-preference arrangement allowed him to be one of the final candidates still with a chance to win the sixth seat in that contest despite polling a mere 21,152 (that is, less than 1 %) of the primary vote.

Druery was the person who assisted interested micro-parties to participate in cross-preference deals in both the 2007, 2010 and 2013 Federal elections. Micro party success was limited to the election of a DLP senator in Victoria in 2010, but the 2013 election saw a significant number of 'micro parties' returned. While a significant swing away from both the ALP and the Greens occurred, arguably of no less significance was the growth in the number of political parties registered for this election clearly for the purpose of contesting the Senate. In the larger states, voters received Senate ballots papers listing in excess of 30 party tickets in addition to tickets from Labor, the Liberal and National Parties Coalition and the Greens. The performance of the 'micro parties' in this contest was remarkably consistent in all but a few cases. The only instances of these tickets polling a primary vote greater than 4 per cent were the Liberal Democratic Party in NSW (with 9 per cent), and the Palmer United Party tickets in Queensland (9.8 per cent), Tasmania (6.5 per cent), and Western Australia (5 per cent).

In each state, the average primary vote for all micro parties was 0.5 per cent. However, the cumulative effect of there being so many of these parties all receiving these small primary votes was to push the total vote for 'others' beyond the 14.4 per cent required to achieve a quota. Indeed, if the total vote for all parties other than Labor, Coalition and the Greens for 2013 is aggregated by state, the 'other' category won 28.8 per cent in NSW (1.7 quota), 16.4 per cent in Victoria (1.1 quota), 23.8 per cent in Queensland (1.6 quota), 19.7 per cent in Western Australia (1.3 quota), 17.4 per cent in South Australia (1.2 quota) and 17.9 per cent in Tasmania (1.2 quota). Organised in this way, the 2013 Senate vote reinforces the legitimacy of the election of senators other than those from the ALP, the Coalition and the Greens, and in the case of NSW and Queensland, there was almost enough quota for a second micro-party seat.

Figure 3: Number of non-major parties, Australian Senate elections 1984 to 2013



This figure includes all forms of 'green' political parties

The contentious issue here, however, was not so much the use of the GVT (which really only had such an impact because of the extent of the realignment of voter support from Labor and the Greens to 'others' in this election), but the rate at which parties were being formed and candidates were being nominated for this election. The increase in party registrations and candidate nominations was quite significant between 2010 and 2013 (see figure 3) and this has raised questions as to whether the enthusiasm for party formation reflected reaction to the political debate over the previous three years, or an attempt by political actors to try to impact on representational outcomes by swamping the contest with candidates. While it is true that party and candidate rates rose dramatically in 2013, it is also the case that party and candidate rates had been increasing over the period since 1984 anyway (see figure 3). Green noticed a similar phenomenon occurring in other jurisdictions using the multi-member, STV system for their upper house elections and where an option to cast a GVT exists. As he noted (2005) with regard to elections for the NSW Legislative Council:

> The game reached new heights at the 1990 NSW election. A plethora of so-called 'micro parties' created a ballot paper the size of a table-cloth, with 264 candidates and 81 groups across 3 rows. Despite finishing 29th on the primary vote, Malcolm Jones from the Outdoor Recreation Party stormed to victory with just 0.2 per cent of the vote, or 0.04 of a quota. Jones harvested preferences from 21 other parties, including 8 that had achieved a higher primary count.

These developments demonstrate the nature of the causal link between the introduction of the GVT and the changes that have since occurred to the Senate party system. As political actors other than the secretariats of the major political parties honed their skills at organising the direction of preferences, the GVT now acted as an incentive for the formation of political parties. Although it is not clear whether the increase in party registrations and candidate numbers has been the product of reactions to how the political debate had progressed during the previous three years, or if it is the result of a deliberate strategy to swamp elections with candidates, this aspect of Australian Senate contests emerged as a significant development. The 2013 election revealed just how a large number of tickets could impact upon the final result. With each ticket taking a very small share of the primary vote from the major parties (in 2013, this was mainly at the expense of the primary vote for the Liberal and National Parties) the past tendency of Senate outcomes to divide neatly between the Coalition and Labor and the Greens was challenged. This represented quite a significant shift in the balance of power from the recent past where it was the major parties that were using their GVTs to decide which minor party would win the sixth seat in each state (and, on occasions, seeking to successfully freeze out challenges arising from parties outside of the mainstream). In 2016, the Liberal-National coalition government legislated to abolish the GVT.

