

# Australasian Parliamentary Review

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## FROM YOUR EDITOR

### Jennifer Aldred

This issue carries three articles on various topics dealing with governance in the Australian Capital Territory (ACT). 2013 marks 100 years since Canberra was founded as the nation's capital. The site was chosen for the federal capital after a long search process and entrenched by the *Seat of Government (Acceptance) Act 1909*, matching NSW surrender legislation. For several decades after, it was administered by sections of Melbourne-based departments, with gradual movement towards an elected representative institution for the ACT and a distinctive set of administrative arrangements. The Commonwealth parliament moved to Canberra in 1927, and the city's population grew rapidly after World War II as the government moved many of its departments from Melbourne to Canberra: this increased pressure for a more conventional governance system. Self-government for the ACT came with the passing of the *Australian Capital Territory (Self-Government) Act* in 1988. The new territorial governance system settled in with a small (17 member) unicameral legislature, a ministerial executive (or cabinet), a fully fledged judiciary, a separate public service comprising a number of ministerial departments and a population of non-departmental bodies similar to those operating in the states. Some differences remained. Notably, as with the Northern Territory, the ACT did not have its own constitution or the constitutional protections that go with it, so that it was consequently possible for the Commonwealth to intervene directly in its legislative process by annulling ACT legislation. Another notable difference was that the ACT did not have a local government system of its own, so that its legislature and administrative apparatus had a responsibility for a wide range of services which was, in the states, divided between central and local governments. There is strong argument in Canberra's centenary year that the Legislative Assembly needs enlarging for two main reasons. First is that the central-plus-local range of responsibilities places a very heavy load on the small band of Assembly members. Secondly, that — irrespective — more are needed to allow for the effective working of government and opposition front and back benches and a committee system, all seen as vital ingredients of a Westminster-style legislature. We will wait and see. I am grateful to Roger Wettenhall for his article on arm's

length bodies in the ACT and for his contribution to this potted history of the jurisdiction.

Also in this issue George Williams and Anne Twomey write on separate issues dealing with constitutional matters. George examines the place of race in Australia's Constitution and what it means for recognising Aboriginal peoples. Anne considers the various dilemmas involved in drafting a new state Constitution for the Northern Territory. Of particular interest is the balance between entrenchment and flexibility.

Queensland's Integrity Commissioner, David Solomon, examines the range of developments in the enforcement of ethical standards for MPs in both Australia and the UK. He considers their impact on ministers and backbenchers and the relationship they have with the parliament and the government.

Alex Stedman raises questions, through the NSW experience, of whether the proclamation device can be abused by an executive to undermine parliament. Change is supported. Executive accountability — again in the NSW context — is discussed by Merrin Thompson. She considers the impact on the independence of the house of review of ministerial references to upper house committees.

The articles conclude with Abel Kinyondo's paper examining the effectiveness of strategies to strengthen parliaments in the Pacific. Using the case study of Tonga, he argues that strategies in place, such as parliamentary training and various democratic reforms, will be of limited success without deeper and more specific constitutional reforms. In Tonga's case, reforms should necessarily seek to significantly and positively transform the make-up, leadership structure and the role of the parliament in discharging its functions independently of the monarchy. Some of the recommendations drawn in this piece have wider relevance to jurisdictions facing similar challenges elsewhere around the world.

Robyn Smith and Harry Phillips chronicle various happenings around the parliaments for the past six months and the issue finishes with reviews of an interesting mix of recently released books. My thanks go to all who have given their time to contribute to APR in this way.

The 2013 annual conference of the Australasian Study of Parliament Group is to be held in Perth on 2–4 October. The topic is: 'Oversight: Parliamentary Committees, Corruption Commissions and Parliamentary Statutory Officers'. Further information is available on the ASPG website [www.aspg.org.au](http://www.aspg.org.au).

Remember readers, views and comments on the content of the journal are always most welcome. Email me at [jennifer@aldred.com.au](mailto:jennifer@aldred.com.au).

April 2013

## **ARTICLES**

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## Race and the Australian Constitution\*

**George Williams**

### *Introduction*

The idea of a referendum on recognising Aboriginal and Torres Strait Islander peoples in the *Australian Constitution* was put on the national political agenda in the aftermath of the August 2010 federal election. This occurred without any announcement of what form the change would take. In effect, it was a commitment by the minority Gillard government to a referendum at or before the next federal election without a specific proposal for change. This poses a major challenge. Although Indigenous peoples have long sought recognition in Australia's national and state Constitutions, common ground has not yet emerged on how this should be achieved. Hence, the task is not simply one of convincing Australians to vote Yes, but of determining what the amendment should be in the first place.

The fact that the federal government has not stated what Australians will vote on has opened up debate about the nature of Australia's *Constitution* and the form that the change should take. In 2011 this discussion was led by a government appointed expert panel chaired by Professor Patrick Dodson, former Chairman of the Council for Aboriginal Reconciliation, and former Reconciliation Australia co-chair Mark Leibler. The panel's report and its recommendations for constitutional change were released publicly in early 2012. Its recommendations, which mirror those explored in this paper, have helped to frame the discussion, yet significant disagreement remains. The panel's report has not galvanised community and political support around an agreed set of changes.

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\* This article has been developed from Williams, George. 2012. 'Removing Racism from Australia's Constitutional DNA' (2012) *Alternative Law Journal* 37, pp. 151–55 and Williams, George. 2011. 'Recognising Indigenous Peoples in the *Australian Constitution*: What the *Constitution* Should Say and How the Referendum Can Be Won', *Land, Rights, Laws: Issues of Native Title* 5(1).

This lack of support led the Gillard government to postpone the referendum planned for 2013, for at least two to three years. The Minister for Indigenous Affairs, Jenny Macklin, said the government 'recognise[d] that there is not yet enough community awareness or support for change to hold a successful referendum at or before the next federal election.'<sup>1</sup>

In the meantime, the government has introduced an 'Act of recognition' into federal Parliament. The Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (Cth) was introduced into the House of Representatives on 28 November 2012, the second last day of the parliamentary year. The proposed Act is described as an 'interim' measure to recognise 'the unique and special place of Aboriginal and Torres Strait Islander peoples as the first peoples of [Australia]' pending constitutional reform.<sup>2</sup> It provides:

- (1) The Parliament, on behalf of the people of Australia, recognises that the continent and the islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples.
- (2) The Parliament, on behalf of the people of Australia, acknowledges the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.
- (3) The Parliament, on behalf of the people of Australia, acknowledges and respects the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.<sup>3</sup>

Jenny Macklin assured that the Bill 'is not a substitute for constitutional recognition'.<sup>4</sup> Rather, she described the Bill 'as a clear step forward' that would 'build the the momentum we need for successful constitutional change'<sup>5</sup> by allowing Australians to 'become familiar with formal recognition of Aboriginal and Torres Strait Islander peoples ahead of [the referendum]'.<sup>6</sup> To this end, the legislation will be subject to a sunset clause of two years<sup>7</sup> and require the Minister for Indigenous Affairs to review support for a referendum within 12 months of its enactment.<sup>8 9</sup> The Bill awaits further consideration in the next parliamentary year.

In this paper I return to first principles. I examine the place of race in the *Australian Constitution*, and the implications this has for the debate. The *Constitution* and its history is examined with a view to determining what changes are needed to appropriately recognise Australia's first nations in the document.

### ***The Constitution as drafted***

The *Australian Constitution* was not written as a people's constitution. Instead, it was a compact between the Australian colonies designed to meet, amongst other things, the needs of trade and commerce. Consequently, the Constitution says more about the marriage of the colonies and the powers of their progeny, the Commonwealth, than it does about the relationship between Australians and their government. It does not mention the concept citizenship, only 'the people'.

The document does not expressly embody the fundamental rights or aspirations of the Australian people. It contains few provisions that are explicitly rights-orientated. According to Lois O'Donoghue, a former Chairperson of the Aboriginal and Torres Strait Islander Commission (ATSIC):

It says very little about what it is to be Australian. It says practically nothing about how we find ourselves here — save being an amalgamation of former colonies. It says nothing of how we should behave towards each other as human beings and as Australians.<sup>10</sup>

The *Australian Constitution* was drafted at two Conventions held in the 1890s. Neither Convention included any women, nor representatives of Australia's Indigenous peoples and ethnic communities. In most cases, Aboriginal people were not qualified to vote for the delegates to the Convention, and appear to have played no meaningful role in the drafting process itself. It is not surprising then that the *Constitution* as drafted did not reflect their interests or aspirations.

While the preamble to the *Constitution* set out the history behind the enactment of the *Constitution* and the notion that the *Constitution* was based upon the support of the people of the colonies, it made no mention of the prior occupation of Australia by its Indigenous peoples. In fact, the operative provisions of the *Constitution* were premised upon their exclusion, and even discrimination against them. This then was the legal foundation upon which Aboriginal people were made part of the Commonwealth of Australia on 1 January 1901.

This was reflected in the terms of Australia's *Constitution*:

- Section 25 recognised that the States could disqualify people from voting in the elections on account of their race.
- Section 51(xxvi) provided that the Commonwealth Parliament could legislate with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. This was the so-called, 'races power'.
- Section 127 went further in providing: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'. Significantly, neither provision spoke of Indigenous peoples as people, but in the latter case as 'aboriginal natives'.

Section 51(xxvi) was inserted into the *Constitution* to allow the Commonwealth to discriminate against sections of the community on account of their race. Of course, Aboriginal people were not originally subject to this section. However, this was not because they were to be protected, but because it was thought that the Aboriginal issues were a matter for the States and not the federal government.

By today's standards, the reasoning behind s 51(xxvi) was clearly racist. Edmund Barton, the Leader of the 1897–1898 Convention and later Australia's first Prime Minister and one of the first members of the High Court, stated at the 1898 Convention in Melbourne that the power was necessary to enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth.'<sup>11</sup> In summarising the effect of s 51(xxvi), John Quick and Robert Garran, writing in 1901, stated that:

It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localise them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.<sup>12</sup>

One framer, Andrew Inglis Clark, the Tasmanian Attorney-General, supported a provision taken from the United States *Constitution* requiring the 'equal protection of the laws'.<sup>13</sup> This clause might have prevented the federal and state Parliaments from discriminating on the basis of race.

However, the framers were concerned that Clark's clause would override Western Australian laws under which 'no Asiatic or African alien can get a miner's right or go mining on a gold-field.'<sup>14</sup> Clark's provision was rejected by the framers who instead inserted s 117 of the *Constitution*, which merely prevents discrimination on the basis of state residence. Sir John Forrest, Premier of Western Australia, summed up the mood of the 1897–1898 Convention when he stated:

It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.<sup>15</sup>

In formulating the words of s 117, Henry Higgins, one of the early members of the High Court, argued that it 'would allow Sir John Forrest ... to have his law with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based upon colour and race.'<sup>16</sup>

### ***Since 1901***

Given the drafting history of the *Constitution*, it is not surprising that legislation enacted by the new Commonwealth Parliament was premised upon racially discriminatory policies. The *Immigration Restriction Act* 1901 (Cth), for example, prohibited the immigration into Australia of any person who, when asked by an officer, was unable to 'write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer'.<sup>17</sup> This was the means by which the White Australia policy was implemented.

Of more significance to Aboriginal people was legislation that denied them the right to vote in federal elections. The scope of the federal franchise was determined after Federation by the *Commonwealth Franchise Act* 1902 (Cth). That Act extended the federal franchise to women, and it had been proposed that the Bill also extend the franchise to Aborigines.

However, that proposal was strongly resisted and was finally defeated. Among its opponents were Isaac Isaacs, subsequently Chief Justice of the High Court and Australia's first Australian Governor-General, who thought Aborigines 'have not the intelligence, interest or capacity' to vote;<sup>18</sup> and Henry Higgins, later a Justice of the High Court, who thought it 'utterly inappropriate . . . [to] ask them to exercise an intelligent vote'.<sup>19</sup>

As finally enacted, s 4 of the *Commonwealth Franchise Act* specifically denied the voting rights of the 'aboriginal native[s] of Australia . . . unless so entitled under Section 41 of the Constitution'. It was not until 1962 that the *Commonwealth Electoral Act* 1918 (Cth) was amended to extend universal adult suffrage to Aboriginal people. Even then, full equality at federal elections did not occur until 1983, when the Act was amended to make enrolment for and voting in federal elections compulsory for Indigenous people as it is for other Australians.

### **The 1967 Referendum**

The obvious discrimination against Aboriginal peoples on the face of the *Constitution* was one factor in the emergence of moves to amend it. Another factor was a concern that Aboriginal issues were not being dealt with appropriately at the State level and the federal Parliament ought to be given primary responsibility for their welfare.

In 1967, a proposal was put before the Australian people under which the words 'other than the aboriginal race in any State' in s 51(xxvi) would be struck out and s 127 deleted entirely.<sup>20</sup> The people overwhelmingly voted 'Yes'. The proposal was supported in every State and nationally by 90.77% of voters. Out of the 44 referendum proposals put to Australian people since 1901, this is the highest 'Yes' vote so far achieved.

The 1967 referendum was an important turning point in the place of Aboriginal people within the Australian legal structure. However, it is important to note that, while the referendum deleted an obviously discriminatory provision in the form of s 127, it did not insert anything in its place (not did it remove s 25).

The change left the *Constitution*, including the preamble, devoid of any reference to Indigenous peoples. While the objective of the 1967 referendum was to remove discriminatory references to Aboriginal people from the *Constitution* and to allow the Commonwealth to take over responsibility for their welfare, it may be that, in failing to set this intention into the words of the *Constitution*, the change actually

laid the seeds for the Commonwealth to pass laws that impose a disadvantage upon them.

The racially discriminatory underpinnings of s 51(xxvi) were extended to Aboriginal people, but without any textual indication that the power could be applied only for their benefit.

### **The Hindmarsh Island Bridge Case**

The possibility that the races power, as extended to Indigenous peoples, might be applied to their detriment was raised in a case before the High Court of Australia in 1998. The Minister for Aboriginal and Torres Strait Islander Affairs was urged to exercise his powers under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) for the protection and preservation of the area. Ngarrindjeri women claimed to be the custodians of secret 'women's business' for which the island had traditionally been used, and which could not be disclosed to Ngarrindjeri men, nor to other men.

In 1994 and 1996, the claim was the subject of two reports to the Minister. Each report ended in a controversy that failed to resolve the underlying issue. The *Hindmarsh Island Bridge Act 1997* (Cth) was then enacted by the newly elected Howard (Liberal-National Party) Coalition Government to preclude any further possibility of a protection order under the 1984 Act. The *Hindmarsh Island Bridge Act* amended the *Aboriginal and Torres Strait Islander Heritage Protection Act* so that it no longer applied to 'the Hindmarsh Island bridge area' and thus prevented any further possible claim by the Ngarrindjeri women.

The Ngarrindjeri women responded by bringing an action in the High Court challenging the validity of the *Hindmarsh Island Bridge Act*. They argued, with myself as part of their legal team, that the Act could not be passed under the races power because that power extends only to laws for the benefit of a particular race, and cannot be used to impose a detriment on the people of a race.

In the High Court, the Commonwealth argued that there are no limits to the races power, that is, provided that the law affixes a consequence based upon race, it is not for the High Court to examine the positive or negative impact of the law. On the afternoon of the first day of the hearing, the Commonwealth Solicitor-General, Gavan Griffith, suggested that the races power 'is infused with a power of adverse operation'.<sup>21</sup> He acknowledged 'the direct racist content of this provision' in the sense of 'a capacity for adverse operation'.<sup>22</sup> The following exchange then occurred:

Kirby J: Can I just get clear in my mind, is the Commonwealth's submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary ... or is there a point at which there is a justiciable question for the Court? I mean, it seems unthinkable that a law such as

the Nazi race laws could be enacted under the race power and that this Court could do nothing about it.

Griffith QC: Your Honour, if there was a reason why the Court could do something about it, a Nazi law, it would, in our submission, be for a reason external to the races power. It would be for some wider over-arching reason.<sup>23</sup>

Of course, without a Bill of Rights or express protection from racial discrimination, there was no such over-arching reason.

The challenge failed by 5:1 (with Justice Kirby dissenting) because, in the words of Chief Justice Brennan and Justice McHugh: ‘Once the true scope of the legislative powers conferred by s 51 [is] perceived, it is clear that the power which supports a valid Act supports an Act repealing it’.<sup>24</sup> It was common ground that the *Aboriginal and Torres Strait Islander Heritage Protection Act* was valid. Hence, it necessarily followed that a later modification of its operation must also be valid. This conclusion meant that Brennan and McHugh did not need to address the scope of the races power.

Four judges did address that issue. Justices Gummow and Hayne held that the power could be used, as in this case, to withdraw a benefit previously granted to Aboriginal people (and thus to impose a disadvantage). More generally, they pointed out that the use of ‘race’ as a criterion, which s 51(xxvi) not only permits but requires, is inherently discriminatory.

Justice Kirby’s dissenting judgment held that the power ‘does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race)’.<sup>25</sup> He argued that the 1967 amendment ‘did not simply lump the Aboriginal people of Australia in with other races as potential targets for detrimental or adversely discriminatory laws’, but reflected the Parliament’s ‘clear and unanimous object’, with ‘unprecedented support’ from the people, that the operation of s 51(xxvi) ‘should be significantly altered’ so as to permit only positive or benign discrimination.<sup>26</sup> Justice Kirby argued that this was the only interpretation of s 51(xxvi) that was compatible with international human rights standards.<sup>27</sup>

Justice Gaudron found that the deletion of eight words from s 51(xxvi) in 1967 could not change the meaning of the words that remained. However, she went on to examine more closely the requirement in s 51(xxvi) that the Parliament must deem it ‘necessary’ to make special laws for the people of a race. Applying an analysis of the concept of discrimination, she argued that any such judgment of necessity must be based on some ‘relevant difference between the people of the race to whom the law is directed and the people of other races’, and hence that the resulting legislation ‘must be reasonably capable of being viewed as appropriate and adapted to the difference asserted’.<sup>28</sup> She found it ‘difficult to conceive’ that any adverse discrimination by reference to racial criteria might nowadays satisfy these tests, and ‘even more difficult’ in the case of a law relating to Aboriginal Australians.<sup>29</sup>

The overall effect of the judgments was inconclusive. The Court split 2:2 on the scope of the races power, with a further two other judges not deciding. It thus failed to resolve the issue of whether the Commonwealth possesses the power under the *Constitution* to enact racially discriminatory laws.

### ***Today***

Indigenous peoples have long sought recognition in Australia's national and State Constitutions. They have done so because these laws have either ignored their existence or discriminated against them. They argue that the story of our nation is incomplete without the histories of the peoples who inhabited this continent before white settlement.

Prime Minister Julia Gillard has pledged a referendum at or before the next election on whether to recognise Indigenous peoples in the *Constitution*. When the history and current text of the *Constitution* are taken into account, Aboriginal and Torres Strait Islander peoples should be recognised in the *Australian Constitution* by way of:

1. Positive mention of Indigenous peoples and their culture in a new preamble or other section to the *Constitution*;
2. The deletion of:
  - (i) section 25; and
  - (ii) section 51(26).
3. The insertion of new sections that:
  - (i) grant the Commonwealth Parliament the power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples';
  - (ii) prohibit the enactment of laws by any Australian Parliament or the exercise of power by any Australian government that discriminates on the basis of race (while also providing that this does not prevent laws and powers which redress disadvantage or recognise and preserve the culture, identity and language of any group).

I elaborate on these changes below.

Aboriginal people cannot meaningfully be recognised in the *Australian Constitution* unless the capacity to discriminate on the basis of their race against them is removed from the document. Symbolic change by way of a new section or new preamble to the *Australian Constitution* will not be sufficient. Sections 25 and the races power in section 51(26) must also be deleted.

It is important however that the races power not simply be repealed. Doing so would undermine the validity of existing, beneficial laws enacted under the power. An important achievement of the 1967 referendum was to ensure that the federal parliament can pass laws for Indigenous peoples in areas like land rights, health and the protection of sacred sites. A continuing power should be available in such areas, but in a different form.

One way of ‘fixing’ the races power is to grant power to the federal parliament to pass laws for ‘Aboriginal and Torres Strait Islander peoples’. Such a grant, consistent with the way that the High Court interprets the *Constitution*,<sup>30</sup> would be broad enough to cover laws enacted in the past, such as the *Native Title Act 1993* (Cth), and those that might be enacted in the future for Indigenous peoples.

An alternative suggested by former Chief Justice of New South Wales Jim Spigelman would be to insert a new head of power to pass laws with respect to particular subjects, without making any mention of Aboriginal and Torres Strait Islanders.<sup>31</sup> This might grant the Commonwealth power over matters such as native title and other Indigenous specific concerns. This certainly has the merit of producing a general head of power without reference to any particular racial group.

On the other hand, there is no easy way of formulating a head of power to enable the federal parliament to make laws generally for Indigenous-specific disadvantage. Enabling the Commonwealth to legislate with respect to something like ‘disadvantage’, risks the granting of a power of extraordinary width that would permit federal laws in a range of areas of existing state legislative concern. Ultimately, it is not clear that a generic subject matter power can be constructed to enable federal laws to be passed specifically for Aboriginal and Torres Strait Islanders.

A power to make laws for ‘Aboriginal and Torres Strait Islander peoples’ could still be used to pass negative laws. This could be avoided by expressly limiting the grant of power to enable the federal parliament to make laws with respect to ‘Aboriginal and Torres Strait Islander peoples, but not so as to discriminate against them on the basis of their race’. This would provide more secure protection in at least providing a clear statement that laws passed under the power could not discriminate against them on the basis of their race.

The limitation might also provide protection to Indigenous Australians in respect of laws passed under the other heads of power in section 51 of the *Constitution*.<sup>32</sup> It might not, however, provide protection for laws passed under powers in other parts of the *Constitution*, such as the territories power in section 122.<sup>33</sup> It might thus continue to be possible for laws such as the *Northern Territory National Emergency Response Act 2007* (Cth) to be enacted under the territories power on a discriminatory basis.

To avoid this, the *Constitution* should contain both a new power over ‘Aboriginal and Torres Strait Islander peoples’ and an overarching freedom from racial discrimination. Such a guarantee is a standard feature of other national constitutions, and is lacking only in Australia because it is now the only democratic nation in the world not to have a national framework for human rights protection such as a human rights act or Bill of Rights.<sup>34</sup>

A general freedom from racial discrimination would not only protect Indigenous Australians. It would protect all people in Australia from laws that discriminate against them on the basis of their race. The freedom could be drafted only to apply to federal laws, or also to state and territory laws. The freedom might also be applied to government action, such as programs and policies supported by government funding and departmental action without a separate legislative basis. Given the past record of discrimination by Commonwealth and the states and territories, and the fact that as a matter of principle racial discrimination ought to be prohibited generally within Australian government, it would be preferable for the freedom to have a wide operation.

There is a possibility that a freedom from racial discrimination might be interpreted by the High Court to strike down laws and programs that provide special benefits or recognition to Aboriginal and Torres Strait Islanders. It might be held that these discriminate against non-Indigenous people. This could affect programs which, for example, provide accelerated entry into university in order to redress the long-term shortage of Indigenous doctors and lawyers.

To avoid this, the freedom from racial discrimination should be made subject to a savings clause stating that it does not affect laws and programs aimed at redressing disadvantage. Such a clause would enable the High Court to determine the consistency of laws and measures with the savings clause. Such a power is typically found in other nations as part of their protection from discrimination or equality guarantee.<sup>35</sup> The clause should also ensure that, irrespective of whether Indigenous peoples continued to suffer disadvantage, laws may be made to recognise and preserve culture, identity and language (of Aboriginal peoples or indeed any other group).

The practical impact of these constitutional changes would be significant. A freedom from racial discrimination in the *Australian Constitution* applying to all laws and programs would mean that a law or program could be challenged in the courts if it breached the guarantee. Examples of recent federal laws that might be challenged on this basis include the *Native Title Amendment Act 1998* (Cth), which implemented the Howard government's 'ten point plan' for native title after the *Wik* decision. In seeking to achieve, in the words of the Deputy Prime Minister Tim Fischer, 'bucket-loads of extinguishment',<sup>36</sup> the Act overrode the *Racial Discrimination Act 1975* (Cth). This was achieved through section 7 of the new Act, which provides that the *Racial Discrimination Act* has no operation where the intention to override native title rights is clear.<sup>37</sup> A similar suspension of the *Racial Discrimination Act* was achieved under the legislation that brought about the Northern Territory intervention.<sup>38</sup> Both of these statutes are examples of laws that could not stand in the face of a constitutional guarantee of freedom from racial discrimination. It would also not be possible in the future to suspend the *Racial Discrimination Act* so as to permit racial discrimination.

Recognising Aboriginal peoples through positive words combined with substantive changes that eradicate racial discrimination and protect against future discrimination provides the best basis for constitutional change. Fortunately, these changes are all contained within the recommendations of the government's expert panel.<sup>39</sup> In addition, the panel proposed that the *Constitution* contain a new section entitled 'Recognition of languages'. This would recognise that the 'national language of the Commonwealth of Australia is English' and that the 'Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.'

### ***Conclusion***

Australia ought to recognise Aboriginal and Torres Strait Islander peoples in the *Constitution*. It does not speak well of our nation that, after more than a century, we have yet to achieve this and have not removed the last elements of racial discrimination from the document. It is past time that we had a *Constitution* founded upon equality that recognises Indigenous history and culture with pride. ▲

### ***Endnotes***

<sup>1</sup> *Hansard*, House of Representatives, 28 November 2012, 11.

<sup>2</sup> Explanatory Memorandum, Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (Cth), p. 3.

<sup>3</sup> Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (Cth), s 3.

<sup>4</sup> *Hansard*, House of Representatives, 28 November 2012, 11.

<sup>5</sup> *Ibid.*

<sup>6</sup> Explanatory Memorandum, Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (Cth), p. 4.

<sup>7</sup> Aboriginal and Torres Strait Islander Peoples Recognition Bill, s 4.

<sup>8</sup> *Ibid.*, s 5.

<sup>9</sup> *Hansard*, House of Representatives, 28 November 2012, 11.

<sup>10</sup> Brennan, Frank. 1994. *Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia*. Melbourne: Constitutional Centenary Foundation, p. 18.

<sup>11</sup> *Convention Debates*. 1898, vol. 4, p. 228-29.

<sup>12</sup> Quick, John and Garran, Robert. 1995, 1901 edition. *The Annotated Constitution of the Australian Commonwealth*. Sydney: Legal Books, p. 622.

<sup>13</sup> *Convention Debates*. 1898, Melbourne, vol. 1, p. 962.

<sup>14</sup> *Convention Debates*. 1898, Melbourne, vol. 4, p. 665.

<sup>15</sup> *Convention Debates*, 1898, Melbourne, vol 4, p. 666.

<sup>16</sup> *Convention Debates*, 1898, Melbourne, vol. 5, p. 1801.

- <sup>17</sup> *Immigration Restriction Act 1901* (Cth), s 3.
- <sup>18</sup> *Hansard*. House of Representatives, 24 April 1902, p. 11979.
- <sup>19</sup> *Ibid*, p. 11977.
- <sup>20</sup> Amendment of the Australian Constitution is provided for by s 128. A successful change under s 128 must be: (1) passed by an absolute majority of both Houses of the federal Parliament, or by one House twice; and (2) at a referendum, passed by a majority of the people as a whole, and by a majority of the people in a majority of the states (that is, in at least four of the six states).
- <sup>21</sup> Transcript, *Kartinyeri v Commonwealth* A29/1997 (5 February 1998).
- <sup>22</sup> *Ibid*.
- <sup>23</sup> *Ibid*.
- <sup>24</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 376.
- <sup>25</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 411.
- <sup>26</sup> *Ibid* at 413.
- <sup>27</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [166]–[167].
- <sup>28</sup> *Ibid* at 366. Cf opinion expressed in *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 56
- <sup>29</sup> *Ibid* at 367.
- <sup>30</sup> The general approach to interpreting the scope of such heads of power by the High Court is that the text is to be construed ‘with all the generality which the words used admit’: *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225–6.
- <sup>31</sup> Spigelman, Jim. 2012. ‘A Tale of Two Panels’ (Speech delivered at Gilbert + Tobin Centre of Public Law Constitutional Law Dinner, 17 February 2012) viewed on 25 November 2012, <[www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/dinner\\_speech\\_j\\_spigelman.pdf](http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/dinner_speech_j_spigelman.pdf)>.
- <sup>32</sup> See s 51(13) of the *Constitution*, which enables federal legislation with respect to ‘Banking, other than State banking’. In *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 it was held that the words ‘other than State banking’ are a limit not only on the ‘banking’ power, but also on other heads of power in s 51. The guarantee of ‘just terms’ for any ‘acquisition of property’ in s 51(31) applies in the same way.
- <sup>33</sup> But see *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 and *Wurridjal v Commonwealth* (2009) 237 CLR 309.
- <sup>34</sup> Williams, G. 2007. *A Charter of Rights for Australia*. Sydney: UNSW Press, pp. 16–17.
- <sup>35</sup> See eg, *Canadian Charter of Rights and Freedoms 1982*, s 15: (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- <sup>36</sup> Above n 21

<sup>37</sup> *Racial Discrimination Act 1975* (Cth), s 10(1): ‘If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.’

<sup>38</sup> *Northern Territory National Emergency Response Act 2007* (Cth).

<sup>39</sup> *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012), p. xviii.

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## **The dilemmas of drafting a Constitution for a new state\***

**Anne Twomey**

### ***Introduction***

Most State Constitutions were first written in the 1850s and later revised, consolidated and re-enacted but not fundamentally re-written. Hence the wording of many provisions can be traced back to the 1800s, and sometimes even before that, as they were often based upon British provisions from the 1700s and before. There are two main exceptions to this proposition. On the one side is the Western Australian Constitution, which is to be found in two statutes from 1889 and 1899 and has never been revised or re-enacted. It continues to operate in its gloriously chaotic and confusing scheme, without substantial reform. On the other side is the Queensland Constitution, which was substantially re-written in 2001. It retains, however, old provisions from the 1867 Constitution that cannot be amended or repealed without a referendum. So it is a hybrid Constitution — both new and old. The challenge in writing a Constitution for a new State is to find the appropriate balance between the old and the new. Use of old terminology drawn from existing State Constitutions has the value of stability and plenty of judicial precedents concerning its meaning. It is therefore much easier to predict how it will be interpreted by a court. However, it has the disadvantage of being potentially incomprehensible to the people that the Constitution binds and the risk of being misleading to those unfamiliar with the constitutional principles that surround the interpretation of this archaic terminology. This is not only problematic from a public education point of view, but it is likely to give rise to particularly acute difficulties if the draft Constitution must be first approved by a constitutional convention comprised of people who are not experts in constitutional law and then

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\* This paper was delivered at the ASPG Annual Conference, Darwin, 3–5 October 2012. It discusses dilemmas that arose in drafting a ‘Constitutional Framework Document’ for the Northern Territory, a copy of which is appended to: Northern Territory Legislative Assembly, Legal and Constitutional Affairs Committee, *Report on the Statehood Program* (16 February 2012), Appendix E, pp 25–48: <http://www.ntstate7.com.au/sites/default/files/page-files/ConstitutionalFrameworkDocument.pdf>.

approved by the people in a referendum. The main challenge faced by the drafter, therefore, is the difference in the audiences to which the Constitution is directed. In the short-term, the Constitution must make sense to the people who must vote to approve its terms, both in a constitutional convention and a referendum, before it can have life as a Constitution at all. This is therefore an essential, rather than an optional, requirement. In the longer term, however, it must operate also as a document that is applied by Parliaments, Governments and the courts, in a consistent and predictable manner, with as few crises and controversies as possible. It must be comprehensible to both the people and the cognoscenti in quite different ways. It must also be practical and capable of amendment to deal with changing circumstances. It must therefore be all things to all people, which is extremely difficult to achieve. In this paper I will discuss some of these dilemmas, with a particular focus on the drafting of a new Constitution for the Northern Territory if it achieves statehood.

### ***Entrenchment***

When most people think of a Constitution, they think of it in terms of a document which has a higher status than ordinary legislation and which cannot be altered without undertaking a particularly arduous process, such as a referendum. People tend primarily to think of the Commonwealth Constitution and the United State Constitution, which are both fully entrenched Constitutions. State Constitutions, however, have always been different. They were enacted as flexible Constitutions, meaning that they can be changed by ordinary legislation, except in relation to particular provisions which may be entrenched. This was not necessarily the desire of the colonies in which they were first enacted. When the NSW Constitution was drafted in NSW in 1853, it was intended to be completely entrenched. The Select Committee of the NSW Legislative Council which prepared it, took the view that only limited amendments in relation to electoral boundaries and representation should be possible and that even these changes would require special majorities of two-thirds approval of the members of both Houses. Other provisions would not be able to be amended locally at all. One of the main founders of that Constitution, WC Wentworth, said:

It was the object of the committee who framed this Bill to frame a Constitution in perpetuity for the colony — not a constitution which could be set aside, altered and shattered to pieces by every blast of popular opinion.<sup>1</sup>

The British, however, took a different view and inserted in the *Constitution Statute* 1855, which approved the enactment of the NSW Constitution, a provision that permitted the NSW Parliament to amend or repeal provisions of the Constitution by ordinary legislation.<sup>2</sup> The British Parliament had always taken the view that it should not shackle the independence of its successors. It considered that the wisdom

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<sup>1</sup> W C Wentworth, second reading speech, *Constitution Bill 1853 (NSW)*, 16 August 1853, in C M H Clark (ed.), *Select Documents in Australian History 1851–1900* (Angus & Robertson, 1955) p 335.

<sup>2</sup> 18 & 19 Vic, c 54 (1855) (Imp), s 4.

and foresight of current politicians would not necessarily be greater than that of their successors who ‘will possess more experience of the circumstances and necessities amid which their lives are lived.’<sup>3</sup> It was therefore a matter for every generation to shape and amend its Constitution to suit the circumstances in which it lived. Hence the Constitutions of the Australian colonies were deliberately made to be flexible Constitutions, rather than rigid Constitutions.

The reason why the Commonwealth Constitution had to be a rigid Constitution was because Australia is a federation and the respective powers of the Commonwealth and the States needed to be protected from unilateral amendment by either side. But this is not a problem for State Constitutions, which remained largely flexible. Today, the States are bound by both the Commonwealth Constitution and the *Australia Acts* 1986 (UK) and (Cth). Section 2 of the *Australia Acts* 1986 gives the States full legislative power, subject to the Commonwealth Constitution. As a State cannot unilaterally override the *Australia Acts*, this means that a State can’t abdicate the legislative power conferred upon it by the *Australia Acts*. A State Parliament cannot, for example, effectively legislate to deny itself the power to amend or repeal a law in the future, or to require someone else’s approval before it enacts or amends a particular law.

There is an exception, however, in s 6 of the *Australia Acts*. It says that where a State law is one with respect to ‘the constitution, powers or procedure’ of the State Parliament, it shall be of no force or effect unless it is made in such ‘manner and form’ as required by the Parliament. That ‘manner and form’ requirement might be approval by the people in a referendum or approval by a special majority of members of Parliament. This allows a limited category of State laws to be entrenched so that they can only be amended or repealed in the future by following such a manner and form of enactment. This category covers laws with respect to:

- the *constitution* of the Parliament (eg, how many Houses it has, how they are comprised, and the features which go towards giving the House its representative nature, such as single or multi-member electorates and redistributions);
- the *powers* of the Parliament (eg, powers with respect to deadlocks or powers to suspend or expel members); and
- the *procedures* of the Parliament (eg, provisions re standing orders).<sup>4</sup>

Section 6 of the *Australia Acts* does *not* support the entrenchment of other provisions, such as those concerning the courts or local government or human rights. Whether or not such provisions can be entrenched by reliance on other sources, such as s 106 of the Commonwealth Constitution, has not been resolved by

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<sup>3</sup> *McCawley v The King* [1920] AC 691, 703 (Lord Birkenhead LC), explaining the general British approach to the issue.

<sup>4</sup> See further on each category: Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004), pp 276–82.

the courts, but is doubtful.<sup>5</sup> It is likely that the provisions of the *Australia Acts* now cover exclusively the issue of entrenchment. Nonetheless, some jurisdictions, such as Victoria, have purported to entrench a wide variety of provisions, on the basis that even if the entrenchment does not have legal effect, it has a powerful political effect.<sup>6</sup> If the Constitution says that a referendum is required to change a particular provision, then the people will most likely feel cheated if they are denied the right to vote in a referendum. It would, of course, depend upon the importance of the provision. For example, in Queensland a provision concerning the appointment of public servants, which was purportedly (although not effectively) entrenched by a requirement that a referendum be held before it could be amended or repealed, was actually repealed by ordinary legislation. There was no great fuss and no one challenged the constitutional validity of the repeal.<sup>7</sup> If the provision, however, had been one protecting human rights, or Aboriginal land rights, for example, it is likely that the political furore arising from its repeal by ordinary legislation would be such that no government would be game to do it, despite the fact that the purported entrenchment was legally ineffective.

Entrenchment should ideally be preserved for fundamental matters, not details. Otherwise, when details need to be changed, Parliaments end up having to pass terribly convoluted and contorted provisions to avoid the cost of holding a referendum to fix a minor problem. For example, the NSW Constitution has an entrenched provision which requires voters to vote for at least 15 people in upper house elections in order for the vote to be valid. This meant that when the State moved to optional preferential above-the-line voting, each group above the line needed 15 members to ensure that if a person only voted 1 for a single group, the vote would be valid. Then there was the problem with what happened if one of the 15 died before the poll, so complicated 'death of a candidate' preference flows had to be included.<sup>8</sup> A great deal of care and an extraordinary degree of foresight needs to be exercised in order to predict how entrenched provisions might be used in the future and what constitutional implications might be drawn from them. It needs to be remembered that unentrenched provisions cannot give rise to binding constitutional implications, because later laws simply impliedly repeal or amend the constitutional provision, leaving any implication completely impotent. Entrenched provisions, however, have the potential to give rise to binding constitutional

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<sup>5</sup> *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 [70] (Gleeson CJ, Gummow, Hayne and Heydon JJ) regarding the application of s 106 of the Commonwealth Constitution; and [80] (Gleeson CJ, Gummow, Hayne and Heydon JJ); and [214]–[215] (Kirby J) regarding the application of the *Ranasinghe* principle.

<sup>6</sup> *Constitution Act 1975* (Vic), s 18.

<sup>7</sup> See s 146 of the *Public Service Act 1996* (Qld) which repealed s 14(1) of the *Constitution Act 1867* (Qld) and amended s 53 of it by removing reference to s 14 as an entrenched provision. See further: Anne Twomey, 'The Entrenchment of the Queen and Governor in the Queensland Constitution', in Michael White and Aladin Rahemtula, *Queensland's Constitution — Past, Present and Future*, (Supreme Court of Queensland Library, 2010) 185, 208–9.

<sup>8</sup> *Parliamentary Electorates and Elections Act 1912* (NSW), s 81C.

implications that may not be anticipated at the time. For example, in 1978 when the Western Australian Government entrenched a requirement that Members of Parliament be ‘chosen directly by the people’,<sup>9</sup> little did it know it was inserting an implied freedom of political communication in its Constitution.<sup>10</sup>

Another example of unexpected consequences happened in Queensland in 1977. The Parliament entrenched the provision which confers legislative power on the Parliament, being the power to make, amend and repeal ordinary laws. What it didn’t realise was that in doing so, it effectively limited its ability to entrench other provisions in the future. This was because any new entrenchment clause would impliedly amend or affect the Parliament’s ordinary legislative power, therefore requiring a referendum.<sup>11</sup> Western Australia followed Queensland in 1978 and made the same inadvertent error.<sup>12</sup>

These examples show that you have to be incredibly careful in entrenching provisions in the Constitution, because it can lead to unexpected consequences and real problems when entrenched provisions need to be changed in the future.<sup>13</sup> In my view, entrenchment should be limited to a very few, necessary provisions — such as those dealing with fixed term Parliaments, where a limit on parliamentary power is genuinely needed. Anything more is generally asking for trouble. The issue of entrenchment will be a major one that will need to be faced by a constitutional convention in the Northern Territory. It will have to decide:

- which provisions should be entrenched and which should remain flexible;
- whether to confine entrenchment to those provisions that can be legally entrenched under s 6 of the *Australia Acts* or to extend purported entrenchment to other provisions, even if this might be legally ineffective; and
- the nature of the manner and form requirements imposed — i.e., whether in all cases it should be a referendum, or whether it should be a special majority, or whether to have different levels of entrenchment, with some provisions being more deeply entrenched than others.

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<sup>9</sup> *Constitution Act 1889 (WA)* s 73(2).