CONCLUSION

Changes to electoral systems will always have the potential to impact on representational outcomes, but not always in ways that the sponsors of reform might have originally envisioned and/or hoped for. Changes to the Senate voting system in time for the 1984 election, designed to make it easier for electors to cast formal votes and thus address what had been a significant informal vote, to which the GVT was a major reform, have been a case in point. This reform was enacted by a Labor Party convinced that those being disadvantaged the most by the old system were more likely than not to be part of that party's core constituency. In getting the reforms through parliament, the Labor government needed the assistance of Australian Democrats cross-bench senators whose interests would also be served by a system that would bring greater certainty to the process by which Senate preferences could be cast and then counted in their entirety. Indeed, the politics of this reform re-enforces Colomer's (2005) view that electoral system reform tends to be self-serving of those seeking to undertake changes, notwithstanding the grand normative democratic rhetoric that might be employed in rationalising these changes.

Colomer also noted that such reform can be double edged, and that the actual consequences of change might be very different to those forecast by the reformers. This would appear to be the case for the GVT reform, as the forecast of a consolidation of Labor representational outcomes on the back of a re-enfranchising of voters previously rendered as informal did not come to pass. On the contrary, since the 1983 changes Labor has never won more than three seats per contest and it has certainly not ever won an upper house majority. Rather, Labor has struggled to defeat either the Democrats or the Greens to win a third seat in a number of states, and in the last election won only one seat in both Western Australia and South Australia. The Australian Democrats party has also declined since the reform, and part of the reason for this decline has been the fact that the Greens have displaced the Democrats as the party capable of winning the third left-of-centre seat in each state. This in turn has occurred because of the way the Greens and Labor have been able to enter in to preference-swapping arrangements not allowable under the Australian Democrats' party rules. In to the vacuum has come the new parties, led principally by the Greens but in more recent times other right-of-centre 'micro' parties have been benefiting from the realignment of the Labor vote.

The GVT system, whose popularity was confirmed by the way a vast majority of Australians use it to cast their Senate vote, and whose success in reducing informal voting can be demonstrated, was central to all of this. It has opened a new dimension to the politics associated with the way political parties interacted with each other for the purpose of entering in to agreements on preferences. It also acted as an incentive to the formation of political parties. There is no doubt that the GVT system empowered the secretariats and executives of the political parties to try to influence outcomes (it is primarily these actors who preside over preference negotiations and agreements), but it was also clearly the case that this influence had not always resulted in outcomes

that those actors desired and/or intended. This was particularly so for the Labor Party, whose representational successes have been diminishing since the introduction of the system, and for the Australian Democrats party which was finally de-registered in 2015.

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The New South Wales Legislative Council's Oral History Project

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INTRODUCTION

In 2013 the Department of the New South Wales (NSW) Legislative Council (the Department) held a series of interviews with former parliamentarians to document and share aspects of a particularly important milestone in the Council's history: the establishment of the modern committee system.

The Council's oral history project (the project) is now an ongoing initiative that has three primary objectives. Firstly, to study how Australia's oldest representative legislative body has developed from a staid, undemocratic institution to an upper house that has become an effective house of review. Secondly, to provide those interviewed an opportunity to reflect on their involvement with and contribution to significant events of the past. And finally it is hoped that the thoughts of the interviewees can be used to further our understanding of how a reinvigorated Council has performed in its role of legislative review, scrutiny and inquiry.

The purpose of this paper is to summarise the project's progress and outcomes to date and reflect on what is required to administer such an initiative. The paper also teases out some of the key issues and themes that have emerged from the interviews, briefly details some of the similar programs that have been undertaken in other Australian jurisdictions and outlines the project's future direction.

WHY UNDERTAKE AN ORAL HISTORY?

The impetus for the project stemmed from the 25th anniversary of the establishment of the Council's system of standing committees in 2013. The anniversary proved an opportune moment to look at the contribution Council committees have made to the effective governance of NSW and also to consider what role upper house inquiries may take in future. Three primary means were identified through which to take stock and identify possible future directions: a debate in the House,[1] the C25 seminar co-hosted by the Council and the Australasian Study of Parliament Group in September 2013,[2]

1 *NSW Legislative Council Debates*, 19 September 2013, pp 23765- 23796.

2 'C25: Marking 25 years of the committee system in the Legislative Council', http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/C25, retrieved 4 April 2016.

and interviews with five former members all closely involved in creating the Council's standing committee system.[3]

Having decided to undertake an oral history to study the establishment of the standing committee system two additional Council milestones were identified for future examination, namely the reconstitution of the Council as a directly elected body in 1978 and the Egan cases.

Until its reconstitution the Council was the last non-elected House in Australia. The catalyst for the reconstitution was the election of the Wran Labor Government in 1976 and its promise to hold a referendum to decide the Council's membership number and future method of election.[4]

The Egan cases enabled the courts to consider a number of important issues regarding the relationship of the Executive to the Parliament, and in particular whether the Council has the power to order the production of state papers. The key finding of the High Court in the first case was that as the Council has the implied powers and privileges necessary for the fulfilment of its roles, including scrutinising the activities of the Executive Government, it did indeed possess the power to order the production of state papers. The second case made clear that the power of the House could be exercised and must be complied with notwithstanding executive claims of privilege.[5]

With identified areas of interest to examine, the oral history project was added to the Department's *Strategic Plan*[6] as a key deliverable and a project officer (reporting to the Clerk and where appropriate the Clerk Assistant – Committees) was assigned to manage its implementation.