<sup>10</sup> *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

<sup>11</sup> See further: EARC, *Report on Consolidation and Review of the Queensland Constitution*, August 1993, para 4.110; and S Ratnapala, *Australian Constitutional Law — Foundations and Theory* (2<sup>nd</sup> edn, OUP, 2006) 350.

<sup>12</sup> See further: Peter Congdon, ‘The History, Scope and Prospects of Section 73 of the *Constitution Act 1889 (WA)*’ (2012) 36(2) *University of Western Australia Law Review* 82.

<sup>13</sup> See: Peter Congdon and Peter Johnston, ‘Stirring the Hornet’s Nest: Further Constitutional Conundrums and Unintended Consequences Arising from the Application of Manner and Form Provisions in the Western Australian Constitution to Financial Legislation’ (2012) 36(2) *University of Western Australia Law Review* 295.

### *Terminology*

The next dilemma is how to deal with terminology. Old forms of words have established meanings in constitutional law, but may be misleading to the general public. For example, when legislative power is conferred upon a Parliament, it is normally a power to make laws for the ‘peace, order and good government’ of the State.<sup>14</sup> Members of the public might then seek to argue that a law is not one with respect to ‘peace’ or is not a law with respect to ‘good government’. The judiciary, however (apart from a couple of minor deviations),<sup>15</sup> has long accepted that this phrase means that a full, or ‘plenary’, legislative power has been conferred upon the Parliament and that a court cannot strike down a law on the ground that it is not for the ‘good government’ of the State.<sup>16</sup> There is a risk that if different terminology is used, it might be interpreted in a different way — yet if the old terminology is used, it might be misleading to the general public.

Another example is the reference to a Governor holding office ‘at the Queen’s pleasure’. It encompasses the notion that a person continues to hold office at discretion, not for a fixed term, and that he or she may be removed at any time and for any reason or no reason at all, without the need for the application of natural justice. It probably also incorporates the concept of non-justiciability. How is such a concept to be conveyed in so few words without using this archaic and misleading terminology? It is misleading, of course, as it has nothing to do with whether or not the Queen is pleased with the performance of a Governor and everything to do with how the Queen is advised by her Premier under s 7 of the *Australia Acts*.

Many of the archaic phrases used in Constitutions concern the Crown — such as ‘office of profit under the Crown’, holding office at ‘the Queen’s pleasure’ or the reservation of bills ‘for the signification of Her Majesty’s pleasure’. This leads to the further question of whether in drafting a new Constitution for a State, one should draft with an eye to the future and minimise any references to ‘Crown’, ‘Queen’ and ‘royal’ in the Constitution. Is it preferable to talk about ‘assent’ rather than royal assent, or the ‘State’ or the ‘Executive Government’ rather than the Crown? This is particularly relevant to entrenched provisions.

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<sup>14</sup> Note that some Constitutions substitute ‘welfare’ for ‘order’. See the various formulations: *Constitution Act 1902* (NSW), s 5; *Constitution Act 1867* (Qld), s 2; and *Constitution Act 1889* (WA), s 2. *Constitution Act 1934* (SA), s 5 and *Constitution Act 1934* (Tas), s 9, relate back to the grant of legislative power given by the *Australian Constitutions Act 1850* (Imp) for ‘peace, welfare and good government’. Victoria is the only State to use different terminology, with s 16 of the *Constitution Act 1975* (Vic) giving its Parliament power to ‘make laws in and for Victoria in all cases whatsoever’.

<sup>15</sup> *Building Construction Employees and Builders’ Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372, 382–5 (Street CJ); *R v Secretary of State for the Foreign and Commonwealth Office; Ex parte Bancoult* [2001] QB 1067, [57] (Laws LJ); and [71] (Gibbs J).

<sup>16</sup> *R v Burah* (1878) 3 AC 889; *Hodge v The Queen* (1883) 9 AC 117; *Powell v Apollo Candle Co* (1885) 10 AC 282; *Ibralebbe v The Queen* [1964] AC 900; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9–10.

In another case of an ill-thought-through act of entrenchment, the Victorian Government, in 2003, in widening the scope of its entrenched provisions, inadvertently entrenched references to 'royal assent' in s 18 of the Victorian Constitution so that both an absolute majority and a referendum is required to remove them. Prior to 2003, Victoria only required the support of an absolute majority in each House to implement a republic at the State level. It is likely that the Bracks Labor Government did not intend its 2003 amendments to increase the difficulty of cutting its ties with the Queen if Australia became a republic at the national level, by requiring in addition a State referendum as well as an absolute majority, but this is what it achieved.<sup>17</sup> So a further factor to contemplate, along with the removal where possible of archaic and misleading terminology is the extent to which a new Constitution should be drafted in contemplation of future change, but without pre-empting such change. It also raises issues of current views and contemporary standards. Is it still appropriate for Members of Parliament to make oaths of allegiance to the Queen, or would it be more in keeping with contemporary Australian life for Members of Parliament to pledge their loyalty to Australia and to the people of the State?<sup>18</sup>

### ***The inclusion of constitutional principles and offices***

A further significant issue in drafting a new State Constitution is the question of whether the Constitution should include reference to certain offices, bodies and principles, that form part of the 'constitution' in its broader sense but which have not, historically, been included in the written version. For example, it is often remarked that the Commonwealth Constitution contains no reference to the Prime Minister or the Cabinet. Should a new State Constitution refer to the Premier and the Cabinet and make some reference to their constitutional role? In addition, should the Constitution refer to the basic constitutional principles that underlie the Constitution, such as individual and collective ministerial responsibility? For example, the following provision could be included in a new State Constitution:

- (1) There shall be a Cabinet consisting of the Premier and all the other Ministers.
- (2) The Cabinet has the general direction and control of the government of the State and shall make policy decisions on behalf of the Government.
- (3) The Cabinet is collectively responsible to the Parliament for the performance by the Government of its functions and its exercise of executive power.

This, of course, gives rise to concern about justiciability. It may well be considered unwise to include such a provision if it were to result in courts adjudicating upon

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<sup>17</sup> See further: Anne Twomey, 'One In, All In — The Simultaneous Implementation of a Republic at Commonwealth and State Levels' in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic* (Federation Press, 2010), pp 23–4.

<sup>18</sup> See, for example, New South Wales, where in 2006 the oath of allegiance of Members of Parliament was changed to a pledge of loyalty. In 2012 a further amendment was made allowing Members to choose whether to take an oath of allegiance or a pledge of loyalty when being sworn in: *Constitution Act 1902* (NSW), s 12 (for Members of Parliament) and s 35CA (for Executive Councillors).

questions of individual or collective ministerial responsibility. However, an express non-justiciability provision could be included, which would apply to all those provisions which ought not be made justiciable. The benefit would be to make constitutional conventions and principles clear both to those who must apply them and to the general public, making the Constitution more comprehensible and reducing the area for dispute while not expanding the scope for litigation. Other principles or conventions which might be included in the Constitution could include the principle upon which the Premier is appointed, for example:

- (1) The Governor, by commission, may appoint to the office of Premier a person who, in the Governor's opinion, can form a government that is best able to command the confidence of the Legislative Assembly.

It might also be wise to clarify when the Governor must act on advice, when the Governor may exercise discretion, and that when discretion is exercised it should be exercised in accordance with existing constitutional conventions and principles. Again, any such provision would need to be classified as non-justiciable.

### *New approaches*

Finally, there is the issue of whether new constitutional approaches should be taken in a new State Constitution. For example, should the Premier be appointed by the Parliament, rather than the Governor?<sup>19</sup> Should the Governor's reserve powers be codified or removed? Should there be an entrenched bill of rights in the Constitution or a set of guiding principles for Parliament in the enactment of its laws? Should executive power be defined and limited? Should there be a capacity to appoint a small number of Ministers from outside the Parliament?<sup>20</sup> While there are some constitutional constraints upon a State, such as the requirements of the Commonwealth Constitution and the *Australia Acts* 1986, there is still a lot of scope for innovation in the governmental system of a new State. The question to be asked is — what makes this new State different from the others, and how should the Constitution be shaped to accommodate this difference or to promote it by improving upon the constitutional systems in the existing States? One aspect of difference in the Northern Territory is its significant Aboriginal population. What aspects of Aboriginal governance, culture and rights could be drawn upon to shape a different Constitution for the Northern Territory? Again, it is a matter of balancing the benefits of stability and security in tried and true systems against the potential benefits of a better calibrated constitutional system that is shaped to meet the requirements of its people today and for the future. This is the challenge that the Northern Territory will face as it moves towards statehood. ▲

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<sup>19</sup> See, for example, the Australian Capital Territory.

<sup>20</sup> See further: Alysia Blackham and George Williams, 'The Appointment of Ministers from Outside of Parliament' (2012) 40 *Federal Law Review* 253.

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## **Arm's length bodies in the Australian Capital Territory — time for review?**

**Roger Wettenhall**

### ***Introduction***

In the *Governing the City State* report released in February 2011, reviewer Allan Hawke observed that ‘there were currently around 180 boards and committees supported by the ACTPS ACT Public Service (ACTPS), many of which have a statutory basis.... While there are undoubted benefits from these structures, there are inevitable costs to the decision making process, principal among which is “dispersion of government entities and resulting lack of readability of the institutional system”’ (Hawke, 2011: 99, quoting from OECD, 2002: 24). Hawke believed the system needed tidying up: along with recommendations relating to several particular entities, he wanted all ACT (Australian Capital Territory) government boards and committees to be reviewed ‘with a view to ensuring the role and function of these bodies is clearly understood and that bodies recommended to continue have clearly designed roles and responsibilities that align with the Government’s overall strategic direction and objectives’ (Hawke, 2011: 7).

Somewhat similar sentiments have been expressed by reviews in the recent period in a number of countries. There is clearly considerable interest today in the masses of public bodies that inhabit what has sometimes been described as the ‘outer public sector’, made up of all the non-departmental but still public bodies that contribute so much to the active working of our governmental systems (on the Commonwealth, see Wettenhall 2010: ch.4). This article seeks to develop debate about this issue as it affects the ACT jurisdiction. It reports a limited review of the ACT position, both as a partial response to the relevant sections of the Hawke Report and as an up-date of earlier work in this area undertaken in the ANZSOG Institute for Governance and its forerunner Centre for Research in Public Sector Management (CRPSM) in the University of Canberra.<sup>1</sup> Amongst other things, it serves as a reminder that there has been long use of non-departmental bodies in the ACT, and that this use has been the subject of review by several other inquiry agents before the Hawke exercise.<sup>2</sup> The original intention was to support the main paper by an appendix reporting case studies of selected ALBs currently operating in the ACT, but that

remains a work for the future. The conclusion at this stage offers commentary and a main suggestion in line with the recommendation for further inquiry contained in the Hawke Report.<sup>3</sup>

A major outcome of the Hawke report was the restructuring of the ACT public service to constitute a single 'department', with all the old departments redesignated as 'directorates' within that single department.<sup>4</sup> Just how much difference this has made to the working of the system remains a matter for investigation, and that is not the purpose of this article. However, since almost all the relevant international discourse about departments and their relations with ALBs assumes a multi-department ministerial and public service system, the term 'department' is used when appropriate to facilitate cross-system comparisons, with the term 'directorate' used in the particular post-Hawke ACT context.

### ***A new class-name, and wide international interest***

'Arm's length body' has emerged as a new class-name intended to embrace all those non-departmental/non-ministerial bodies that have been such an important feature of most governmental systems in the modern world. Very often in discussing such bodies over the years, the expression 'arm's length' has been used to indicate that they were distanced from ministers in a way that was impossible with regular departments. However, it is only very recently, pushed by the Read Before Burning document that accompanied the accession to office of the Cameron government in Britain (Gash et al., 2010), that the term 'arm's length body' (ALB) has come to be seen as an alternative class-name for those in much longer use such as NDPB or 'quango'.<sup>5</sup> Whatever the class-name, of course, the arm's length distance could be big or small, which is one of the main lines of relevant discussion and relevant research.

The Read Before Burning exercise was by no means the first, and certainly will not be the last, significant inquiry undertaken in an effort to establish better order among, and better understanding of, Britain's ALBs. It followed others in lamenting the incoherence of the field and, acknowledging that there can be no single pattern, proposed a division of the field into four categories based on required degrees of independence for particular bodies; it also recommended sunset clauses for all new ALBs to ensure that bodies which are no longer 'fit for purpose' are phased out. The report sought 'a clear and sensible division of responsibility between ALBs, their sponsor departments, and ultimately with the public' (Gash et al., 2010: 14, 29, 52, 63). Its novelty lies in large part in its concern for ALBs as instruments of service delivery and its development of a bottom-up (from those receiving services) as well as top-down approach to management issues, thus tempering the 'whole-of-government' or 'joined-up government' emphasis in the past generation of reform-directed inquiries and reports in Britain and elsewhere.<sup>6</sup> This issue is stressed here because the tide of international thinking about public sector reform appears to be shifting towards an emphasis on service delivery. Whole-of-government is not abandoned as a reform theme, but it is increasingly recognised that it needs to be tempered by a consideration of community needs at the delivery end of ALB

operations. The new focus on service delivery is apparent in recent developments in the Australian Commonwealth system (Moran, 2011).

### *Long use in Australia*

Before considering how the ACT experience fares in this regard, it is important to acknowledge the very long and often quite innovative Australian use of ALB-type bodies. In the form of the statutory authority, ALBs are virtually as old as organised government in Australia: using nominated legislatures to pass the enabling acts, colonial governors of the pre-self-government period (usually up to the 1850s) were frequently importing the established British habit of using 'statutory authorities for special purposes' for functions such as road and bridge construction, public school and savings bank management, convict assignment and land registration (Webb & Webb, 1922; Wettenhall, 1987). The practice carried forward into the self-government period, and after federation in 1901 was adopted also by the new Commonwealth jurisdiction. What was very innovative was that, driven by the high policy importance of economic development and the lack of adequate private capital resources, the states used the same organizational arrangement for new enterprises involved in quasi-commercial but still public ventures like railways and tramways, water and irrigation systems, and many others. The authorities concerned were usually given corporate status at law to facilitate their commercial operations, giving rise to the new term 'statutory corporation'. There is considerable evidence that this innovative 'colonial' stance was influential in guiding movement in Britain itself towards use of the 'public corporation' form for its own public enterprises (Wettenhall, 1990, 1996).

These traditional Australian ALBs were, more often than not, staffed outside the respective public services, so that it could be said by the 1970s (and before the onset of the privatization pandemic) that some three-quarters of all Australia's public sector personnel were engaged directly by their employing authorities and so not part of a unified Commonwealth or state 'public service'. Where commercial operating factors were important, the authorities were also mostly 'off-budget' just as they were 'off-public service'. So the sense of a 'public sector' being much bigger and broader than a public service was well engrained in Australian administrative history. Commercial considerations were important also in the emergence of the government-owned (or state-owned) company as the main organizational variant of the statutory authority/corporation in the ALB field. In the 1980s–90s, the government-owned company became a popular alternative — with many statutory bodies converted to the new form — though doubts were often expressed that the resulting organizations were less accountable because of the non-involvement of parliament in their creation.<sup>7</sup>

Some structures at the weak end of the autonomy spectrum have remained fairly closely tied to supervising departments, so that the degree of separation has been doubtful in these cases — it may be convenient now to regard them as quasi-ALBs. In Britain the term 'executive agency' emerged in this context, and to a degree the

term, and the organizational conditions loosely covered by it, have been applied in Australia too.<sup>8</sup>

### *Use in the ACT: Pre-self-government foundations*<sup>9</sup>

Early applications of the statutory authority form in the pre-self-governing ACT were simply extensions of the Commonwealth system. For territory governance as a whole, the Federal Capital Commission (1924-31) and the National Capital Development Commission (1957-88) played vitally important roles. For specific functions, operational bodies active in fields like electric power, theatre, cemetery and hospital management, policing, liquor licensing, professional and vocational registration and bush fire control performed much as did their counterparts in the states, except that oversight came from Commonwealth ministers. There were a few novelties, such as milk distribution administered by an ACT Milk Authority, and services like those provided by the Retail (Food) Markets and Showgrounds Trusts that might elsewhere have been within the province of local governments. And complications came from the long-standing practice of identifying particular public service positions within departments as registrars, directors, inspectors, controllers etc in statutes and regulations creating a variety of powers and responsibilities: these became statutory officials of a kind, though of a vastly different kind from significant, separate and clearly autonomous 'statutory officials' like ombudsmen and auditors-general.

As the issue of self-government gained increasing attention (Grundy et al., 1996), there were suggestions by Commonwealth ministers Enderby and Bryant that an adequate form of 'self-government' would consist of having many statutory authorities to cover a wide range of ACT services, with self-government achieved simply by seating members of a still-advisory-only territorial assembly on their boards to represent the community. However such schemes failed to attract support and the movement of the ACT to a far more conventional form of self-government in 1988-89 brought into being an also-conventional territorial public sector with its complement of ministerial departments and ALBs very largely consistent with the pattern customary in the Australian states — except, of course, that in the ACT a single government performed both state-type and municipal-type functions.

It is not so surprising that the ACT's situation as a small yet separately governed jurisdiction within a federal collection of states all larger than it — mostly much larger — has been a major factor in conditioning the evolution of its governing arrangements. Politicians, public servants and sometimes members of inquiry bodies all familiar with the arrangements in the states have together been the main designers of the ACT machinery, and they have usually been content to follow the example of the state systems in their designs. The consideration that economies of scale might suggest other arrangements has rarely been present. So often, in consequence, the ACT has emerged with more administrative units than are needed, on any rigorous assessment, to serve its small population. There is little awareness of advantages that might come from merging functions and establishing larger units better able to develop strong specialist and professional cadres. Against that, of

course, there are the 'small is beautiful'-type advantages that come from closeness to the constituencies being served. The point is simply that pros and cons of these kinds have rarely been consciously identified and weighed in an effort to ascertain the best interests of the ACT community as a distinctive governance jurisdiction. What is customary in the states has been assumed to be good enough for the ACT, and the copying operation has therefore been the dominant style. There have of course been some adjustments, but mostly of a fairly minor kind, crowding out any possibility of radical redesign.

### ***An outer ACT public sector emerges: many ALBs, including a few TOCs***

In one important respect, however, the ACT was soon to depart from the now-traditional state pattern. It would follow New South Wales in adopting a new corporate model for the management of state-owned enterprises developed in New Zealand to suit the aspirations of governments committed to state-shrinking agendas. The impetus in the ACT came from an inquiry by the Priorities Review Board (PRB) established by the Kaine Alliance Government in February 1990. The Board reported (with obvious surprise) that it had found the new and separate territory administration contained 92 non-departmental units in a government service less than half the size of a large state government department (PRB, 1990: 30, 38). It wanted as many of them as possible eliminated and their functions unambiguously returned to departments; but for several (like the ACTION bus network, the forest estate and the nominal 'housing trust'), it proposed movement to the New Zealand/NSW 'corporatisation model' (PRB, 1990: 63).

The Legislative Assembly acted speedily to pass the *Territory-Owned Corporations Act 1990*, which authorized the establishment of government-owned companies to operate under the national companies legislation: they would not be entitled to crown immunity and there would be no Territory liability for debts they incurred (unless the Territory agreed to be liable), they were required to make tax-equivalent payments and pay dividends out of earnings to the Territory, and the Chief Minister would determine who were the voting shareholders and hence board members. Before long three enterprises were brought within its compass: the totalizator betting agency ACTTAB, the electricity and water authority Actew (sometimes ACTEW), and the Mitchell Health Services complex which became Totalcare Industries Ltd. In one way or another, they have played a large and important part in the governance of the ACT: with some reduction in its functions, Totalcare became Rhodium, which was eventually disposed of under controversial circumstances;<sup>10</sup> Actew has joined with the private AGL to form a major, continuing and effective public-private partnership (Wettenhall, 2007); and ACTAB continues more-or-less in its original form notwithstanding the privatization (and therefore disappearance from the several public sectors) of most of its state counterparts. What is at first glance surprising is that more ACT ALBs have not been brought into this territory-owned corporations (TOC) system: as the observations of the Hawke report and the

other inquiries preceding it make clear, inconsistencies and anomalies continue generally to infect this part of ACT governance.