PROJECT PHASE ONE – THE STANDING COMMITTEE SYSTEM

Work on the first part of the project commenced in March 2013 approximately six months prior to the C25 seminar. To begin, a project plan was developed that: established the project's purpose; identified anticipated outcomes; outlined the role required of the project officer and the Clerk; and set out a project timeline. A key element to developing the plan involved the project officer and Clerk Assistant, Committees meeting with various people throughout the parliamentary administration who had expertise in interview techniques, historical research methods, and an understanding of the elements to conducting an oral history.

3 Links to the interview transcripts can be accessed via 'Legislative Council Oral Project', http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/OralHistory, retrieved 4 April 2016.

4 L Lovelock and J Evans, 2008, *New South Wales Legislative Council Practice*, the Federation Press, Leichhardt, p 37.

5 G Griffith, 1999, 'Egan v Willis & Cahill: the High Court Decision', *NSW Parliamentary Library Research Service,* 1/99, High Court of Australia – Egan v Willis – [1998] HCA 71, and New South Wales Court of Appeal – Egan v Chadwick & Ors [1999] NSWCA 176.

6 The Strategic Plan can be accessed via 'Strategic Plan – Department of the Legislative Council', http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/LCStrategicPlan, retrieved 4 April 2016.

During the consultation phase it was suggested that someone external to the Department be involved with the project in either an advisory role or a hands-on capacity. This suggestion was made to ensure that the project benefited from the involvement of someone with expertise directly relevant to oral history rather than simply being administered by departmental officers whose principal skills and knowledge lay elsewhere. To that end, the Department was very fortunate to secure the services of Dr David Clune, the former NSW Parliamentary Historian and Manager of the Library's Research Service. Further detail and comment on Dr Clune's involvement is detailed below.

With a project plan established and external assistance obtained, the project officer worked to identify potential interview candidates that had been integral to the establishment of the standing committee system. To begin, the two key books which detail the institutional history of the Council and the Parliament, namely *New South Wales Legislative Council Practice*[7] and *Decision and Deliberation – the Parliament of New South Wales 1856–2003*[8] were referred to. Next, the 1986 report of the 'Select Committee on Standing Committees'[9] that investigated and reported on potential options for the Council to implement a structured committee system was examined. The identification process also involved going through relevant Hansard debates and media clippings and consulting former departmental staff.

The project officer sought to identify potential interviewees representative of the then government, opposition, and cross-bench. The identification process yielded five potential interviewees: the Hon Max Wills (Liberal), the Hon Ron Dyer (Labor), the Hon John Hannaford (Liberal), the Hon Lloyd Lange (Liberal), and the Hon Elisabeth Kirkby (Democrats).

Those identified for interview were contacted in writing so as to detail the project and its objectives, as well as to ascertain their interest in participating. Fortunately all agreed to an interview. With the interviews canvassing events and issues that had occurred at least 25 years prior, it was important to ensure that all interviewees were fully briefed prior to their interview in order to provide them the best opportunity to confidently answer questions at length.

Briefing packages were prepared for all interviewees. The briefings detailed their contribution to the development of the standing committee system as well as their service as a member of the Council. They also included a timeline tracing the history and development of the Council and provided indicative questions and suggested talking points. Also attached to the briefing packages were relevant Hansard extracts, journal articles and extracts from both *New South Wales Legislative Council Practice* and *Decision and Deliberation*. Each interviewee was given at least two weeks to review the material prior to their interview. Additional material was provided to the interviewees on request.

7 L Lovelock and J Evans, 2008.

8 D Clune and G Griffith, 2006, *Decision and Deliberation – the Parliament of New South Wales 1856–2003*, the Federation Press, Leichhardt.

9 Select Committee on Standing Committees, 1986, NSW Legislative Council, *Report of the Select Committee on Standing Committees of the Legislative Council*.

The interviews were held at the NSW Parliament, transcribed by Hansard, and conducted by the Clerk in collaboration with Dr Clune. As noted above Dr Clune is a trained historian. He is also the co-author of *Decision and Deliberation* and is currently an Honorary Associate at the Department of Government and International Relations, Sydney University. Dr Clune's expertise significantly benefited the project given his in-depth knowledge of the Parliament's history and experience in interviewing parliamentarians for the purpose of developing narrative accounts that recite key events from the past. An historian's training is undoubtedly different to that of a Clerk and as a result the interviews benefited from having two interviewers with different perspectives and approaches.

Following the interviews the transcripts were edited to eliminate extraneous material and to enhance clarity and readability. The edited transcripts were then provided to the interviewees and they were offered the opportunity to make revisions or corrections. Once the transcript had been returned it was treated as the final version and each interviewee was advised that it would be published on the Council's website and ultimately be added to the Parliament's archive series.