Serious moves were made through the 1990s to bring the ALBs into a single public sector management framework. The Follett Labor Government's *Public Sector Management Act 1994* completed the process of separating the ACT Public Service from the Commonwealth Public Service and, infused by the whole-of-government thinking that was becoming a major stimulus for public sector reform generally, it brought the staffs of many ALBs into the notionally 'unified' public service. Then the Carnell Liberal Government's *Financial Management Act 1996* closed a number of trust funds which had aided the autonomous operation of some ALBs, and introduced into the system the concept of a purchaser-provider relationship under which portfolio ministers would buy services from ALBs within their portfolios. In the TOC companies, these ministers were also the principal voting shareholders, leaving them in a serious potential conflict-of-interest situation: so, in 1998, the ministerial arrangements were changed to make the Chief Minister and Deputy Chief Minister the main voting shareholders of the TOC companies, and to create a Government Business Enterprise (GBE) Monitoring Group initially within the Chief Minister's Department but moved to the then Treasury when that was established as a separate department. While aimed especially at the TOC enterprises, these changes affected many other ALBs; the functions of the GBE Monitoring Group soon settled in the Treasury's Finance and Budget Division.<sup>11</sup>

Subsequent experience shows, however, that these changes were not sufficient to introduce order into the sector. Allegations of maladministration in the Stadiums Authority and several other members of the ACT family of ALBs led to special performance audits conducted by the Auditor-General's office around the turn of the century: the first looked particularly at problems with the redevelopment of Canberra Stadium in the lead-up to the hosting of Olympic Games Soccer matches (Auditor-General 2000), and the second looked more generally at a group of 16 statutory authorities with operational functions.<sup>12</sup> The findings were scathing about lack of accountability and conflicts of responsibility across the whole group, running to inadequate safeguards to prevent ministers from interfering unduly in authority affairs, unsatisfactory arrangements for appointing board members, inconsistencies that lacked apparent justification (eg, in remunerating part-time board members), and ambiguous guidelines generally on how authorities should be governed. There was recognition that different authorities had different needs; nonetheless it was considered that an effort should be made to prepare standard guidelines to aid all concerned in the operation of statutory authorities (Auditor-General, 2002; Hannaford, 2002). It became clear also that the Chief Minister's Department had issued a document entitled *Ethical Requirements for Appointees to ACT Government Boards and Committees: A Guide for ACT Government Agencies* in September 1999, but that 10 of the 16 authorities involved in the performance audit exercise declared that they had not seen it (Auditor-General, 2002: 60–61).

### ***Disorder in the outer public sector***

Studies of the ALB situation in many countries have commented on the characteristic untidiness of this part of the machinery of government, leading to efforts to classify the several forms of ALBs (on which see Wettenhall, 2003a). Thus, in another document associated with the recent British review, academic-consultant Matthew Flinders (2010: 35–36) noted that inquiry action had easily located around 900 ALB-type bodies but also that there were more created ‘off the radar’, and that many ministers he had worked for did not even know what bodies they were responsible for. The ACT situation is obviously far less complex, and most governance-savvy observers would have little difficulty in listing a dozen or 20 or so of the main ALBs operating in this jurisdiction. There are others, however, which rarely attract much attention and would be missed in many such listings, yet receive occasional mentions in the daily press. How many, without serious prompting, would include the Nominal Defendant of the ACT, the ACT Victims of Crime Commission, the ACT Insurance Authority, or the Public Advocate? What exactly is their status? What about Victims Support ACT, Territory Venues and Events (the owner of Manuka Oval), No Waste, or Health Safety Services? Are they ALBs too, or just parts of central directorates (departments)? Are they included in the Hawke count of ‘around 180 boards and committees supported by the ACTPS’?

When ACT citizens get their drivers’ licenses and car registration documents, they find they are issued by the Road Transport Authority. And those interested in environmental matters will have many reasons to be aware of the Environment Protection Authority. Many will also know of the Housing Commissioner. In their titles, these agencies sound like the normal run of ALBs, and it is possible that they figured in the Hawke count. However a check of the establishing statutes indicates that, while there are specified statutory functions to be performed in each case (and these agencies are therefore in a sense statutory bodies), they are otherwise regular public servants appointed to discharge those functions, housed within directorates, and subject in the normal way to their ministers. In the roads and housing cases, the director-general himself doubles as the ‘authority’ (and is constituted as a corporation in the housing case); in the environment case, the director-general appoints one of his senior officers to be the ‘authority’. As agencies, they are thus in no sense independent of, or separate from, the directorates. Whether including them or not, the Hawke count is muddied by these arrangements.

The last-mentioned dispositions are, of course, sourced in statutes, and are therefore unquestionably ‘official’. But there are other listings that appear in public information guides prepared by governmental agents of one kind or another that must be seen as equally ‘official’, and yet can in no way satisfy those seeking machinery-of-government clarity. Before the advent of the directorates, the *Canberra Connect* website was presenting information on ‘ACT Government organisations’ that purported to list the ACT departments but included several ALBs among the departments, and then provided a second but strikingly different list of ‘ACT government agencies’ that mixed information on these ALBs with more on departments, identifying separately some departmental branches, divisions,

related networks etc, and other ALBs including some statutory officers (*Canberra Connect* 2005). A 2012 *ACT Government Directory* website provides relevant information split into a dozen-or-more indexed sections of which two have particular machinery-of-government relevance ('ACT Government Directorates' and 'Boards, commissions, advisory councils and committees'), and then opens immediately with an un-indexed section on the ACT Auditor-General's Office (not otherwise noted). The currently existing directorates are then explained, followed by identification of a miscellaneous and unclassified group of 19 bodies including a variety of assessment committees, advisory councils, a couple of offices internal to directorates, and some smaller ALBs (or groups of them) which may or may not have been noticed elsewhere in this article (*ACT Government Directory*, 2012). All this may perhaps help members of the public make contact with particular agencies or programs that can be of use to them, but it does nothing to encourage systematic thought about how the whole government structure is assembled.

### ***A secretive review, a 'shared services' regime, and integrity agencies as a special case***

Through late 2005 and early 2006, the ACT lived through a close examination of 'every nook and cranny of the way this city-state is governed' (Uhlman, 2006) by the Strategic and Functional Review headed by Michael Costello, managing director of the ACTEW TOC. Controversially, the report presented to Labor Chief Minister Stanhope in April 2006 was treated as a 'cabinet-in-confidence' document and never released. But it soon became clear that its main concern was with the comparatively high cost (in Australian terms) of the delivery of territory services, especially in health and education, and a drastic and also highly controversial program of school closures followed. In our submission, we in the University of Canberra's CRPSM drew attention to machinery-of-government issues such as the role of departments and ALBs and the relationship between them (Aulich & Wettenhall, 2006), but given the secrecy involved we have no sense of how that submission was processed.<sup>13</sup> Doubling as Treasurer and about to present the 2006-2007 budget, however, Stanhope entered the numbers game: he was reported as saying that the effect of the review would be that 'as many as 80 statutory authorities and smaller offices ... would be merged into mainstream departments to save costs' (Mannheim & Dutt, 2006).<sup>14</sup>

To counter the heavy volume of contemporary criticism about the secrecy surrounding this operation, the government had former NSW Chief Justice Sir Laurence Street appointed as an 'independent arbiter' to assess its argument that a document of this sort needed protection under the doctrine of executive privilege, and that argument gained the arbiter's support. However the 2006-2007 Budget Papers gave a few indications of matters included in the review report. Notably for present purposes, they revealed that the review recommended 'reduc[ing] the number of public sector agencies', 'bring[ing] agency costs closer to the national average', and 'streamlin[ing] our public sector, removing duplication and reducing overheads'. The underlying thinking was made apparent in this passage: '...the

Territory's public services were generally high quality but costs are, on average, 20 to 25 per cent higher than the national average. Our structures tend to mirror larger jurisdictions and do not reflect our status as a small city/state' (ACT Treasury, 2007).<sup>15</sup>

The ACT's ALB population has inevitably been affected by the adoption of what has been called the 'Shared Services model' (Hawke, 2011: 290) for the undertaking of administrative ('corporate') services common to most directorates and agencies. No doubt influenced by this secretive Costello review report, a Shared Services unit became operational as a 'business unit' of the Treasury in February 2007 (now Commerce and Works directorate: Shared Services 2012). The services thus shared include health and safety, staff recruitment, payroll, employment relations, staff development and training, IT and records, financial services and procurement. For all parts of the public sector subject to this arrangement, the intention is to remove duplication of common functions and enhance efficiency, but there is argument that the focus of the officials involved is so heavily on process that understanding of, and support for, the functions of particular directorates and agencies is often lacking. These pluses and minuses exist in all applications to ALBs, and of course the system is to that extent an inhibitor of agency autonomy (Hawke 2011: 291–93).

Rising interest in the subject of integrity in government over the past decade has focused particular attention on a group of ACT ALBs far removed in function from the more commercialized bodies at the centre of the TOC reforms of the early self-government period, and this group has furnished some of the more spectacular cases involving ALBs and their relations with members of the political executive over the recent period. There has been serious discussion about the need to recognise members of this group — notably Auditor-General, Ombudsman, Electoral Commissioner and Human Rights Commission — as 'officers of parliament' (from New Zealand origins, as with the TOCs). In keeping with this broadening discussion, a workshop on integrity agencies was convened by the ANZSOG Institute for Governance at the University of Canberra in July 2009, and some insights arising from that workshop have been published separately.<sup>16</sup>

### *A trigger for the Hawke inquiry*

It was another clash involving an ALB and the political executive that triggered the establishment of the Hawke inquiry itself. Planning and land development had long been difficult areas providing many governance problems in the ACT, with ministers and their departments, and some ALBs, heavily involved. The respective roles have not been well defined, and it has been virtually inevitable that differences of opinion have emerged as affected citizens have sought to gain maximum advantage to themselves through the operations of the system, and in so doing pushed ministerial and ALB involvements to and beyond the limits of their respective formal responsibilities.

Cabinet documents obtained by the ACT Liberal opposition under an FOI (Freedom of Information) application revealed 'months of infighting' between the chief

executive of the ACT Planning and Land Authority (ACTPLA), Neil Savery, on the one hand, and Chief Minister Stanhope and the land release section of the ACT public service on the other hand, over the issue of supermarket competition. Among other things, Savery asserted that, through his interventions, Stanhope had made it impossible to achieve the government's stated aim of 'taking politics out of planning', and argued that the level of interference he experienced in trying to carry out his statutory functions would 'not be encountered by other statutory office bearers'. The Chief Minister was reported by the press to have reacted furiously, he got legal support for his own position, and — despite a soft apology — the Chief Planner was left with little alternative but to resign his office (as reported in Towell, 2011a). Stanhope then made no secret of the fact that this damaging row was the catalyst for commissioning Allan Hawke to undertake his root-and-branch review of the ACT bureaucracy, the result being 'the biggest shake-up of the public service since self-government' (Towell, 2011b). Not surprisingly, 'the planning bureaucracy' was hit hard in the Hawke review, which explained unambiguously that '[c]oncerns about the fragmentation of responsibility for issues relating to land release, land use ... planning, and development loomed as the largest areas of structural focus for the Review'. These concerns, it added, were highlighted by 'the number and respective roles and responsibilities of [departments] and the other agencies, or parts of agencies that comprise the extraordinary number of 26 entities involved in approving development in the ACT' (Hawke, 2011: 179).

The Hawke review also specifically named a few other ALBs as deserving of remedial attention (Hawke, 2011: 110–115). But what is important here is the more general finding, noted in the introduction, that there were currently around 180 boards and committees supported by the ACT Public Service, that a consequence was 'dispersion of government entities and resulting lack of readability of the institutional system', and that review was necessary to ensure that 'the role and function of these bodies is clearly understood and that [they] continue have clearly designed roles and responsibilities that align with the Government's overall strategic direction and objectives' (Hawke, 2011: 7, 99).

### ***Legislative inconsistency as a cause of confusion?***

It would be too much to suggest that there can be a single, or a main, cause of the uncertainties that exist. And observers with experience with systems of governance in other jurisdictions, like Britain's Matthew Flinders quoted above, will be quick to point out that the ACT is by no means alone in demonstrating disorder in its outer public service. However a careful study of several system-establishing statutes designed to regulate the whole ACT public sector suggests that serious inconsistencies exist in the relevant provisions of the statutes themselves, and leads to a recommendation that those statutes need thorough review and revision in order to remove some of the present confusions. To this end, this article concludes by contrasting the listing and defining of relevant organizational categories in three main statutes, the *Legislation Act 2001*, the *Public Sector Management Act 1994*, and the *Financial Management Act 1996*.

In its 2006 inquiry into proposed changes to the planning and development legislation, the attention of the relevant Assembly Standing Committee was drawn to the considerable incoherence in the way the ACT government presented information about its administrative arrangements, with the observation that that incoherence inevitably flowed over to the way ACT LPA (Planning and Land Authority) and LDA (Land Development Authority) were regarded within the system. Five different ways of explaining the machinery-of-government arrangements, all endorsed officially in government documentation, were noted; the CRPSM submission urged the importance of sorting out the issues involved in order that all concerned — ministers and departments, the legislature and its committees, ALBs and their stakeholders — could move to a better understanding of roles, responsibilities and relationships, and so contribute to a smoother and more transparent governance system (Wettenhall, 2006). The Standing Committee observed briefly (SCPE 2006: 47) that, virtually simultaneously with its assessment of the draft planning and development legislation, the Costello Functional and Strategic Review was conducting its own inquiry. It therefore judged it appropriate to leave consideration of such machinery-of-government matters to that inquiry.

In virtually all efforts to classify the various types of bodies to be found in the ALB fringes of most government systems, sub-categories have been required. Thus the British report which gave great currency to the ALB term, noted above, divided the field into four categories based on required degrees of independence (Gash et al., 2010). It is likely, however, that few such efforts contain such blatant overlaps and inconsistencies as does the ACT effort, with (as noted in the Hawke Report) 'around 180 boards and committees currently supported by the ACTPS' and operating in a comparatively small jurisdiction. It appears that there are two essential traditions at work, those of the Chief Minister and Cabinet Department/Directorate and the Treasury Department/Directorate; that others within the system seem ready enough to ignore both and 'do their own thing'; and that what little effort there has been to attempt to reconcile these two 'systems' is to be found in the *Legislation Act 2001*. In significant ways, however, the *Public Sector Management Act* and the *Financial Management Act* fail to reflect that effort. The appendix lists the main organizational categories so identified, and seeks to chart their inter-relationships. The inconsistencies can be easily seen.<sup>17</sup>

### ***Argument restated***

This article reports on a review of the evolution of the NDPB or ALB sector of ACT governance within the broad context of ALB usage across a range of governmental systems. It has shown that disorderliness is a common characteristic of 'outer public sectors' populated by these ALBs, and that the ACT's outer public sector certainly shares that characteristic. There can be no argument that many of these ALBs perform well and give good service to the ACT community. The argument is rather that the system-at-large is made more complicated and difficult to understand because of the variety of class-names found within it and the lack of consistency in this matter across several pieces of major legislation that are surely

vital to its successful functioning as a system, and across various directories that seek to facilitate that successful functioning.

There is no question that categories are needed to sort members of the ALB population — the need for such categories is recognised in all the serious treatments elsewhere such as the British *Read Before Burning* report. The argument is again that the inconsistencies in the categorizing treatment across those pieces of ACT legislation and associated directories make the comprehending process more difficult than it need be, and this leads to a central recommendation. This is that a serious effort should be made within the ACT administration (1) to work out a few categories of ALBs (not too many) that will most suit the ACT situation, and then (2) to build this single set of categories into all those system statutes which serve to regulate the use of ALBs, and to ensure that the compilers of directories, administrative arrangements orders, etc, conform to those categories. Of course further effort will be needed to determine these categories and get agreement on them. However, all concerned with the operations of the outer public sector should benefit, not only those at the service-delivery end running the ALBs and receiving their services, but also those at the centre responsible for policy development and system-wide management. A reform of this sort should thus be seen as one that simultaneously serves both centralizing (whole-of-government) and decentralizing (closer to community and better service delivery) forces. ▲

### *Endnotes*

1. The most comprehensive survey is Wettenhall & Laver, 2002.
2. Several in the lead-up to self-government, notably JCACT, 1974; Craig, 1984; Pearson et al., 1984. After self-government: PRB, 1990; Pettit, 1998; Auditor-General, 2002.
3. I acknowledge the helpful assistance of Graeme Chambers as Research Associate in the early stages of this project. Graeme had work experience as an executive in several present and past ACT ALBs.
4. This major change was effected in late 2011 amendments to the basic machinery-of-government statutes: *Public Sector Management Act 1994* and *Financial Management Act 1996*. See also Gallagher, 2011a, 2011b.
5. The class-name ‘non-departmental public body’ (NDPB) is generally considered to have taken off from the report on the relevant British experience by Sir Leo Pliatzky commissioned near the beginning of the Thatcher government: Pliatzky, 1980. ‘Quango’, introduced after a series of international discussions in the 1970s, emerged as an acronym for ‘quasi-non-governmental-organization’: see Wettenhall, 1981. In a wide-spread but very imprecise application, the word ‘agency’ is also often used in this sense, along with the process word ‘agencification’ on which see note 8 below. On earlier exercises in classification, see Wettenhall, 2003a.
6. The experiences of many countries are canvassed in the international ‘COBRA’ survey centred on the Catholic University of Leuven in Belgium, on which see eg Verhoest et al 2012. For the Australian part of this survey (which included some work on ACT bodies) see Aulich et al., 2010, Aulich & Wettenhall, 2012.
7. On the relevant Commonwealth experience, see Wettenhall, 2003c.
8. In the Commonwealth, creation of such executive agencies was authorized by the amending *Public Service Act* in 1999, but only a few emerged (Wettenhall, 2003b). Some observers have recognised that older bodies like ‘bureaus’ associated with departments have some

similar features (Podger, 2011: 3, drawing attention to a generally neglected comment in Walsh, 1987: 7). Christopher Pollitt and his colleagues had much to do with the coining of the word 'agencification', giving rise to a popular but contested view that, from the late 1980s on, there was a huge increase in the number of ALBs around the world under the stimulus of NPM (New Public Management)-type thinking (Pollitt et al., 2001, 2004; Wettenhall, 2005a).

9. For fuller treatment of the issues covered in this and the next section, see Wettenhall & Laver, 2002.
10. Those who have followed the Totalcare and Rhodium fiascos are likely to regard it as a supreme irony that the initial core component of this enterprise, the ACT laundry service now trading as Capital Linen Services, is back within the central government framework as a business unit of the Territory and Municipal Services Directorate, serves private as well as public clients, and is praised as one of the top 10 commercial laundries in Australia (TAMS, 2012; Inman, 2012).
11. One other effect of this late-1990s series of changes was to further the development of 'business units' within departments, falling short of separate organizational identity but gaining reporting recognition in audit reports and the like. Libraries ACT, ACTION bus service, Road Transport Authority, Commissioner for Housing, WorkSafe ACT (under a Work Safety Commissioner), and Shared Services are such units.
12. To mention a few: Canberra Public Cemeteries Trust, Cultural Facilities Board, ACT Gambling and Racing Commission, Legal Aid Commission, National Exhibition Centre Trust, University of Canberra.
13. Our argument was repeated in a submission (primarily related to the Rhodium enterprise) to the Assembly's Standing Committee on Public Accounts, on which see SCPA, 2008.
14. As noted, Hawke identified around 180 boards etc in the ACT public sector, and Flinders's UK tally stood at around 900 ALB-type bodies (and more still 'off the radar'). Around the time of the Coombs Royal Commission in Australia in the mid-1970s there were various counts putting the Australian Commonwealth tally at 241 (or over 500 if the then ACT administration was included), 220, 198 and 120; when the Victorian (state) Public Bodies Review Committee was in session in 1980, there was press speculation that it might find 1,000, but its search eventually located more than 9,000 (Wettenhall, 1979: 181 and 2005b: 4).
15. This economies-of-scale argument was put strongly in interview (23 May 2012) by Andrew Kefford, ACT Public Service Commissioner. Kefford was chief of staff of the Secretariat assisting Allan Hawke in his *Governing the City State* inquiry. For the political debate about the secrecy of the Strategic and Functional Review report and the Street assessment of it, see Legislative Assembly, *Hansard*, 2009 Week 6 (7 May), pp. 2043–55. Sufficient information became available after presentation of the report to indicate that it scheduled at least one ALB (Australian Capital Tourism Corporation) for closure, and others for serious revision of their role. On this review, see also Uhlman, 2006; Bartos, 2006; Waterford, 2006.
16. A special issue of the journal *Policy Studies* was developed in part from papers presented at this workshop: Aulich, Wettenhall & Evans, 2012. Several Standing Committees of the ACT Legislative Assembly have also conducted relevant inquiries: SCPA, 2011, SCJCS, 2011, SCAP, 2012.
17. There are still other efforts to classify. Thus the Legislative Assembly's Standing Committee on Administration and Procedure noted that there can be three quite distinct staffing arrangements for organizations headed by statutory office-holders (SCAP, 2012: 66–67). However, in what is virtually a category-denying exercise, the annual *Financial Audit Reports* prepared by the Auditor-General use the term 'agency' to embrace

departments /directorates as well as non-departmental bodies in a simple alphabetical listing (eg, Auditor-General, 2010). And, mixing these approaches, the *Insurance Authority Act 2005* recognises ‘agency’ (s.10.3) as a broad generic category made up of ‘administrative units’ (as recognised elsewhere) and ‘territory entities’ (a new category), and subdivides the latter (s.6) into two groups: ‘territory authority’ (as recognised elsewhere), and ‘public sector company’ (presumably more than ‘territory-owned corporation’ as recognised elsewhere).