After the interviews were concluded work commenced on a monograph with the purpose of tying together the memories of the interviewees into one document. Drafted by Dr Clune the monograph, entitled, *Keeping the Executive Honest: the modern Legislative Council committee system* located the genesis of the standing committee system, namely the Council's transformation in 1978 into a fully elected full-time House and the ensuing expectation that members would take a more active approach to their work.[10]

More importantly, the monograph teased out the observations of the interviewees regarding the effectiveness of the Council's standing committee system and its strengths and weaknesses. Common to the interviewees was the belief that the standing committee system has made a significant contribution to the good governance and accountability of NSW. That shared assessment, however, did not preclude the interviewees from commenting on ways committee inquiries may be improved. For example, the Hon John Hannaford and the Hon Ron Dyer both criticised instances where the committee system has been used for political purposes (particularly the Budget Estimates process[11]) with both arguing this deflects attention from its core objectives of policy development, government accountability and the opportunity for members to enhance their knowledge about the machinery of government.[12] Meanwhile, the Hon Max Willis emphasised that the Council committee system is only as good as the people running it and urged that it receive ongoing levels of adequate funding.[13]

10 D Clune, 2013, NSW Legislative Council, *Keeping the Executive Honest: the modern Legislative Council committee system*.

11 Budget Estimates involves members of the Legislative Council questioning ministers and senior public servants on the expenditure, performance and effectiveness of their departments and is thus an integral aspect of the Council's scrutiny role. The Budget Estimates inquiry has been conducted annually by GPSCs since their formation in 1997.

12 D Clune, 2013, p 36.

13 D Clune, 2013, pp 36–37.

The issues canvassed in Dr Clune's monograph were also raised during a series of panel discussions participated in by current and former members, journalists and academics at the C25 seminar. Matters relating to the effectiveness of committee scrutiny of bills and the adequacy of government responses to inquiry reports were also considered at the seminar.[14]

Subsequently, in June 2015 the Council established the Select Committee on the Legislative Council Committee System to inquire into and report on how to ensure that the committee system continues to enable the Legislative Council to effectively fulfil its role as a House of Review.[15] The committee is currently gathering evidence and is considering a diverse range of issues such as opportunities to enhance both the Budget Estimates process and scrutiny of legislation. Other matters being considered include whether the Council's current committee structure is appropriate and adequately resourced and ways through which to improve community engagement with the inquiry process. On the procedural side, the committee is looking at whether committees have adequate powers to undertake their inquiry role and the possible implementation of a mechanism whereby the House can debate government responses to committee reports.[16]

Although the creation of the Select Committee owes itself to a number of factors, the oral history project obviously played a leading role and demonstrates the worth of looking to the past to help navigate future paths.

PHASES TWO AND THREE – THE 1978 RECONSTITUTION AND THE EGAN CASES

After close to a two-year hiatus work on the project recommenced in mid-2015. Originally the intention was to look at the 1978 Reconstitution during 2015/2016 followed by the Egan cases in 2016/2017. However due to the availability or otherwise of some of the proposed interviewees it was decided to hold interviews for both topics concurrently.

Potential interviewees were identified via the same process adopted for the standing committee interviews, namely by reviewing the various sources that document that Parliament's institutional history and looking for members that had made significant contributions to the topics being examined. Also consistent with the committee interviews, the potential interviewees were contacted in writing to gauge their willingness to be involved. Unlike the standing committee interviews, it was decided to interview not only former members but also two former Clerks in order to obtain a broader range of

14 Seminar transcripts can be accessed via 'Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council 20 September 2013', http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/C25, retrieved 4 April 2016.

15 *NSW Legislative Council Minutes*, 245 June 2015, pp 218–219.

16 Select Committee on the Legislative Council Committee System, 2015, NSW Legislative Council, *Legislative Council Committee system – Discussion paper.*

recollections. Unfortunately due to ill-heath and personal reasons not all those who were identified as being suitable for interview have been able to participate.

To date eight interviews have been held with six former members (the Hon John Hannaford – Liberal, the Hon Jack Hallam – Labor, the Hon Max Willis – Liberal, the Hon Elisabeth Kirkby – Democrats, the Hon Michael Egan AO – Labor, and Mrs Ann Symonds – Labor) and two former Clerks (Mr Les Jeckeln and Mr John Evans). In order to help facilitate constructive discussions the interviewees were again provided with briefing material and indicative questions at least two weeks prior to their interview. All interviewees have been afforded the opportunity to make revisions or corrections to their transcripts prior to them being published on the Council's website and ultimately being added to the Parliament's archive series. It is anticipated that approximately eight further interviews will be held before then end of 2016.