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## APPENDIX

### ALB CATEGORIES IN SYSTEM-REGULATING A.C.T. LEGISLATION

*Legislation Act 2001 (from Dictionary, Part 1)*

**Territory authority:** 'a body established for a public purpose under an Act, but ... not ... a body declared by regulation not to be a territory authority'.

**Territory instrumentality:** 'a corporation ... established under an Act or statutory instrument, or under the Corporations Act ... and is a territory authority under the *Public Sector Management Act 1994*'.

**Territory-owned corporation:** a corporation established under the *Territory-owned Corporations Act 1990*.

**Statutory office-holder:** 'a person occupying a position under an Act or statutory instrument (other than a position in the public service)'.

This categorization is obviously intended for ALBs only: there is no attempt to define department or directorate.

*Public Sector Management Act (PSMA) 1994*

**Administrative unit:** The Act declares that the ACT Public Service is made up of administrative units established at the discretion of the Chief Minister and allocated to nominated ministers along with 'enactments and matters' for which the minister is responsible (ss.12-14). [Primary reference is, of course, to the departments/directorates which are the central structures of the Public Service.]<sup>1</sup>

**Territory instrumentality:** A body corporate, with or without a board, established under a special statute or under the corporations law, and 'subject to control or direction' by a minister.<sup>2</sup>

**Statutory office-holder:** The relevant organizations are not declared to be either administrative units or territory instrumentalities; however, like instrumentality chief executives, these office-holders hold powers under PSMA *as if* the units they head were administrative units under that Act.

*Financial Management Act (FMA) 1996*

**Territory authorities:** Bodies that are corporations, may sue and be sued in their corporate name, may have a seal, and represent the Territory when exercising their functions unless otherwise provided by law (s.73). These, of course, are the 'instrumentalities' of PSMA, for which 'authorities' do not need to be incorporated.<sup>3</sup>

### Notes to Appendix

1. These arrangements are effected as 'notifiable instruments' which have the force of law under the *Legislation Act*. In them it is the departments/directorates that are listed as the *administrative units* — and apparently there has only been one exception to this, when ACT PLA was accorded 'administrative unit' status for a limited period from 2003 (SCPE, 2006: 45).

2. These are also referred to as *autonomous instrumentalities*, and discretion is given (s.24) for individual creating acts to provide that their staffs may be employed under the *PSMA*, in which case their chief executive will hold powers of a director-general *as if* they were administrative units under *PSMA*. The *as if* formula has frequently been in use in the Commonwealth public sector, where statutes create ALBs and then provide that their staffs will be appointed under *Public Service Act* procedures with their chief executives holding powers under the *Public Service Act* as if they were departmental chiefs in respect of those staffs. There is, however, a sense in which whatever *PSMA* prescribes about the separate existence of ALBs is cancelled out by their treatment in the *Administrative Arrangements Orders*. Dozens of ALBs (or the statutes that create them and that they administer) appear in these orders simply as 'matters' within the responsibility of the listed ministers and therefore as functions of the respective administrative units. In other jurisdictions, such as that of the Commonwealth, they would be clearly separated from departments, and seen instead as outer parts of the portfolios of the various ministers.
3. In the current version of *FMA*, some 15 such authorities are named specifically (this list includes the Land Development Agency), and others can be added by amendment to the *Financial Management Guidelines* (s.54). Then there is an escape clause: the Treasurer may declare by notifiable instrument that a 'stated body is not a territory authority for this Act or a stated provision of this Act' (s.3B): such notifiable instruments issued in 2003 and 2005 have exempted ACT PLA, health professions boards, the ACT Architects Board, the Government Solicitor, the Registrar-General and several others. There are some special provisions for territory authorities that have governing boards (s.56), introducing another form of categorization.

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## Understanding Conscience Vote Decisions: The Case of the ACT\*

**Peter Balint & Cheryl Moir**

Taken as a whole, previous conscience vote studies have identified four potential influences on an MP's decision: party membership, gender, religious affiliation, and their constituents. Yet most of these studies have identified these influences by simply examining the voting patterns or outcomes of conscience vote results. This is problematic, as the factors that allow us to predict voting outcomes may not be the same factors that actually influence those who do the voting. In this paper, by using the ACT as a case study and employing a mixed methodology, we seek to better explain what actually influences an MP's conscience decision. We conclude that while party remains the most important predictive factor, the influence of the personal should be taken more seriously. By this we mean both an MP's personal experiences and their personal ideology.

Most parliamentary decisions in Westminster systems, made along strict party lines, are entirely predictable and transparent. This is not the case for a conscience vote. When politicians are free to decide individually how they will vote, what influences them? Several theories have been put forward. Some have argued that party stills plays a dominant role,<sup>1</sup> or that gender can be influential,<sup>2</sup> or that the religious affiliation of MPs can

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<sup>1</sup> J. Warhurst, 'Conscience Voting in the Australian Federal Parliament,' *Australian Journal of Politics and History* 54(4) 2008, 579–596; J. Baughman, 'Party, Constituency, and Representation: Votes on Abortion in the British House of Commons', *Public Choice* 120(1/2) 2004, 63–85; C. Pattie, R. Johnston and M. Stuart, 'Voting Without Party?', in P. Cowley (ed.) *Conscience and Parliament* (London: Routledge, 1998); P. Cowley, 'Unbridled Passions? Free Votes, Issues of Conscience and the Accountability of British Members of Parliament', *The Journal of Legislative Studies* 4(2) 1998a, 70–88; J. Hibbing, and D. Marsh, 'Accounting for the Voting Patterns of British MPs on Free Votes', *Legislative Studies Quarterly* 12(2) 1987, 275–297.

<sup>2</sup> Warhurst (2008), *op cit.*; H. Pringle, 'Urban Mythology: The Question of Abortion in Parliament', *Australasian Parliamentary Review* 22(2) 2007, 5–22; S. Broughton and S. Palmieri, 'Gendered Contributions to Parliamentary Debates: The Case of Euthanasia', *Australian Journal of Political Science* 34(1) 1999, 29–41; Pattie, Johnston and Stuart, *op cit.*

determine the outcome;<sup>3</sup> while others have looked to the characteristics of an MP's constituents.<sup>4</sup> Yet conscience votes are intended to be personal. Indeed the term 'conscience' clearly denotes this. The records of parliamentary debates preceding conscience votes show the private sentiments and emotional responses that are commonly provoked and with it a blurring of the political and the personal. Such records are replete with stories of MPs' personal experiences — whether their own sick child, a dying parent or a discussion with a spouse, as well as their particular personal ideologies. Most previous attempts to understand the influences on conscience vote decisions have generally avoided the influence of the personal. In this article, using the ACT as a case study, we argue that it is time to take the influence of the personal much more seriously when analysing conscience votes.

Perhaps one of the reasons why previous conscience vote studies have overlooked the personal, or at least subsumed it into other categories, is methodological. Almost all of the existing studies have the same basic methodology: they rely on the outcomes of conscience votes to then hypothesise about possible causes. While this has made them reasonably good at highlighting predictive factors, it runs the danger of assuming that a predictive factor is an actual cause. Although most conscience vote outcomes can be predicted along party lines, this does not tell us whether the usual party pressures remain a strong influence, or whether people of a similar persuasion join the same political parties and, freed of party shackles, still generally end up voting together. If we want to understand what is actually going on in conscience votes, and not simply predict the overall results, then we need to maintain a distinction between *predictive* factors and *influencing* factors; that is, those factors that usefully allow us to predict voting outcomes, and those factors which instead help shed light on the actual dynamics of individual decision-making. Failure to uphold this distinction is to conflate explanation with prediction, and would be akin to assuming Paul the Octopus, with his excellent predictive power in determining World Cup 2010 soccer results, is the explanation of those results.

The flipside of focussing, as we do, on explanation, and less on prediction, is that explanation is often complex and difficult to reduce to single causes. While we will suggest the importance of various influences, we cannot offer causal weightings. We use a problem driven, predominantly qualitative, mixed methodology which balances three types of data. The first are the results of a series of twelve interviews that were conducted with both past and present ACT Legislative Assembly members in 2009.<sup>5</sup> The second comes from examining Legislative Assembly conscience vote debates recorded in Hansard. The third set

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<sup>3</sup> Warhurst (2008), *op cit.*; Baughman, *op cit.*; N. Longley, 'Voting on Abortion in the House of Commons: A Test for Legislator Shirking', *Canadian Public Policy* 25(4) 1999, 503–521; Pattie, Johnston and Stuart *op cit.*

<sup>4</sup> Baughman, *op. cit.*; Hibbing and Marsh, *op cit.*

<sup>5</sup> It was originally intended that all seventeen members of the Seventh ACT Legislative Assembly would be interviewed on the issue of conscience votes in the context of a potential vote on RU486. However, a number of assembly members were unwilling, or unable, to participate in this research. Only seven of the seventeen serving assembly members agreed to be interviewed (five Labor, two Greens, and no Liberals). In order to gain a more representative sample for analysis, past Liberal members were approached and four more interviews were added. As a validity check, one other past Greens member was also interviewed. The twelve interviews contain a reasonably representative sample of both party (five Labor, four Liberal, three Greens), and gender (seven female, five male). Four interviewees wished to remain anonymous, and any unattributed quotations belong to this group. Further details are available from the authors.

involves correlates observed in the results of two ACT conscience votes; the *Crimes (Abolition of Offence of Abortion) Bill 2001* and the *Human Embryo (Research) Bill 2004*. Our analysis represents a methodological shift from the predominantly quantitative methods used by previous researchers in conscience vote studies, and also sheds light on what actually influences MPs voting on conscience issues, rather than merely predicting their outcomes.

The paper is structured as follows. Using the ACT as a case study, we begin by critically examining the influences put forward by previous conscience vote studies, and argue that, while party is the most important predictive factor, it is not always the influence it appears to be. We then argue that, at least according to the ACT study, the influences of gender, religion and an MP's constituents have largely been overstated. We conclude by arguing that the personal — in the form of both experience and ideology — plays an important and overlooked determinant role in conscience vote decision-making.

### ***The Influence of Party Membership***

This is my first conscience vote as a politician and hopefully my last one. A conscience decision is, by nature, a difficult one to make at the best of times. After today, some of the community will be happy with the assembly's decision and some will not. Some of those in the latter group will be in my own party. I am aware that I am the only Liberal member voting for Mr Berry's bills today and, to be honest this makes me more than a little nervous. However, my vote reflects my convictions, and I stand by them.<sup>6</sup>

One month after Helen Cross uttered these words - during the debate over the *Crimes (Abolition of Offence of Abortion) Bill 2001* - she was an Independent, having been expelled from the Liberal Party. Her vote and subsequent leaving of the Liberal Party may not have been unrelated. While there is no official party line in a conscience vote, the party apparently remained a strong enough influence for Cross to feel uneasy about voting contrary to her colleagues.<sup>7</sup> It is one of the great ironies of conscience votes that, freed of the usual strictures of party discipline, MPs still generally vote alongside their party colleagues. Indeed as Phillip Cowley<sup>8</sup> notes, conscience issues may not always be, as popularly described, non-party issues.

Consistent with predictive theories of conscience voting, recent results of conscience votes in the ACT show clear party trends. For example, the *Crimes (Abolition of Offence of Abortion) Bill 2001* was narrowly passed by the seventeen member assembly (9:8). This bill, which was designed to remove abortion from the ACT Crimes Act, had the support of six out of eight Labor MLAs, and was opposed by six out of seven Liberal MLAs (see Table 1). The situation was very similar with the *Human Embryo (Research) Bill 2004*, which was also passed (11:5). This bill, designed to allow research on human stem cells, had the support of all seven Labor members, while four out of six Liberal members voted against it (see Table 2).

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<sup>6</sup> H. Cross, MLA, ACT Legislative Assembly Debates, Hansard [address], 21 August, 2002, p. 2559.

<sup>7</sup> Cross's former colleague, Gary Humphries, argued that this case was not straight forward, stating: The party did not expel her because of her vote on abortion. Her approach to the issue was certainly a factor in people coming to the view that she was unable to comply with party discipline, but there was no party line on the Abortion Crimes Act and she was free to vote as she saw fit.

<sup>8</sup> P. Cowley, 1998b. 'Conclusion', in his (ed.) *Conscience and Parliament* (London: Routledge, 1998b), p. 188.

**Table 1: Crimes (Abolition of Offence of Abortion) Bill 2001  
votes by party and sex**

		<i>For</i>	<i>Against</i>	<i>Total</i>
	Total	9	8	17
<i>Party</i>	Labor	6	2	8
	Liberal	1	6	7
	Greens	1	0	1
	Democrats	1	0	1
<i>Sex*</i>	Male	4	7	11
	Female	5	1	6
	Labor Male	4	2	6
	Labor Female	2	0	2
	Liberal Male	0	5	5
	Liberal Female	1	1	2

\* Both the Greens and Democrats MLAs were female

**Table 2: Human Embryo (Research) Bill 2004 votes by party and sex**

		<i>For</i>	<i>Against</i>	<i>Total</i>
	Total	11	5	16
<i>Party</i>	Labor	7	0	7
	Liberal	2	4	6
	Greens	0	1	1
	Democrats	1	0	1
	Independent	1	0	1
<i>Sex*</i>	Male	8	2	10
	Female	3	3	6
	Labor Male	6	0	6
	Labor Female	1	0	1
	Liberal Male	2	2	4
	Liberal Female	0	2	2

\* Both the Greens and Democrats MLAs were female

Yet these clear party trends do not explain what actually influenced MPs to vote generally along party lines. Conscience vote researchers, after identifying party trends, tend not to go much further. John Warhurst does briefly suggest two ways in which party membership may influence conscience vote decisions in Australia: comfort within the party majority, and fear of the repercussions of voting contrary to typical party views or the views of party leaders.<sup>9</sup> Thus although freed of formal party discipline, MPs may still feel pressure to vote in a similar fashion to their colleagues. This may occur both consciously, where someone with one eye on their future career may be unwilling to vote against the majority of their party, and unconsciously where vote decisions are made by force of party-voting habit. Indeed,

<sup>9</sup> Warhurst (2008), *op cit.*, pp. 585-6.

Pattie, Johnston and Stuart describe British MPs as ‘creatures of habit’, whose ‘first instinct is still to vote with their fellow party members.’<sup>10</sup>

Cross’s speech above seems to be an example of a conscious party pressure. A less dramatic case might occur when a parliamentary leader, while allowing a conscience vote, still expresses a strong view — for example, then-Prime Minister John Howard’s opposition to euthanasia.<sup>11</sup> This situation could be described a type of ‘informal whip’.<sup>12</sup> Unconscious party pressures might be seen in the fact that in both ACT votes, Labor MLAs, who would be more used to stronger sanctions for voting against formal party lines, were more likely to vote similarly to their colleagues than Liberal MLAs.

Yet because most conscience vote researchers have primarily relied on the outcomes of conscience votes, the actual influence of party membership on conscience vote decisions has not been sufficiently explored and indeed, may not be as strong as it initially appears. Although the correlations in conscience vote results clearly show party trends, they cannot distinguish between conscience vote decisions that have been influenced by party, and conscience vote decisions that have been influenced by some other factor, or factors, but remain consistent with a party line.

The types of more direct influences suggested by Warhurst need to be distinguished from much less direct influences. Hibbing and Marsh, for example, in their study — which looked strictly at outcomes — argue that it is shared policy views, rather than the repercussions of voting the ‘wrong’ way, that explain the influence of party.<sup>13</sup> They do not mention direct party pressures at all. To explain this less direct type of influence another way, we can imagine that it is the shared general ideologies, policy views and beliefs that attract like-minded people to specific parties in the first place. The ACT study suggests the importance of both these types of influence.

Despite the clear party trends in the outcomes of these ACT conscience votes, almost all of the parliamentarians interviewed played down the influence of party. Nine out of twelve interview participants responded that party lines would ‘not at all’ influence their conscience vote decisions on potential legislation concerning the availability and use of RU486 (an abortion-inducing medication) in the ACT. Only two of the twelve said it would influence them ‘a little,’ and only one suggested ‘moderate’ influence. While it might be easy to dismiss these answers as either dishonest or at least self-deceiving, there seems to be something worth exploring here.

As former Liberal MLA Greg Cornwell put it, ‘although in the results of conscience votes, it may look like party members got together and voted in a particular way, they probably didn’t.’ This is supported by a number of statements made by interview participants including senior Greens MLA Caroline Le Couteur who, when asked whether party membership would influence her vote decision on potential RU486 legislation, replied: ‘The Greens are in favour of choice for women and that is certainly my view but I don’t know that that would influence me. It’s more that my views are consistent with the Greens policy. It’s not really a question of influencing because we are on the same page to start with.’

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<sup>10</sup> Pattie, Johnston and Stuart, *op cit.*, p. 172.

<sup>11</sup> Warhurst (2008), *op cit.*, p. 586.

<sup>12</sup> Pattie, Johnston and Stuart, *op cit.*, p. 176.

<sup>13</sup> Hibbing and Marsh, *op cit.*, pp. 277, 292.

Similarly, former Greens MLA Deb Foskey said, 'I am a Green because of the particular views that I hold.' Former Liberal MLA Gary Humphries summarised it best when he said:

...on issues like abortion and euthanasia you'll end up with the majority of Coalition members being anti those things and the majority of the Labor members being for them. It's more of a tradition and a cultural mindset than anything else, it's to do with the fact that you tend to come from a more conservative background or otherwise.

This suggests that at least some — and in the ACT case, perhaps the majority — of the apparent party cohesion of conscience vote results may stem from an adherence to shared general ideologies and common policy views. This would mean that party cohesion can be explained by the less direct influence of a common affinity with conservative or liberal social values among like-minded party members as well as by more direct party pressures. These two types of influence help explain the primacy of party observed in conscience vote results, and taken as a whole, party is a very good predictive tool. However, as an influencing factor, the effect of party in general seems considerably more complicated. Indeed if we wish to use party as an *explanation* rather than as a *predictor* of conscience vote results, then only the more direct party influences (such as comfort within the majority, fear of voting contrary to party leaders, and the 'informal whip') should be included. The fact that parties attract like-minded people who happen to vote in a similar fashion is not the influence of party, but of something else. It is better understood as that of the personal, in this case personal ideology. That is, much of the apparent influence of party is simply the aggregation of many similar personal ideologies. While it is hard to say how much of an apparent party trend is caused by direct party influences and how much by the fact that like-minded people are generally in the same party, two points need to be made.<sup>14</sup> First, from a predictive point of view party is not the only important variable — that is, conscience votes do not go strictly along party lines — and second, where parliamentarians do vote along apparent party lines, we should not assume that party is the cause.

### ***The Influence of Gender***

Although most researchers have argued that party is the primary determinant of conscience votes, it cannot be their sole determinant. Otherwise there really would be little practical difference between conscience votes and regular votes. Gender has been put forward as an explanation for conscience vote outcomes that deviate from party lines. Warhurst, for example, argues that women in parliament are generally more socially liberal on conscience issues than their male colleagues and thus vote differently.<sup>15</sup> More specifically, Helen Pringle argues that because the number of women in Federal Parliament has increased, and women vote differently from men on the issue of abortion, conscience voting should no longer be seen as a serious obstacle to liberal abortion law reform.<sup>16</sup> The ACT experience is initially consistent here. If we look at Table 1, we can see the vast majority of female MLAs voted for the removal of abortion from the ACT Crimes Act (five out of six), while the majority of men voted against it (seven out of eleven).