Without delving too deeply into the content of the interviews themselves (this will be done during the drafting of future monographs on the 1978 Reconstitution and Egan cases) they have produced a valuable set of reflections and commentary on a variety of matters. Potential future Council reforms have been canvassed along with suggestions to enhance the administrative arrangements of the departments that support the House. The natural tension between a government's right to legislate and an upper house's right to review the work of the Executive has been a topic of discussion as has the work performed by those in Council leadership positions. It should also be noted that the interviews have enabled some people, who gave decades of service to the Parliament and who otherwise may not have had the opportunity, to re-engage with the institution and reflect on their storied careers.

It is hoped that the topics canvassed during the latest interviews will not only yield future monographs, but also other outcomes such as ideas for members to pursue, potential procedural improvements, or the identification of other matters to investigate via future oral histories.

WHAT HAS HAPPENED IN OTHER JURISDICTIONS?

The Council is not unique in conducting an oral history or similar type projects. Other parliaments throughout Australia have also worked to capture the thoughts and recollections of former members and staff through a variety of means. The list below briefly details some of what has been undertaken, as provided by the parliaments:

- Department of the NSW Legislative Assembly: In 2008 as part of the Department's succession and knowledge management plans an oral history program was established to record significant events that impacted on the NSW Parliament over the previous 40 years. Four sessions were held with former members and led by the former Clerk, Mr Russell Grove, former Deputy Clerk, Mr Mark Swinson, and Dr Clune. Briefing material was provided to the former members to help them prepare and the discussions were transcribed by Hansard. Since 2009 no further sessions have been held but the material gathered has been used as a resource to

train departmental staff on standing and sessional orders. The transcripts have also been added to Assembly's collection of procedural reference resources.

- Commonwealth Parliamentary Library: Since 1988 the library has undertaken a long-running oral history project to interview members and senators. The impetus for the project was the Australian Bicentenary. Much of what has been produced from the earlier interviews is held by the National Library (subject to caveats placed by the interview subjects regarding access to some of the material). The interview materials have been a valuable source of information for contributors to the *Biographical Dictionary of the Australian Senate*.
- The Department of the Senate: While no formal oral histories have been undertaken two former Clerks (Mr Rupert Loof and Mr Alan Cumming Thom) have been interviewed. The Loof interview was with the National Library while the Cumming Thom interview was with senior Senate officers and is held in its departmental collections.
- Western Australia Parliament: It has had a longstanding oral history program which commenced in the 1980s under the auspices of the Parliamentary History Advisory Committee. The program was initially jointly administered by the Parliament and the JS Battye Library of Western Australia but the library's role in recent years has diminished somewhat. To date approximately 100 interviews have been held with members, in some instances members' spouses, and parliamentary officers at levels ranging from switchboard operators to clerks. In a small number of cases short-term restrictions have been placed on the release of the interview transcripts (at the interviewee's request) but for the main the transcripts are accessible via the Parliamentary Library and the State Library.
- Queensland Parliament: In 2009, at the request of a former speaker, the Parliament's Honorary Research Fellow, Dr Paul Reynolds commenced an oral history through interviews with former members. The aim being to capture the thoughts of the interviewees regarding the institution of parliament and also to get them to reflect on their careers. To date 23 interviews have been completed via a process very similar to that adopted by the Department of the NSW Legislative Council. At this stage there is no plan to publish the interview material. However, the transcripts will be reviewed to compile a topics-based index.
- Department of the Victorian Legislative Assembly: Under the direction of the former Deputy Clerk, Ms Liz Choat, the Department undertook a social history from 1940 onwards to document the recollections of what it has been like to work in a parliamentary administration. Information was gathered via interviews, review of department records and correspondence, clerk's notes, and newspaper reports to add social context to the stories told by former staff.
- Northern Territory Legislative Assembly: In 2014 as part of the celebrations for the Assembly's 40th anniversary a panel, comprising three members from the first Assembly in 1974, shared stories and participated in a public question and answer session.[17]

17 Note – the information presented in this list was gathered via a request for information sent to the Australia and New Zealand Association of Clerks-at-the-Table (ANZACATT) e-CATT Info-share forum. Thanks to all who responded to the post.

NEXT STEPS AND CONCLUDING REMARKS

As noted earlier, at the conclusion of the Reconstitution and Egan cases interviews two further monographs will be drafted. As was the case with the standing committees monograph, the purpose will be to tie the recollections of all interviewees into the one document. At this point no future oral history topics have been decided but a possible area for exploration arising directly from recent interviews is the work performed by those in Council leadership positions.

Unfortunately not all those identified as being suitable for interview have been able to participate in the project with the primary reason being ill-health. To ensure this does not happen in future, the Department is considering getting departing members to reflect and comment on significant events during exit interviews. Although the exit interviews are primarily held to obtain the views of departing members on the quality of the services provided by the Department, they could also serve as a means for members to reflect on their careers and mitigate the risk of potentially not being able to hear from them in future. It is possible that future exit interviews could be merged with the oral history project.

The project has been a valuable initiative for the Department to undertake and has yielded some positive outcomes. It has helped create an irreplaceable archive of commentary on some of the key events that have shaped the Council's evolution. Work on the project is ongoing and hopefully all future actions will continue to add to our understanding of how a reinvigorated Council has performed in its roles of legislative review, scrutiny and inquiry.

Interviewees have appreciated being contacted and invited to reflect on their contributions. An additional, unanticipated benefit of the project has been the re-engagement of a number of interviewees with the institution of parliament. It has been a pleasure for the interviewers, the project officer and other Council staff to renew their acquaintance with political figures and officers who have made such significant contributions to the Parliament and the people of NSW.

The project has required resources, time and commitment. The more thorough the preparation undertaken for each interview the more worthwhile they have proven. The project has been extremely valuable and any other jurisdiction or institution considering a similar project is encouraged to do so. However, it is not an exercise to be entered into lightly.

Chronicles

From the Tables[1]

Liz Kerr

Liz Kerr is Clerk Assistant (Procedure) with the Western Australian Legislative Assembly

ACT

In October 2015, following a recommendation of the Standing Committee on Administration and Procedure, Standing Orders were amended to provide for accredited Auslan interpreters to be present without having to seek leave of the House. In November, Standing Orders were further amended to refer any petition with at least 500 signatures to the relevant subject standing committee for consideration. The matter had also been the subject of a referral to the Standing Committee on Administration and Procedure, which supported the change.

HOUSE OF REPRESENTATIVES

On Monday 10 August 2015, the Hon. Bronwyn Bishop resigned as Speaker and the Clerk conducted the election to appoint Ms Bishop's replacement. Tony Smith accepted a proposal to take the position and there being no further nominations, Mr Smith was declared elected as Speaker. Shortly thereafter, the Speaker informed the House of the death on 21 July of Mr Don Randall, Member for the Division of Canning (WA) since 2001 and Member for the Division of Swan (WA) from 1996 to 1998. The by-election was held on Saturday 19 September, at which the Liberal candidate Andrew Hastie was elected.

On 14 September 2015 the Federal Parliamentary Liberal Party elected the Hon. Malcolm Turnbull as its Leader in place of the Hon. Tony Abbott. A vote was also held for the Deputy Leadership, which was retained by the Hon. Julie Bishop. The next day Mr Abbott tendered his resignation as Prime Minister to the Governor-General, and Mr Turnbull received his commission as Prime Minister. On 9 November, former Treasurer Hon. Joe Hockey resigned his seat. A by-election was held on Saturday 5 December 2015, at which Mr Trent Zimmerman was elected.

On 2 December the Standing Committee on Procedure presented its report, *Provisions for a more family-friendly Chamber*, which recommended allowing Members to bring

1 From the tables is compiled from material supplied by each House/jurisdiction for Parliament Matters, the biannual newsletter of the Australian and New Zealand Association of Clerks at the Table (ANZACATT).

infants into the chambers to breastfeed, bottle feed and at other times as necessary. To enable this, Standing Orders were amended to provide that a 'visitor' does not include an infant being cared for by a Member.

SENATE

On 12 August 2015, the Privileges Committee presented its report, *Possible imposition of a penalty on a witness before the Rural and Regional Affairs and Transport References Committee*. The report addressed the question of whether an employee of the Civil Aviation Safety Authority (CASA), who gave *in camera* evidence to an inquiry into aviation safety, was then subject to code of conduct proceedings by CASA as a consequence of that evidence. The code of conduct proceedings, which related to the employee's use of IT systems, led to a recommendation that the person's employment be terminated.

Improper interference with a witness ranks among the most serious of all possible acts of contempt. In this case, it was not disputed that action was taken against the employee. What was at issue was whether that action taken was a result of his giving evidence. The Privileges Committee concluded that, on the evidence before it, the requisite causal connection could not be demonstrated. Without that connection, the committee could not recommend that a contempt be found.

NSW LEGISLATIVE ASSEMBLY

In September the Legislative Assembly followed a recommendation of the Standing Orders and Procedure Committee and amended the Standing Orders to reflect changes in the Assembly's practice. One change was to increase the time allotted for Community Recognition Statements from 15 to 20 minutes, while another amended the resolution providing for a Citizens' Right of Reply, in order to reflect the current practice of the House. It is noted that the changes do not fundamentally alter the right of a person, or corporation, to seek a Right of Reply.

NSW LEGISLATIVE COUNCIL

At the March 2015 election, the numbers in the Legislative Council changed granting the Government 19 seats (excluding the President), two short of an absolute majority of 21 seats. Since then, the Government has generally been able to achieve a majority with the support of the Christian Democratic Party. The change in the dynamics of the House is demonstrated by a significant drop in the number of orders for papers agreed to by the House. In contrast to the 30 orders for papers agreed to in 2014, in 2015 only four orders were made, two of which were standard orders related to budget papers. It is the lowest number of orders made since 2004, and close to the lowest

number made since the last of the Egan decisions of the late 1990s confirmed the power of the House to order the production of State papers.