<sup>14</sup> Shared personal ideology may also lead to organised cross-party voting, such as occurred in the *Therapeutic Goods Amendment (Repeal of Ministerial Responsibility for Approval of RU486) Bill 2005*. K. Ross, S. Dodds, and R. Ankeny, 'A Matter of Conscience?: The Democratic Significance of 'Conscience Votes' in Legislating Bioethics in Australia' *Australian Journal of Social Issues* 44(2) 2009, 121-144.

<sup>15</sup> Warhurst (2008), *op cit*.

<sup>16</sup> Pringle, *op cit.*, p. 19.

Warhurst's conclusions are based predominantly on the outcomes of three conscience votes in Federal Parliament between 1996 and 2006. The bills included: the *Euthanasia Laws Bill 1996*, in which euthanasia legislation introduced in the Northern Territory was overturned by Federal Parliament; the *Research Involving Embryos Bill 2002*, which sought to allow research to be conducted on excess assisted reproductive technology embryos; and the *Therapeutic Goods Amendment (Repeal of Ministerial Responsibility for Approval of RU486) Bill 2005*, which returned the licensing approval of RU486 to the Therapeutic Goods Administration from the Health Minister. Yet, as Warhurst himself admits, two out of the three bills he examined were complicated by regulative measures. The euthanasia bill was clouded by debates concerning territorial rights, and the RU486 bill, though approached as an abortion issue, primarily concerned the correct licensing authority of modern drugs in Australia. As a result, MPs' votes may have been influenced by the technical aspects of these bills rather than the conscience issues they concern.<sup>17</sup>

Indeed if we dig further, there seems to be a further complicating factor to the explanation that women are generally less socially conservative than men. To see this, one only has to separate conscience votes that are on abortion from other conscience votes. In the three cases Warhurst examines, women were not consistently less socially conservative than men. In the House of Representatives, there was negligible difference between the conservatism of men and women on the euthanasia issue (71:72% respectively), and very little difference on research involving embryos (28:16% respectively). Further, on the euthanasia vote in the Senate, the contrast between the voting conservatism of men and women (65:30% respectively) is not as marked as in the case of the abortion vote (52:11%).

In the ACT, in contrast to the abortion vote, the embryo research vote (Table 2) had a far higher percentage of men (80%) voting less conservatively than women (50%). Strikingly, it was the votes of Liberal men that were most divided on this issue (2:2). This suggests that while some conscience issues in parliament, namely abortion, exemplify the illusion of sex-based differences, sex does not appear to hold up as an influence on conscience vote decisions *overall*.

While sex may be a good predictive factor for conscience votes on abortion-type issues, it does not appear to be a good predictive tool for non-abortion-type issues, and therefore may not be a good explanatory factor *at all*. If we accept the feminist insight that 'sex' is a biological matter while 'gender' is socially determined, then despite most conscience vote researchers using the term 'gender', their arguments seem to be about sex. Looking at conscience votes more generally, it may be gender, or something like it, that offers the better explanation overall.

There is much to indicate that MP's experiences as either men or women can influence their voting decisions. Greens MLA, Caroline Le Couteur, perhaps best summarises this when she said:

My gender influences who I am and what I feel about things. What things is gender totally irrelevant to? I don't think that being a woman necessarily makes me pro or against abortion. However, I think it makes me probably more aware that there are two sides to it.

Le Couteur's words highlight the fact that both men and women have different life experiences which, as Broughton and Palmieri suggest, may lead to a distinctive perspective in politics.<sup>18</sup> Yet, as one Labor MLA noted, this certainly need not be a conscious influence:

<sup>17</sup> Warhurst (2008), *op cit.*, pp. 584, 595-6.

<sup>18</sup> Broughton and Palmieri, *op cit.*, p. 29.

'I cannot detach my gender from my life experiences and therefore it is a part of who I am, so yes in some ways my gender comes into my voting decisions. But I do not vote specific ways on issues typically construed as 'women's issues' purely because I am a woman.'

What these MLAs seem to be pointing at is that gender, as lived experience can affect their voting decisions. Further, it seems that gender might not even be the best term here, and this influence might be more accurately described as less conscious, or subconscious, relevant personal experience. In the case of abortion, when women are not influenced by party or personal ideology, they are likely to have similar relevant personal experiences which lead them to be socially liberal. However on other issues, their personal experiences either pull in very different directions, or are not sufficiently strong and thus, absent a strong personal ideology, they may fall back to a de facto party line. If we are trying to understand why MPs vote one way or another in a conscience vote, then neither sex nor gender in themselves seems to offer sufficient insight.

### ***The Influence of Religious Affiliation***

Conscience vote studies in the UK have tended to suggest that the religion of parliamentarians can affect their vote, with a particularly strong conservative link between votes on abortion and Catholicism.<sup>19</sup> In Australia, Warhurst similarly concludes that religious variables — and not just Catholicism — cut across party lines in conscience votes and link members on all sides of the house.<sup>20</sup> This is consistent with the common view that religion equals conservatism in politics. However, the ACT case suggests this may not accurately reflect many religious MPs' conscience voting habits and intentions. Despite common perceptions, religious affiliation and social conservatism may not be that strongly linked. We found that religious affiliation was neither a good predictive nor a good explanatory factor.

One of the key limitations of using the variable 'religion' is that it overlooks deep and important divisions both within and between different religious groups.<sup>21</sup> Different religious denominations are, for the most part, barely comparable, and thus viable conclusions regarding the influence of religion as a whole on conscience vote decisions are difficult, if not impossible, to make. While the Catholic Church holds strong and inflexible anti-abortion and anti-euthanasia positions, some Christian churches are less conservative. For example, in a press statement, the President of the Uniting Church Assembly, Rev Dr Dean Drayton clarified his church's position on abortion, stating: 'We [the Uniting Church] reject two extreme positions: that abortion should never be available; and that abortion should be regarded as simply another medical procedure.'<sup>22</sup>

Indeed some Christian Churches are not socially conservative at all. In the ACT parliamentary debates leading up to the 2002 abortion vote, Greens MLA Kerrie Tucker quoted two religious sources which expressed a clear 'pro-choice' position on behalf of their Churches; Rev Christine Grimbol of the Presbyterian Church, and the New South Wales

<sup>19</sup> Baughman, *op cit.*; Pattie, Johnston and Stuart, *op cit.*; Hibbing and Marsh, *op cit.*

<sup>20</sup> Warhurst (2008), *op cit.*

<sup>21</sup> Although Warhurst (2008), *op cit.*, p. 595, notes that there are divisions within religious denominations and that generalisations about religious groups should be made carefully, he does not explain what this means for conclusions, including his own, that suggest the influence of religion on conscience vote decisions. Both Baughman, *op cit.* and Hibbing and Marsh, *op cit.*, explicitly discuss religion in general, yet their modelling only has the variable 'Catholic'.

<sup>22</sup> D. Drayton, 'Abortion (Uniting Church position)', *John Mark Ministries*, 3 February 2005, <<http://jmm.aaa.net.au/articles/14477.htm>> accessed on 30 November 2012.

Synod of the Uniting Church.<sup>23</sup> This is in contrast to Warhurst's conclusion that religious MPs — both Christians as a whole and Catholics in particular — tend to vote more conservatively on conscience votes, and suggests that there may be no uniform approach to conscience issues among religious MPs.<sup>24</sup>

An alternative explanation here might be that it is not religion in general that is the influence, but only more traditional religions like Catholicism. This seems to be the view of former Liberal MLA Greg Cornwell, who singled out Catholic MPs stating:

In a small assembly, such as the ACT Assembly, I am concerned about the number of Catholics in it because they can really influence a vote. Catholicism can be very strong in the ACT, perhaps not physically strong, but vocal; and vocal groups frighten politicians.

Yet in our interviews of past and serving MLAs, only five out of the twelve (four of whom are affiliated with the Liberal Party) identified with a religious group, and only two as Catholic (one Labor, one Liberal). One of these MLAs, former Liberal MLA Gary Humphries admitted that his religion could influence his vote on potential RU486 legislation, but went on to argue that he did not think it would: 'Potentially it could influence my vote. I don't believe in fact that it has because there are some things in the Catholic teaching that I don't agree with, but there is potential that it could.'

This suggests the need to distinguish between religion affecting one's conscience, and religion affecting one's conscience vote. This is supported by the other Catholic interviewee (a Labor MLA) who said: 'Based on your religious beliefs you may personally think that abortion is wrong, however, you can still vote for it to be made available in the ACT because you must consider the views of other women, and give them their own choice.'

Given the raw numbers, it seems Cornwell's earlier-stated concern may not be warranted. Indeed, even if there were more Catholics in the assembly, it is not at all clear they would vote as a bloc on conscience issues. Thus, outside the general observation that the Liberal party appears to be more likely to attract religious members, and as previously noted, Liberals are more likely to vote more conservatively on conscience issues, there is very little evidence in the ACT to confirm the suggestion that religious affiliation influences individual parliamentarians' conscience vote decisions in parliament. For this reason, it appears that, at least in the ACT, religious affiliation is both a weak predictive conscience vote factor, and an equally weak influencing conscience vote factor.

### ***The Influence of Constituents***

British conscience vote researchers have highlighted the importance of the characteristics of constituents for an MP's conscience vote. Baughman, for example, argues that, at least on the issue of abortion, MPs make decisions with one eye watching their electorate.<sup>25</sup> In an examination of the voting patterns of British MPs between 1965 and 1980, Hibbing and Marsh note that the more Catholics in a constituency, the more likely the person representing that constituency will vote in a socially conservative fashion.<sup>26</sup> Both studies explicitly argue that the perceived characteristics of MPs' constituents may influence their conscience vote decisions.

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<sup>23</sup> K. Tucker, MLA, ACT Legislative Assembly Debates, Hansard [address], 21 August, 2002, 2513–4.

<sup>24</sup> Warhurst (2008), *op cit.*, p. 595.

<sup>25</sup> Baughman, *op.cit.* p. 78.

<sup>26</sup> Hibbing and Marsh, *op.cit.*, p. 292.

Australian researchers have not directly examined this influence previously. Perhaps with good cause. Despite the many references to MPs representing their constituents' views in Australian parliamentary debates on conscience issues, the characteristics of constituents do not appear to be an influence in the ACT. Hibbing and Marsh's suggestion of a correlation between the number of Catholic constituents and conservative voting of their MP may be useful as a predictive tool, but it is problematic as more general explanation. One imagines that in these electorates there is an increased probability of a socially conservative representative being elected, and thus it may not be the immediate influence of his or her constituents that impacts on an MP's conscience vote, so much as the likelihood of an ideological similarity between an MP and their constituents. Taken as a whole, the evidence gathered in the ACT — which comprises three multi-member electorates<sup>27</sup> — suggests that the characteristics of constituents do not significantly influence conscience vote decisions. This is consistent with Neil Longley's conclusion that Canadian parliamentarians voting on the issue of abortion did not appear to be influenced by the preferences of their constituents.<sup>28</sup>

ACT conscience vote debates, like Australian conscience vote debates in general, include many statements made by parliamentarians claiming to represent the views of 'the people' or 'the electorate'. Some MPs are more explicit and admit to representing only those by whom they were lobbied. For example, during Federal debates on the *Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Bill 2006*, Senator Patricia Crossin announced: 'I do not come to this debate with a Northern Territory perspective. I do come here, though, representing the views of the people in my constituency who have lobbied me in respect of this legislation.'<sup>29</sup>

Other MPs, such as some of those who defended the Northern Territory's pro-euthanasia legislation, believe that in conscience votes parliamentarians should follow the majority view of the broader community, as demonstrated by public opinion.<sup>30</sup> This last view does not, however, seem to be widely followed: the *Euthanasia Laws Bill 1996* was passed by the House of Representatives (88:35), in the face of 80:20% opinion poll in the opposite direction.<sup>31</sup>

While it might be good politics to refer to one's constituents in parliamentary debate, as former Liberal MLA Greg Cornwell argued, 'the views among constituents on these issues are so varied that, even if one wanted to, it would be impossible to represent them all in parliament.' Thus, even if MPs try explicitly to represent their own constituents, it is far from clear what it actually means for them to do this, irrespective of whether the system is single- or multi-member such as in the ACT. MPs may select certain views from within their electorates to help publicly justify their own vote decisions, not unlike normal party votes. This may help to explain the prominent referencing of constituents' views in parliament, and adds to the illusion that constituents influence parliamentarians' conscience vote decisions.

Indeed, even the 'keeping one eye on the electorate' explanation may not hold up either, especially considering the passing of the *Euthanasia Laws Bill 1996* in the face of such overwhelming public opinion. Likewise, on abortion issues, Pringle argues that the

<sup>27</sup> Brindabella and Ginninderra elect five members each and Molonglo elects seven.

<sup>28</sup> Longley, *op cit*.

<sup>29</sup> P. Crossin, Senator, Commonwealth of Australia Parliamentary Debates, Senate, Hansard [address], 6 November, 2006, p. 40.

<sup>30</sup> J. Warhurst, 'There is No Such Thing as a Free Vote', *The Canberra Times*, 12 April 2002.

<sup>31</sup> Broughton and Palmieri, *op cit*, p. 33.

Parliament has not kept up with public opinion.<sup>32</sup> Although some parliamentarians remain aware that their conscience vote decisions may carry electoral repercussions, most parliamentarians interviewed agreed that the characteristics of their constituents would have very little influence on their conscience vote decisions — and if the characteristics of constituents was to have significant influence, it would likely be evident in multi-member electorates such as the ACT. Former Liberal MLA Greg Cornwell, for example, noted that ‘in these matters every politician is inundated by letters, the situation generally is that it doesn’t change things.’ Former Liberal MLA Gary Humphries best summarised the views of the majority of interview participants when he said:

It’s suggested sometimes that politicians should put aside their moral judgement and make a decision based on what their electorate thinks about something. I’ve never met a politician who in fact votes in this way because I don’t believe that you can develop a consistent and coherent approach to the world when you make decisions in politics based on what people tell you they want to do, because frankly, people are inconsistent in these circumstances.

To use Edmund Burke’s terms, on issues of conscience at least, these MLAs see themselves as trustees rather than delegates. The characteristics of constituents like religious affiliation appears to be a weak predictive conscience vote factor and an equally weak influencing conscience vote factor.

### ***The importance of the personal***

Our argument so far has been that party (both directly and indirectly) is the key influence on conscience votes in both a predictive and an explanatory way. We have largely been sceptical of religion and the influence of constituents and questioned the importance of gender. This leaves the question of what influences conscience votes that have not been determined by party? On the evidence gathered in the ACT, it is time to take the personal more seriously. By this we mean both the influence of personal experience, which we expand on below, and of personal ideology, which we discussed in the section on party.

The importance of personal experience was clear in both our interviews and in conscience vote debates. In one interview, for example, a senior Greens MLA stated:

At the end of the day a conscience vote is just that, it is personal. It is up to you to decide what it is that you include in your decision making and what you don’t. Whether you include your own personal experiences and the experiences of your family, the wishes of those constituents who contact you, or any other influences, is your decision.

During debate over the ACT abortion vote, Greens MLA Kerrie Tucker noted that ‘the questions of where personhood begins and where life begins are personal’.<sup>33</sup> During parliamentary debate over the embryo research vote, Democrat Roslyn Dundas said, ‘the extent to which people will choose to weigh the various ethical dimensions in this debate is a personal choice’.<sup>34</sup> But what does it mean for the personal to have a determinate role? According to one of the Greens interviewees, ‘your personal experiences in life will influence your conscience votes.’ This is an argument borne out by the frequency of personal narratives and private accounts in ACT conscience vote debates, as well as those in Federal Parliament.

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<sup>32</sup> Pringle, *op cit*.

<sup>33</sup> Tucker, ACT Legislative Assembly Debates, *op cit*. pp. 2512-3.

<sup>34</sup> R. Dundas, MLA, ACT Legislative Assembly Debates, Hansard [address], 1 April 2004, p. 1588.

It might seem that using the influence of personal experience as a general explanation of conscience vote decisions is meaningless: all influences can ultimately be considered as personal experience. A clarification might help here. In the context of conscience votes, the sense of personal experience that we are referring to is relevant personal experience/s in its most basic form. By this we mean close experience that has a clear and causal connection to the particular conscience issue. Such experiences are likely to be determinant and primary. While personal experiences may lead to a personal ideology or the joining of a particular political party, this is distinct from personal experiences that are directly related to the conscience issue at hand.

For our purposes, relevant personal experience can be broken into three basic types. The first involves relevant events experienced either by MPs, or by people close to MPs. For example, four out of seventeen MLAs in the 2002 abortion vote debates, and seven out of ten MLAs in the 2004 embryo research vote debates, cited personal narratives, and at times, deeply private accounts, to justify their individual vote decisions on these conscience issues.<sup>35</sup> During the embryo research debate, for example, Liberal MLA Brendan Smyth said: 'as the father of twins, day fourteen was pretty important to me and pretty important to my kids', adding, 'my mother died of cancer. I would love to see a cure for cancer'.<sup>36</sup> MPs regularly appeal to their life experiences, or to the life experiences of people close to them, to help make and justify conscience vote decisions in parliament. This is true for those voting both for and against such bills. Liberal MLA Bill Stefaniak, in opposition to the *Human Embryo (Research) Bill 2004*, said, 'my wife has a metal valve in her heart and has benefited from scientific research and advances in medicine...had it not been available, she would, most likely, be dead right now'.<sup>37</sup>

Perhaps even more strikingly, Labor MLA John Hargreaves, who had initially planned to vote against the *Human Embryo (Research) Bill 2004*, explained:

What absolutely changed my view on this matter was an encounter with a very good friend of mine who was rendered a quadriplegic by a gunshot wound. His quality of life was pretty ordinary before the shooting; it has now been devastated. If research is able to free him from being sentenced to a life in a wheelchair...then I think we have a responsibility to do something like that.<sup>38</sup>

These are just some examples of a variety of personal experiences cited by ACT MLAs during these debates, suggesting that personal experience is a sufficiently strong influence not only to confirm parliamentarians' conscience vote decisions, but actually to change them.

The second way in which personal experience can influence conscience vote decisions is via conversations with those personally close to MPs. While this may not always be publicly acknowledged, there are several cases in the ACT where it is. For example, during the human embryo research debate, Liberal MLA Steve Pratt admitted that 'the wise counsel of

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<sup>35</sup> Broughton and Palmieri, *op cit.*, offer the only other acknowledgment of personal experience we found. However, they use the fact that women parliamentarians in the Federal 1996 euthanasia debate use personal experience in parliamentary argument significantly more than their male counterparts to argue that women bring a different voice to parliament, rather than that women were more likely to be influenced by personal experience.

<sup>36</sup> B. Smyth, MLA, ACT Legislative Assembly Debates, Hansard [address], 1 April 2004, pp. 1569, 1571.

<sup>37</sup> B. Stefaniak, MLA, ACT Legislative Assembly Debates, Hansard [address], 1 April 2004, p. 1584.

<sup>38</sup> J. Hargreaves, MLA, ACT Legislative Assembly Debates, Hansard [address], 1 April 2004, p. 1591.

my wife in recent days has perhaps tipped me over to making the decision to support the *Human Embryo (Research) Bill 2004*.<sup>39</sup> In a similar case on the same issue, Liberal MLA Bill Stefaniak, also noted the influence of his wife's views on his vote decision. He explained, 'I have certainly talked to my wife about this research, and unlike Mr Pratt's wife, she is somewhat concerned'.<sup>40</sup>

While these first two types of personal experience are of a conscious nature, the third is much less so and may be cumulative over time. A good example is our discussion of the influence of a person's gender. We suggested that one's sex is a predictive and not an influencing factor on conscience votes. Yet we also argued that one's personal experiences as either a male or a female — one's gender — can influence conscience vote decisions. This was particularly evident in the case of abortion. An MP's gender, by definition, cannot be removed from his or her life experiences, and therefore, unlike the previous examples, gender may not be a *conscious* influence on conscience vote decisions.

Finally, the personal may influence conscience vote decisions through personal ideology. This influence is of a different order from the three previous types of personal experience. Recall that a distinction was made between two possible types of party influence, one direct — including comfort within party majorities and fear of the repercussions of voting contrary to typical party views or the views of party leaders — and the other much less direct — the fact that parties tend to attract like-minded people and thus they tend to vote in a similar fashion even when party discipline is removed. We argued that while both of these categories can help explain the success of the predictive factor of 'party' in conscience vote outcomes, only direct party influences can properly be described as the influence of party. Indirect party influence is much better described not as the influence of party, but of that of personal ideology. Although one's personal ideology may be the result of one's personal experiences, this observation seems to stretch the influence of relevant personal experience too far. Personal ideology should be kept separate from relevant personal experience as a distinct influence of the personal, and is thus a third influencing conscience vote factor (along with relevant personal experience and direct party influences) on ACT conscience vote decisions.

To be clear, several conscience voting studies have included the personal characteristics of MPs,<sup>41</sup> and one even uses the label 'personal ideology'.<sup>42</sup> Yet these studies are interested in predicting conscience vote outcomes, and are looking for measurable characteristics. Longley, for example, argues that personal ideology is highly influential in conscience voting.<sup>43</sup> However, his 'personal ideology' is simply the sum of six variables: age; previous occupation; education; gender; Catholicism; and fundamentalism — and he found only three of these (previous occupation, education, and Catholicism) to have any influence in the abortion vote he studied. These types of variables might help predict conscience vote outcomes, but do not appear to explain adequately the actual influences of conscience vote decisions. For example, Pattie, Johnston and Stuart found that younger MPs were more likely to be 'pro-gay, 'pro-divorce' and willing to end restrictions on Sunday trading.<sup>44</sup> But this does not mean that the age of an MP is the influence. It is instead more likely that younger MPs have a greater tendency to be socially liberal, at least on these issues, than

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<sup>39</sup> S. Pratt, MLA, ACT Legislative Assembly Debates, Hansard [address], 1 April 2004, p. 1583.

<sup>40</sup> Stefaniak, *op cit.*, p. 1584.

<sup>41</sup> For example, Baughman, *op cit.*; Pattie, Johnston and Stuart, *op. cit.*; Hibbing and Marsh, *op cit.*

<sup>42</sup> Longley, *op cit.*

<sup>43</sup> *ibid*

<sup>44</sup> Pattie, Johnston and Stuart, *op cit.*, p. 162.

older MPs. Indeed the complexity of the personal is borne out in Pattie, Johnston and Stuart's conclusion that in eighteen votes across eleven separate issues in the British Parliament (from 1979-1997), *no* variable other than party (including an MP's age, gender, education, previous occupation and religion) was consistently significant.

### ***Conclusion***

Despite a recent spike in conscience votes in the Federal Parliament<sup>45</sup> and elsewhere (seemingly related to advances in bio-technology, which are likely to continue), the current understanding of them is far from complete. Previous studies have generally failed to distinguish between predictive and influencing conscience vote factors, and offered four possible explanations; party membership, gender, religious affiliation, and the characteristics of constituents. By contrast, using a mixed methodology and distinguishing predictive from influencing factors, we have argued that while both sex and party in general may be useful predictive conscience vote tools, only direct party, relevant personal experience, and personal ideology, seems actually to influence conscience vote decisions made in the ACT. There was little evidence in the ACT to confirm the suggestion that MPs' religious affiliations, in particular Catholic affiliation, influence their conscience vote decisions in a socially conservative manner. The proposed influence of the characteristics of constituents appears similarly weak.

When conscience vote decisions are not determined by direct party influences, the ACT case study suggests they may be best explained by the influence of relevant personal experience and of personal ideology. To invert a feminist slogan, it seems the 'political is the personal'; and the personal should be taken more seriously in future conscience vote research. Finally, the significant methodological clarifications we have made — which have revealed much more than the usual practice of simply studying the outcomes of conscience vote decisions — opens up the possibility of taking a deeper look into conscience vote influences, and of moving beyond outcome-focussed conscience vote research. ▲

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<sup>45</sup> From 1950 to 2007, 32 bills/issues have been decided by a conscience vote in the Federal Parliament. Between 1968 and 1979 there were nineteen bills/issues decided by conscience vote, then only three until 1996, and then five up until 2007. D. McKeown and R. Lundie, 'Conscience Votes During the Howard Government 1996 — 2007', Research Paper, no. 20, 2008 — 09, Information, Analysis and Advice for the Parliament, Australian Parliamentary Library, 2 February 2009.

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## **Committees in a unicameral parliament: impact of a majority government on the ACT Legislative Assembly committee system\***

**Grace Concannon**

### ***Introduction***

Parliamentary committees are a common feature of the Westminster system of government and over recent decades have taken on more wide ranging roles in the conduct of parliamentary business. According to *House of Representatives Practice*, ‘the principal purpose of parliamentary committees is to perform functions which the Houses themselves are not well fitted to perform, that is, finding out the facts of a case, examining witnesses, sifting evidence, and drawing up reasoned conclusions’.<sup>1</sup> This description does not include the enhanced scrutiny and oversight role of committees in a unicameral parliament. In a comparative study of six unicameral legislatures, committees were identified as a prominent feature and it was argued that a comprehensive committee system can ‘take care of the second chamber review function’.<sup>2</sup> The Legislative Assembly for the ACT (Assembly) was established in 1989 under the *Australian Capital Territory (Self Government) Act 1998* (Commonwealth) as a unicameral legislature of 17 members. Members of the Legislative Assembly (MLAs) are elected by the Hare-Clark proportional representation system (also known as the ‘single transferable vote’). The ACT is a young legislature, and of the eight assemblies to date, seven have been controlled by a minority government.<sup>3</sup> The government of the day is responsible for both ‘state’ and ‘local government’ functions. In the absence of an upper house, participation on parliamentary committees of the Assembly provides non-executive MLAs the opportunity to scrutinise and oversee the actions of the executive. Participation on committees also provides non-executive MLAs opportunities to contribute to the governance of the territory through the conduct of inquiries and

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making recommendations to government. This paper will provide an overview of the ACT Legislative Assembly committee system, explore the enhanced role of committees in a unicameral legislature and consider the methodologies used to evaluate committee work. The article will also examine government responses to ACT parliamentary committee reports under a minority and majority government to discern any differences in government behaviour across the two assemblies. It will also determine whether there is any evidence to suggest that ACT committees are less effective under a majority government. Statistical analysis is undertaken of both the response rate to committee reports and the rate of acceptance of committee recommendations for the standing committee reports of two successive labor governments of the fifth assembly (2001–2004) and the sixth assembly (2004–08). Both governments were led by Chief Minister, Jon Stanhope. The difference in membership and makeup of the standing committees across these two assemblies provides an interesting opportunity for comparative study.

### ***The ACT committee system***

There are two types of committees in the ACT, standing and select. Standing committees are established by resolution at the commencement of each Assembly for its duration. The number and structure of standing committees varies between assemblies, but generally covers the functional areas of responsibility (i.e. health, community services, education, planning and environment, legal affairs and public accounts). Select committees are established by a motion in the Assembly to inquire into matters that fall outside the remit of standing committees or are matters of significant importance that warrant a specific committee. They are established with specific terms of reference and a set reporting date and are commonly utilised by the Assembly to examine the annual expenditure proposals in appropriation bills and in matters of privilege.<sup>4</sup> The role of committees is to:

- scrutinise (and oversee) the actions of the executive through annual reports and estimates inquiry processes;<sup>5</sup>
- conduct evaluative inquiries into administrative and policy matters;
- make recommendations to the government of the day;
- gather evidence through the receipt of submissions, public hearings and other means;
- facilitate public engagement in parliamentary processes;
- promote public debate;
- perform a range of statutory functions such as consideration of statutory appointments, examination of draft variations to the Territory Plan or reviewing Auditor-General's reports; and
- provide opportunities for non-executive MLAs to work together across parties.

### **Committee powers**

The Self Government Act provides the Assembly with the power to establish committees which share its powers and privileges. Inquiry topics for standing committees are established through referral from the Assembly or by self-referral.

The power to self-refer was conferred on the ACT Legislative Assembly standing committees in December 2004 and the provision in the Standing Orders (SO) was strengthened in March 2008 (SO216). This is an important power, particularly for committees in a unicameral legislature, and is extensively used by ACT committees. The chair and deputy chair are elected by committee members at the first meeting of a committee (SO225). The chair of the committee has no special powers and, like all members, only holds a deliberative vote (SO 228). The chair is responsible for the preparation of a draft report for the committee's consideration (SO 247). Standing order 249 allows for a member, other than the chair, to submit a draft report for the Committee's consideration. In such an instance the Committee is required to decide on which report it will consider. There are no examples where this standing order has been utilised. Standing order 251 allows members to present a dissenting report or additional comments to be added to the final report agreed to by the committee.<sup>6</sup> Standing orders also allow for non-committee members to participate and question witnesses during public hearings. This occurs most often during estimates and annual reports inquiries, and became increasingly popular during the Seventh Assembly (2008–2012) for all committee inquiries.

### **Level of committee activity**

The Legislative Assembly has an extremely active committee system. For example, the period 1 July 2010 to 30 June 2011, standing and select committees met on 267 occasions; held 57 public hearings and heard from 595 witnesses; tabled 40 reports; and received 208 submissions. The level of committee activity in the ACT also extends to the chamber when reports are tabled. Final reports are usually presented to the Assembly by the committee chair who is allowed 15 minutes to make a tabling speech. Other committee members are then afforded 10 minutes each to make their comments. Non-committee members are also able to comment on the report during the tabling or move that the debate be adjourned to another day. It is common for committee members to comment when reports are tabled. It is also common for committee reports to be referred to in the chamber well after tabling.

### **Scrutiny of legislation**

One of the most important functions of a parliament is to make laws for the good governance of the people. Without adequate checks and balances on the passage of proposed legislation, majority governments would be free to make laws as they saw fit. In a bicameral system, the upper house will usually have a review function on legislation passed in the lower house, such as in the Australian Senate. Without an upper house, the ability of committees in a unicameral parliament to scrutinise legislation is considered an important feature.<sup>7</sup> In New Zealand all proposed legislation stands referred to committees who have the power to conduct full inquiries. Committee recommendations are drafted directly into the bill, and unanimous changes are adopted automatically by the house. This method of scrutinising proposed legislation has been described as one of the features of the New Zealand committee system.<sup>8</sup>

The automatic referral of bills to ACT Legislative Assembly committees does not occur, and would be impractical given the large number of bills and the relatively small size of the committee system. Any bill before the Assembly can be referred to a committee by motion of the Assembly, pursuant to standing order 174 (*Reference to select or standing committee*) that allows a member to move that a bill be referred to a select or standing committee after the presentation of a bill 'including immediately after a bill has been agreed to in principle but not after the completion of the detail stage'. Despite this provision, very few bills are referred to Assembly committees, other than the standard referral to the Scrutiny of Bills Committee, established by resolution to examine, within specific parameters, all proposed laws. For example, of the 370 bills presented during the Sixth Assembly only seven were referred to committees and of the 256 bills presented during the Fifth Assembly 14 were referred to committees. Appropriation bills are routinely referred to select committees on estimates or the public accounts committee. The lack of referral of bills to committees could be regarded as a weakness in the ACT committee system. While committees have the power to make recommendations to the government on bills referred for inquiry, it is then up to government to accept or reject each recommendation. Despite this, all bills must pass through the chamber, which in the absence of a majority government, are robustly debated and often extensively amended, not always to the satisfaction of the executive.<sup>9</sup>

### ***Analysing government responses***

While the analysis of government responses to committee reports and recommendations has been used to evaluate committee performance, a purely statistical approach is not without its criticisms. For example David Monk notes that, 'attaching numbers to parliamentary committee work is difficult given its flexible and unpredictable nature'. Despite this, he does go on to say that statistical data 'is likely to bring additional information to light and increase our understanding of committees, even if it does not capture everything of importance'.<sup>10</sup> Another legislative scholar, John Halligan, regards the acceptance and implementation of recommendations by government as an 'obvious' measure of committee performance, but considers it to be 'difficult to determine in practice except on a limited case study basis; and the interpretation of such statistics can be complicated by the politics of formulating committee recommendations and anticipation of recommendations by the bureaucracy.'<sup>11</sup> Malcolm Aldons, a former committee secretary from the House of Representatives, developed a comprehensive methodology for rating committee performance based on government responses to committee recommendations. Rather than using a purely statistical analysis of government acceptance rates, which he argues can give rise to seemingly impressive results while ignoring the importance of key recommendations and giving unnecessary weight to soft recommendations<sup>12</sup>, his methodology uses a series of steps designed to define and separate the types of recommendations and the responses they elicit. He sets the benchmark for success at either 50 per cent of recommendations accepted or the acceptance of a major recommendation.<sup>13</sup> David

Monk, on the other hand, considers that setting a figure for the benchmark of acceptance of recommendations is an ‘arbitrary’ measure and that ‘a more clear-cut approach would be to accept that a committee demonstrates a minimum level of effectiveness by having the government accept at least one recommendation’.<sup>14</sup>

A further problem identified with adding up the ‘strike rate’ of recommendations accepted as a measure of success, is that it does not take into account other constructive outcomes of committee work and the views of relevant stakeholders. For example, Aldons concedes that his methodology does not take account of important qualitative considerations such as the raising of awareness about issues, the ‘deterrent effect’ of detailed scrutiny and the ‘discharge of parliamentary functions not associated with decision making’.<sup>15</sup> David Monk also considers that the acceptance rate of committee recommendations should not be used to measure committee performance in isolation of the views of relevant stakeholders to a committee inquiry.<sup>16</sup> Despite his view, that using the government acceptance rate may be an ‘overly simplistic’ measure, he states that ‘it is currently, the best proxy we have for the government view of a report’.<sup>17</sup>

For the purposes of this article, a statistical analysis of government responses to committee reports and recommendations is used based on the government’s stated response to committee recommendations and does not attempt to define the types of recommendations or analyse their implementation. This would be a further study in itself. The objective of this article is to assess the impact of a majority government on the operation of committees in the ACT by using the statistical data to discern any differences in government behaviour across a minority and majority government. The data will not measure the performance of individual committees, but examine the performance of the government in its response to committee reports and recommendations. Despite the limitations of a purely statistical analysis, I believe it provides a useful benchmark for further analysis and evaluation of parliamentary committee performance in the ACT Assembly.

### ***Fifth and sixth assemblies — what does the data show?***

The fifth assembly was controlled by a minority labor government comprising eight party members, seven Liberal Party members (with one member becoming independent), and one member from each of the ACT Greens and the Australian Democrats. Four out of the six standing committees were chaired by a non-government member and there were no government majority committees.<sup>18</sup>

The sixth assembly was a majority labor government with party members; seven Liberal Party members (one becoming independent joining the Canberra Party), and one ACT Green. In contrast with the fifth assembly, only two of the five standing committees were chaired by non-government members and there were three standing committees with a government majority.<sup>19</sup> In the ACT, the Public Accounts Committee and the Legal Affairs Committee are traditionally chaired by non-government members. Table 1 provides a list of the committees and their membership.

**Table 1: Standing committees of the Fifth and Sixth Assemblies**

Sixth Assembly	Committee membership	Fifth Assembly	Committee membership
Public Accounts Committee	Three members Non-government chair Three party representation	Public Accounts Committee	Three members Non-government chair Three party representation
Planning and Environment	Three members Government chair Government majority	Planning and Environment	Three members Non-government chair Three party representation
Legal Affairs	Three members Non-government chair Three party representation	Legal Affairs	Three members Non-government chair Three party representation
Education, Training and Young People	Three members Government chair Government majority	Education	Three members Government chair Three party representation
Health and Disability	Three members Government chair Government majority	Health	Three members Non-government chair Three party representation
		Community Services and Social Equity	Three members Government chair Three party representation

Given the government dominance of committees of the sixth assembly, one might expect to see a higher rate of acceptance of committee recommendations, due in part to the inclusion of ‘soft recommendations’, referred to by Malcolm Aldons, that have no potential to influence government policy, or recommendations that maintain the current arrangements and are easy for the government to agree to.<sup>20</sup> While it is agreed that government acceptance of a committee recommendation does not necessarily lead to the implementation of new policies or procedures,<sup>21</sup> a high acceptance rate can reflect well on a government in that the government is seen to be listening and responding to committees. The response rate to committee reports is another area where one might expect to see fluctuations between a minority and majority government.

### **Government responses to committee reports**

The practice of governments responding to parliamentary committee reports has been adopted by successive governments at the national, state and territory levels and is an important part of the inquiry process. Without a formal government response, it could be argued that there would be little point in committees making recommendations to government. Community members expend considerable resources to provide submissions and/or oral evidence to a committee inquiry. While there are many other facets of work undertaken by committees, and valuable contributions that committees make, committee reports and the government responses are tangible outcomes that resonate with inquiry participants. A recent inquiry into the House of Representatives committees stated that it was disrespectful to the inquiry participants for a government to not provide a response to a committee report.<sup>22</sup> John Uhr also questions why community groups should

'bother to put their views to parliamentary committees if governments never bother to listen to the committees'.<sup>23</sup>

Committee inquiries in the ACT receive significant community input, and committee reports and government responses are significant factors for participants in the inquiry process. The community has also increasingly come to expect timely government responses to committee reports. For example, 80 per cent of respondents to a recent survey conducted by the ACT Legislative Assembly Committee Office said they used the committee website to read the committee report and 40 per cent said they used the committee website to read government responses to committee reports.<sup>24</sup> The ACT government does respond to committee reports. As of November 2010, of the reports requiring a government response, there were four outstanding responses to the reports of the fifth assembly (80 of 84) and four outstanding responses to reports of the sixth assembly (78 of 82), representing a 95 per cent response rate across both assemblies. To address the overdue responses, committee chairs of the seventh assembly agreed that the relevant committee should review the reports and recommendations made, and if deemed to still be relevant, to pursue the government for a response. ACT government responses are tabled in the Assembly by the relevant minister. On tabling, the Assembly may resolve to note the government's response or may adjourn debate to another time. Government responses are subject to cabinet consideration and consist of a tabling statement and a written response. The tabling statement outlines the government's position on the report, especially in relation to key recommendations. The written response sets out the government's position on each recommendation, with supporting information.<sup>25</sup>

### **Timeframe for government responses**

While committees have operated in the Australian parliament since 1901, and to a lesser degree in state parliaments, it was not until 1973 that the Senate agreed to a resolution declaring its opinion that governments should respond to committee reports within three months after being presented.<sup>26</sup> With no formal requirement through standing orders for governments to respond to committee reports, most governments set their own agendas for providing responses. In 1998 the House of Representatives Standing Committee on Procedure recommended that standing orders be amended to include government responses to committee reports. The government of the day rejected the recommendation on the grounds that the government considered its response rate to committee reports to be 'perfectly adequate' despite a high number of committee reports not responded to.<sup>27</sup> Like the Australian government, successive governments in the ACT have taken upon themselves the responsibility to respond to committee reports within three months of the report being tabled. The Parliamentary Agreement between the ACT Greens and ACT labor party for the seventh assembly formalised the requirement for the government to respond to committee reports within three months. While there is no standing order directing a government response, a temporary standing order (254A) adopted by the Assembly on 9 December 2008 (*Request for explanation concerning government response to committee*) provides an avenue of recourse for the chair of

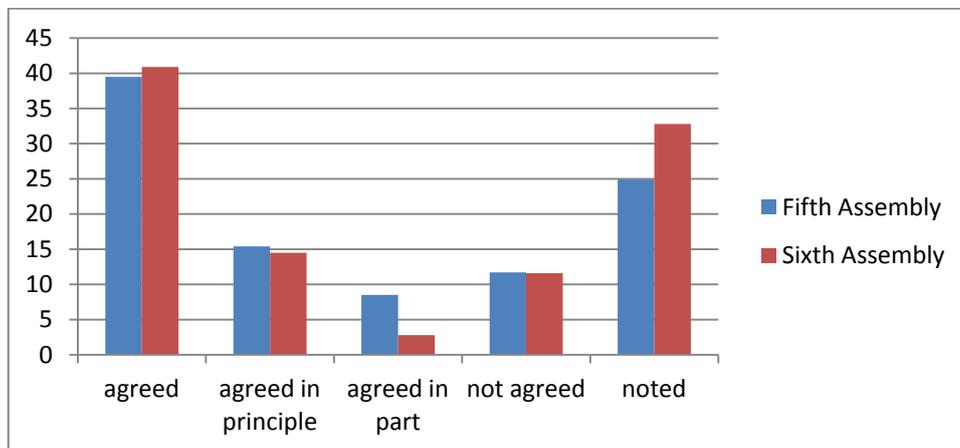
a committee should a response not be received within the given timeframe.<sup>28</sup> Although there is no further action the Assembly can pursue in relation to outstanding responses, this standing order enables the chair of a committee to place the lack of response on the public record. The temporary standing order has only been used twice, despite only 24 per cent of government responses (at the time of writing) being received within the three month timeframe.<sup>29</sup> Of the 95 per cent of government responses to the fifth assembly reports, 56 per cent were received within three months, 31 per cent were received within six months, and 13 per cent took longer than six months. Of the 95 per cent of government responses to the sixth assembly, 40 per cent were received within three months, 26 per cent within six months, and 34 per cent took longer than six months. Without a cross jurisdiction comparison it is hard to assess the response rate of the ACT government to committee reports. It would seem fair, anecdotally, to say that given the response rate of 95 per cent, committee members and other participants to inquiries can, at the least, be relatively confident that a response to a committee report will be received in a reasonable timeframe.<sup>30</sup> It is interesting to note that the majority government took longer than six months to respond, almost three times as many as the minority government (34 per cent to 13 per cent). However, this is still not a guarantee that recommendations will be implemented or that change will occur, but it does show some level of respect for the committee process in the ACT.