NEW ZEALAND HOUSE OF REPRESENTATIVES

A number of questions were referred to the Privileges Committee between October and December 2015, including one that concerned allegations that a person had been disadvantaged by a State sector agency as a direct result of her evidence to the Regulations Review Committee. That committee had been investigating a complaint regarding shipping fees and levies, which has generated much interest in the New Zealand shipping industry. Allegations of this nature are rare in New Zealand with the most recent comparable case dating back to 2006. The Committee is yet to report on the matter.

VICTORIAN LEGISLATIVE ASSEMBLY

Investigation into allegations made against the Auditor-General

On 17 August 2015, the Presiding Officers were notified of allegations of sexual harassment and bullying made against the Auditor-General, John Doyle, by a member of his staff. Given the Public Accounts and Estimates Committee's role in appointing the Auditor-General, the Presiding Officers informed the Committee of the complaint on the same day. The Committee then recommended that the Houses refer the complaint to it for investigation and report.

The Committee engaged retired High Court Justice Ken Hayne QC AM to carry out the investigation, with the Victorian Government Solicitor's Office to provide advice and support. On 22 September, Mr Doyle resigned from the position, before Mr Hayne reported to the Committee in late October. The Committee presented Mr Hayne's report to the House, in which he concluded that it was more probable than not that the allegations were established.

Special Sitting on Family Violence

On 26 November a special sitting of the Legislative Assembly was held to coincide with the *United Nations 16 days of activism against gender-based violence* campaign, with members of the Legislative Council invited to attend. Members heard Australian of the Year Rosie Batty speak about the cultural shift from victim blaming to perpetrator accountability. At the conclusion of her address, six experts addressed the Assembly, each sharing their unique experiences related to the tragedy of family violence.

VICTORIAN LEGISLATIVE COUNCIL

Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015

The Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015, introduced on 12 November, provided for a 150-metre zone of safe access to be established around premises that provide reproductive health services. The legislation was a direct response to the Supreme Court's decision against an East Melbourne Fertility Control Clinic seeking the enforcement of nuisance provisions in the *Public Health and Wellbeing Act 2008* as a result of ongoing anti-abortion protestor presence at the Clinic. The Government initiated Bill was derived from a Private Member's Bill introduced in the Legislative Council by Ms Fiona Patten of the Australian Sex Party. On Thursday 26 November 2015 the Bill passed the Legislative Council without amendment and received Royal Assent on 8 December 2015.

WESTERN AUSTRALIAN LEGISLATIVE ASSEMBLY

Procedure and Privileges Committee report

In 2015 the Assembly's Procedure and Privileges Committee (PPC) tabled a report titled *Protecting the Parliament: Exclusive Cognisance and Sanctions for Breach of Privilege and Contempt of Parliament*. The report affirmed the continuing need for Parliaments to retain their rights, immunities and privileges to enable them to perform their functions effectively and recommended the Assembly should have the power to determine that *any* particular act constitutes a contempt and have the power to fine, for any amount, for a breach or contempt. The PPC also recommended the retention of the power to expel a Member for gross misconduct, arguing that it was important to have a reserve power to protect the dignity and processes of the House.

WESTERN AUSTRALIAN LEGISLATIVE COUNCIL

Bell Group Liquidation

In August 2015 the Attorney General introduced a bill into the Legislative Council entitled the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015*. The legislation aimed to terminate outstanding litigation and determine any returns to creditors of the failed Bell Group companies (of which the WA Government was the largest) sooner than would otherwise be the case. On 15 September 2015 the bill was referred to the Legislative Council Standing Committee on Legislation, which made 29 individual recommendations to amend the bill, all of which were supported and moved by the Attorney General as Government amendments. On 26 November the bill was returned to the Assembly with amendments, and received the Royal Assent on

the same day. In early April 2016, the Houses introduced and passed amendments to the 2015 Act in an effort to address matters that would soon be raised in a High Court challenge. Despite the changes, on 16 May 2016 the High Court ruled that the legislation was constitutionally invalid, as it was inconsistent with federal tax laws.

SOUTH AUSTRALIAN LEGISLATIVE COUNCIL

On 21 April 2011 charges were laid against the Hon B V Finnigan MLC, in respect of four child pornography offences. At that time Mr Finnigan was the Government Leader in the Legislative Council and Minister for Industrial Relations, State/Local Government Relations and Gambling, and Acting Minister for Police. The Australian Labor Party suspended Mr Finnigan from the Party pending the verdict of the criminal trial. Although a total of 30 charges were investigated, only two proceeded to trial – one count of allegedly attempting to access child pornography, and one of allegedly accessing child pornography. On 10 November 2015, Mr Finnigan was found not guilty on one count for attempting to access child pornography, but found guilty on one count of accessing child pornography. Sentencing was set down for 9 December 2015 when Mr Finnigan was convicted and given a 15 month suspended sentence. Mr Finnigan resigned as a Member of the Legislative Council on 12 November 2015.

SOUTH AUSTRALIAN HOUSE OF ASSEMBLY

Parliamentary Remuneration (Determination of Remuneration) Amendment Act 2015

On 8 September 2015, the Attorney General introduced the Parliamentary Remuneration (Determination of Remuneration) Amendment Bill into the House of Assembly, which passed both Houses without amendment, and was assented to on 1 October 2015. The effect of the bill was to confer new obligations, powers and functions on the Remuneration Tribunal to promote transparency and independence in the process that establishes the remuneration of Members of Parliament. The Tribunal undertook a review of the way the basic salary for Members of Parliament is calculated to incorporate a common allowance in lieu of the loss of certain benefits. As a consequence, the basic salary payable is to be at a rate equal to the rate of the Commonwealth basic salary, less $42,000, plus the common allowance for the relevant year. The Tribunal was required to ascertain the full value of the travel allowance, metro special pass and subsidised or free interstate rail travel and determine an amount of remuneration that reasonably compensates for the abolition of each of those components.

QUEENSLAND LEGISLATIVE ASSEMBLY

Bills of note

On 17 September 2015, the shadow Attorney General introduced legislation to introduce fixed four-year parliamentary terms. The Finance and Administration Committee examined the Constitution (Fixed Term Parliament) Amendment Bill and the Constitution (Fixed Term Parliament) Referendum Bill and recommended they be passed with a number of amendments, which included splitting the Referendum bill into two: one to repeal, amend or create entrenched provisions to be approved by voters at a referendum, and another to contain consequential amendments to non-entrenched provisions in other Acts. The government supported the majority of the committee's recommendations and on 4 December 2015, the Constitution (Fixed Term Parliament) Amendment Bill (the new bill) and the Constitution (Fixed Term Parliament) Referendum Bill were passed. A State Referendum was held on Saturday 19 March 2016, at which the state's electors voted to approve the move to fixed four-year parliamentary terms.

On 17 September 2015, the Attorney General introduced the Relationships (Civil Partnerships) and Other Acts Amendment Bill 2015, which sought to reinstate legislative provisions removed in 2012, to: allow a state-sanctioned ceremony prior to registration of a civil partnership; and allow such a relationship to be registered as a 'civil partnership' rather than a 'registered relationship'. The Speaker permitted a personal vote to be held in respect of divisions, which were held on the second and third readings (64 ayes and 22 noes on each vote). The bill was passed on 3 December 2015 and assented to on 17 December 2015.

Matter of privilege

On 4 December 2015, Ms Jo-Ann Miller, the Minister for Police, Fire and Emergency Services and Minister for Corrective Services, resigned from cabinet following a Parliamentary Ethics Committee Report finding that although she had not been guilty of contempt of Parliament, she had engaged in a 'pattern of reckless conduct.' The Committee undertook the inquiry after revelations that Ms Miller had signed a document (tendered to the then Parliamentary Crime and Misconduct Committee) stating she had correctly disposed of confidential committee papers, which were later found in a safe used to store those papers.

On the matter of failing to comply with the confidentiality rules, the Committee found it was arguable that Ms Miller's actions were not inappropriate in the circumstances, and therefore they did not amount to an improper interference with the authority of the PCCC. The Committee also found that on the matter of deliberately misleading the PCCC by signing an incorrect statement in relation to the destruction of documents, there was no evidence Ms Miller intended to mislead the PCCC. The Committee noted however, that the evidence demonstrated a pattern of reckless conduct on behalf of the member, and recommended that she make a statement in the Assembly apologising

for her conduct. On 3 December 2015 Ms Miller apologised to the House ‘unreservedly and sincerely’ for ‘any conduct that was not of a standard expected of a person’ in her position, and resigned as a Minister on the following day.

NORTHERN TERRITORY

On 17 November 2015, the Leader of Government Business moved for a suspension of standing orders to allow for a motion to remove the Independent Member for Goyder from the position of Speaker. The debate went well into the night, and the motion was ultimately successful. An independent Member had moved to amend the motion so that votes on whether the Speaker should be removed could be taken by secret ballot. This was not agreed to, and shortly thereafter the motion to remove the Speaker was carried. The Leader of Government Business then moved that the Deputy Speaker be elected Speaker, and the Leader of the Opposition nominated the deposed Speaker. A secret ballot was taken, in line with standard practice, and the Member for Goyder was re-elected as Speaker.

Notes for Contributors

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The *Australasian Parliamentary Review* publishes refereed and non-refereed scholarly articles. Authors must indicate, at the time of first submission, if they wish their paper to be subjected to a double blind review process. Peer reviewed papers will be identified as such. If authors do not indicate, it will be assumed that they ***do not*** want their paper peer reviewed.

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Submissions should be sent to the APR editor Colleen.Lewis@monash.edu

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Articles should be between 5000–6000 words, including references and footnotes. The editor may accept slightly shorter or longer articles.

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