### **Government responses to committee recommendations**

As discussed earlier, the ACT Government response to committee recommendations sets out the government's position on each recommendation, with supporting information. This position is usually characterised as: agreed; agreed-in-principle; agreed-in-part; not agreed; and noted. Despite these qualifiers and the supporting information, it is not always clear what new action the government may be considering. For example 'noted' or 'agreeing in principle' might mean that the government considers it is already addressing the recommendation through an existing action or simply that the government does not disagree, but does not intend to implement the recommendation. The government's rejection of a recommendation is less ambiguous. While the outright rejection of recommendations is low, the government usually provides clear reasons for its decision.

The data used in this article is based on 47 standing committee reports of the fifth assembly containing 514 recommendations and 48 reports of the sixth assembly containing 543 recommendations.<sup>31</sup> Of the 514 recommendations made to government in the fifth assembly, the government agreed to 203 (39.5 per cent); agreed in principle to 79 (15.4 per cent); agreed in part to 44 (8.5 per cent); noted 128 (24.9 per cent); and did not agree with 60 (11.7 per cent). Of the 543 recommendations made to government in the sixth assembly, the government agreed to 222 (40.9 per cent); agreed in principle to 79 (14.5 per cent); agreed in part to 15 (2.8 per cent); noted 164 (32.8 per cent); and did not agree with 63 (11.6 per cent). The following graph shows a comparison of government responses across both assemblies.

**Figure 1: Percentage of government responses to committee recommendations of the fifth and sixth Assemblies**



While one might have expected to see a greater acceptance rate across the majority government, the overall response rate shows little variance across both Assemblies with agreement sitting at around 40 per cent and non-agreement sitting at around 11 per cent. When combining the agreed, agreed in principle and agreed in part, the acceptance rate of committee recommendations increases to 63.5 per cent for the fifth assembly compared with 54.9 per cent for the Sixth Assembly showing greater acceptance of recommendations from the minority government.

**Annual reports inquiries:** annual and financial reports are tabled each year by government directorates and agencies and, on tabling, are referred to the corresponding port-portfolio based standing committees as per a schedule included in the resolution as determined by the speaker. On receipt of the referral committees are free to determine their own inquiry process. The process in recent years has been for each individual committee to conduct a full inquiry which usually involves public hearings with the relevant minister and departmental officials and a report being prepared. The fifth assembly saw 10 inquiries into annual and financial reports resulting in 85 recommendations. Of those, the government agreed to 45 (52.94 per cent); agreed in principle to seven (8.2 per cent); agreed in part to four (4.7 per cent); noted 21 (24.7 per cent); and did not agree with eight (9.4 per cent). During the sixth assembly, 16 inquiries were conducted, resulting in 95 recommendations to government. Of those, the government agreed to 50 (52.63 per cent); agreed in principle to 11 (11.57 per cent); agreed in part to two (2.1 per cent); noted 21 (22.1 per cent); and did not agree with 11 (11.57 per cent). The acceptance rate across both Assemblies is higher than the overall average of 40 per cent to just over 50 per cent. Recommendations not agreed to have remained stable at around 11.5 per cent with a slight dip in the Fifth Assembly (minority Government) to below 10 per cent.

**Public accounts committee:** the Standing Committee on Public Accounts (PAC) is recognised as the key scrutiny committee due to its oversight of the government's

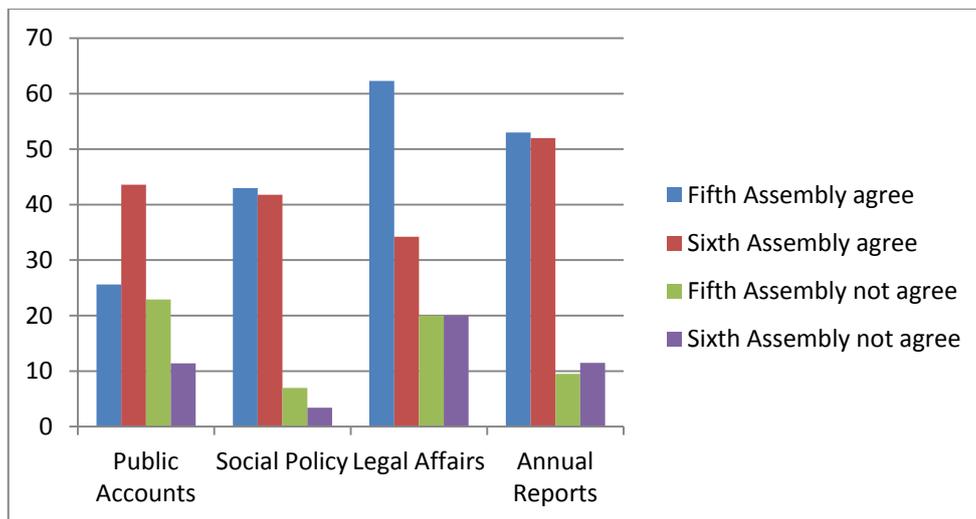
budget and compliance with audit. Audit reports are referred to PAC as a matter of course and PAC usually seeks briefings from the Auditor-General on these reports. Auditor-Generals tend to use PAC as their communication point with the Legislative Assembly and PAC has a role in protecting the Auditor-General from unjustified attacks. The PAC inquiries into audit reports allow it to inquire into areas that may normally fall to another committee, for example in the sixth assembly PAC completed reports into waiting lists for elective surgery and medical treatment and development application and approval processes for planning. The fifth assembly PAC conducted 14 inquiries and made 74 recommendations to government. Of those, the government agreed to 19 (25.6 per cent); agreed in principle to eight (10.8 per cent); agreed in part to nine (12.1 per cent); noted 21 (28.3 per cent); and did not agree with 17 (22.9 per cent). The sixth assembly PAC also conducted 14 inquiries and made 149 recommendations to government. Of those, the government agreed to 65 (43.6 per cent); agreed in principle to 16 (10.73 per cent); agreed in part to three (2 per cent); noted 14 (32.2 per cent); and did not agree with 17 (11.4 per cent). The PAC shows the greatest variance across the two assemblies. While the sixth assembly corresponds with the average agreement rate of around 40 per cent, the agreement rate for the fifth assembly is much lower at 25 per cent and a higher than average rejection rate at 22.7 per cent.

**Legal Affairs:** membership of the legal affairs committee was mirrored across both assemblies i.e. three members, a non-government chair and three party representation. The fifth assembly committee made 45 recommendations to government. Of those, the government agreed to 28 (62.3 per cent); agreed in principle to seven (15.5 per cent); noted one (2.2 per cent); and did not agree to nine (20 per cent). The sixth assembly committee made 76 recommendations to government across eight reports. Of those, the government agreed to 26 (34.2 per cent); agreed in principle to eight (10.5 per cent); agreed in part to six (7.9 per cent); and noted 16 (21 per cent). The fifth assembly committee had the highest rate of agreement with just over 60 per cent. When combining the agreed and agreed in principle the rate increases further to 78 per cent (35 of 45). However, the outright rejection of recommendations was higher than the average across both assemblies, recording a rejection rate of 20 and 26 per cent respectively (corresponding with the fifth assembly PAC).

**Social policy committees:** the fifth assembly had three social policy committees which reduced to two committees in the sixth assembly. The three fifth assembly committees made 316 recommendations to government. Of those, the government agreed to 136 (43 per cent); agreed in principle to 52 (16 per cent); agreed in part to 18 (5.6 per cent); noted 88 (27.84); and did not agree to 22 (6.96 per cent). The two sixth assembly committees made 146 recommendations to government. Of those, the government agreed to 61 (41.78 per cent); agreed in principle to 30 (20.54 per cent); agreed in part to two (1.36 per cent); noted 48 (32.87 per cent); and did not agree with five (3.4 per cent). With the government dominating the two committees of the sixth assembly, a higher response rate may have been expected. While this is not the case, the telling figure is the low rejection rate at only 3.4 per cent.

**Overall comment:** the results of the analysis of the government response to committee recommendations show a consistently high acceptance rate across both assemblies. The annual reports inquiry across both assemblies had the highest rate of acceptance at just over 50 per cent. Surprisingly the scrutiny committees (PAC and Legal Affairs) in the majority government also recorded high acceptance rates. While it could be argued that the high acceptance rate of committee recommendations, (or the batting average referred to by Aldons) is nothing more than the government paying ‘lip service’ to committees, the quality and impact of the recommendations agreed to is an inquiry for another day. What I have been concerned with here is to identify any discerning differences across a majority and minority government. Bearing that in mind, the government has afforded the committee process a degree of respectability and a sign that the government does take the work of standing committees seriously as demonstrated in the figure below.

**Figure 2: Percentage of recommendations agreed to and not agreed to for the fifth and sixth ACT Legislative Assemblies**



### Follow up on committee recommendations

The government response is often considered the final stage in an inquiry process resulting in limited follow-up on the implementation of recommendations agreed to by government and other inquiry outcomes. In a submission to the House of Representative Standing Committee on Procedure a recommendation was made to ‘require and resource committees to periodically review and report on the progress of previous reports’.<sup>32</sup> The Committee concluded that outsourcing such reviews would necessitate additional funding and considered that committees themselves would be better placed to evaluate the success of their own inquiries.<sup>33</sup> In the ACT, committees are free to evaluate their own inquiries should they wish to do so, but this is seldom done formally, and may be done informally through private

committee deliberations, or periodically raised by a member in the Assembly. However, a continuing resolution, Implementation of Committee Recommendations in annual reports, adopted by the Assembly in 2002 calls on the Chief Minister to require government directorates and agencies to report progress on the implementation of committee recommendations agreed to by the government of the day, in their annual reports. This practice is unique to the ACT and places the onus on the government to provide annual updates on the implementation of recommendations it has agreed to. If agencies do not report to the satisfaction of committees they are then free to pursue government comment during the annual reports inquiry. An example of this occurred in the 2008-2009 annual reports inquiry when a number of committees observed that government directorates were not adequately reporting on committee recommendations agreed to by government, as required, resulting in a recommendation that agencies 'provide more accurate reporting on relevant inquiries by assembly committees concerning the operation of the agency, and information on the implementation of Assembly committee recommendations that have been accepted by the government of the day'.<sup>34</sup> The government agreed to the recommendation and subsequent annual reports have provided the required information.

### ***Conclusion***

The ACT Assembly committee system has a number of features to assist in its scrutiny role. These include: portfolio based committees; the power to self-refer inquiries; the use of non-government chairs on major scrutiny committees such as the public accounts, legal affairs, and select committees on estimates; and a high degree of responsibility in monitoring and reviewing the actions of the executive through the well-established annual estimates inquiry process and inquiries into ACT government agency annual and financial reports including oversight of statutory authorities and appointments. The volume of work conducted by committees in a legislature the size of the ACT, performing both state and local government functions, demonstrates the commitment of non-executive MLAs to their scrutiny role. This is enhanced through the opportunities available to non-committee members to participate in all committee inquiries and the amount of time devoted to tabling and debating of committee reports. The lack of scrutiny of bills by committees could be regarded as a weakness in the committee system, but the nature of a minority government allows for robust debate in the chamber not always resulting in a win for the executive. The government response rate to committee reports is high, with over 95 per cent of reports receiving a government response in the fifth and sixth assemblies, albeit not within the self-imposed three month timeframe. This does, at least, demonstrate a respect for the committee process in the ACT. The continuing resolution, adopted by successive governments since 2002, calling upon the chief minister to require government agencies to report on the implementation of committee recommendations in their annual reports is unique to the ACT and an important provision in monitoring the implementation of committee recommendations agreed to by the government of the day.

While the limitations of this article are acknowledged, the findings do provide useful data and a solid background for a more in-depth analysis of government responses to committee recommendations. Further study may consider a comparison of government responses to committee reports across jurisdictions; government responses to select committee reports and dissenting reports; and an in-depth analysis of the implementation of committee recommendations. What has been demonstrated is that the government response rate to committee recommendations across a majority and minority labor government has remained consistent. The high percentage of responses to committee reports, no discerning differences across the assemblies to the agreement rate of individual recommendations, and indeed a higher rate of agreement with non-government chaired/majority committees, demonstrate at the very least the government's willingness to engage with the committee processes established by the ACT Legislative Assembly to ensure accountability and transparency in a unicameral legislature. ▲

### Endnotes

- <sup>1</sup> IC Harris (ed.), *House of Representatives Practice*, 5<sup>th</sup> edn, AGPS, Canberra, 2001, p. 621.
- <sup>2</sup> The Constitution Unit, *Checks and Balances in Single Chamber Parliaments: a Comparative Study*, School of Public Policy, London, 1998
- <sup>3</sup> The ACT Legislative Assembly has four year fixed terms for government. The Eighth Assembly was elected on 20 October 2012.
- <sup>4</sup> Data from select committee recommendations has not been used in this paper.
- <sup>5</sup> The principal scrutiny opportunities present through the annual estimates inquiry process conducted by a select committee on estimates and inquiries into annual and financial reports conducted by standing committees. Both of these inquiries have become major events on the Assembly calendar.
- <sup>6</sup> Recommendations made in dissenting reports have not been considered for the purpose of this paper.
- <sup>7</sup> A review of six unicameral parliaments conducted by the Constitution Unit of the School of Public Policy in 1998 identified the power to initiate inquiries and the ability to review bills as key features of committees performing an effective role (p 33). The Constitution Unit, *Checks and Balances in Single Chamber Parliaments: a Comparative Study*, School of Public Policy, London, 1998.
- <sup>8</sup> M Ganley, *Select Committees and their role in Keeping Parliament Relevant: Do New Zealand Select Committees Make a Difference?*, ASPG Parliament 2000 — Towards a Modern Committee System, 2001.
- <sup>9</sup> A comparative analysis of the number of bills passed and the number of amendments made during the fifth and sixth assemblies would be an interesting study for another time. Bills and the number of amendments are available on the Legislative Assembly website.
- <sup>10</sup> D Monk, 2009, 'In the Eye of the Beholder? A Framework for Testing the Effectiveness of Parliamentary Committees', Parliamentary Studies Paper 10, Crawford School of Economics and Government, Australian National University, Canberra, pp. 1–2
- <sup>11</sup> J Halligan, 'Parliamentary Committee Roles in Facilitating Public Policy at the Commonwealth Level', *Australasian Parliamentary Review*, Spring 2008, Vol. 23(2), pp. 138–139
- <sup>12</sup> M Aldons, 'Rating the Effectiveness of Parliamentary Committee Report: the Methodology', *Legislative Studies*, Vol. 15, No. 1, Spring 2000, p. 26

- <sup>13</sup> M Aldons, 'p. 22-32
- <sup>14</sup> Monk, 2009, p.
- <sup>15</sup> Aldons, p. 26
- <sup>16</sup> Monk, 2009, p. 6
- <sup>17</sup> Monk, 2009, p. 6
- <sup>18</sup> In the Seventh Assembly only one out of seven standing committees is chaired by a government member. Detailed information on committee membership for all assemblies is available in the Business of Committees document on the Legislative Assembly website at [www.parliament.act.gov.au](http://www.parliament.act.gov.au).
- <sup>19</sup> These figures do not include the Administration and Procedures Committee, chaired by the speaker.
- <sup>20</sup> Aldons, p. 26.
- <sup>21</sup> For example see Aldons, p. 26, or *Building a modern committee system*, p. 131.
- <sup>22</sup> House of Representatives Standing Committee on Procedure, *Building a modern committee system An inquiry into the effectiveness of the House committee system*, Parliament of the Commonwealth of Australia, June 2010, p. 129.
- <sup>23</sup> J Uhr, cited in C James, *Government Responses to Parliamentary Committee Inquiries*, paper presented at the Seminar on the Twentieth Anniversary of the Establishment of the House of Representatives Committee System, Canberra, 15 February 2008, p. 163.
- <sup>24</sup> Survey, Participating in Committee Inquires, ACT Legislative Assembly Committee Office, 2010
- <sup>25</sup> Handbook for ACT Government Officials on Participation in Assembly and Other Inquiries, Cabinet Office, Chief Minister's Department, June 2004, p 22
- <sup>26</sup> The Senate, *Standing Orders and other orders of the Senate*, February 2006, continuing resolution 37, p 134
- <sup>27</sup> House of Representatives Debates, 3.12.98, p 1302 (the Hon. Peter Reith MP)
- <sup>28</sup> Parliamentary Agreement For the Seventh Legislative Assembly for the ACT, 31 October 2008, 3.14, p 9 <<http://act.greens.org.au/sites/greens.org.au/files/alp-greens-agreement.pdf>>
- <sup>29</sup> Legislative Assembly for the ACT, Schedule of Government Responses to Committee Reports in the Seventh Assembly, <http://www.parliament.act.gov.au/downloads/committee-business/Responses.pdf>
- <sup>30</sup> The Parliamentary Agreement for the House of Representatives 43<sup>rd</sup> Parliament extended the timeframe for government responses to six months, a more achievable goal. Perhaps the time has come for all legislatures to review the expected timeframe for a government response.
- <sup>31</sup> This excludes reports of the Administration and Procedures Committee and reports of the Legal Affairs Committee operating in its role as Scrutiny of Bills. Reports on draft variations to the territory plan conducted by the Planning and Environment Committee are also excluded from this study, due to the high volume of these reports and the legislative requirement and specific nature of the inquiries conducted. A case study examining the direct influence of these reports on government planning policy should be considered in a further study.
- <sup>32</sup> S Rice OAM and M Rimmer, Submission to the House of Representative Standing Committee on Procedure, no 11, pp. 12–13
- <sup>33</sup> *Building a modern committee system*, pp. 133–134
- <sup>34</sup> Standing Committee on Health, Community and Social Services, *Report on Annual and Financial Reports*, Legislative Assembly for the ACT, March 2012, p. 32–34

David Solomon is Queensland Integrity Commissioner

## **Guarding MPs' integrity in the UK and Australia**

### **David Solomon**

Following the 2010 federal election, Prime Minister Julia Gillard signed several agreements with various independents and the Greens that included undertakings to introduce a Code of Conduct for members of the Commonwealth Parliament and appoint a Parliamentary Integrity Commissioner who, under the supervision of the House and Senate Privileges Committees, would have functions that would include providing advice to MPs and Senators and investigating complaints against them. The proposals have not been implemented at the time of writing but are still alive. These and other integrity proposals were part of the policy agendas of the Greens and some of the independent MPs either before the election, or immediately afterwards. It is interesting to note that Parliament took its time to consider and debate their adoption: that there was no urgency suggests that there was little external pressure to settle the issues that had been raised. These proposals were not a response to public outrage over any scandalous events, of which there have been very few at the national level in Australia.

The same can be said about the slow implementation by the Baillieu Government in Victoria of changes to that State's integrity system. While the new Coalition Government had policies about these matters going into the election in 2010 it has been under little external pressure to put them into effect with any degree of urgency.

Recent history suggests that changes to integrity systems, particularly when they directly affect Ministers and Members of Parliament, are undertaken or expedited mainly in the wake of either public scandals or strongly growing concern at a diminution in public confidence about government, parliament and parliamentarians. I propose to look at such developments in Britain and in Queensland, their causes and their consequences, with a view to seeing whether the traditional role and independence of MPs have been affected in any meaningful way by the changes that have occurred and to see whether the changes that have occurred have impacted on their integrity.

In Britain there have been a succession of scandals prompting the creation of new bodies aimed at placating public concerns: in 1994, the Committee on Standards in Public Life (the ‘Nolan committee’) which in turn resulted in a Parliamentary Commissioner for Standards and a new Standards and Privileges Committee; in 2007 an Independent Advisor on Ministerial Interests; in 2009, the Independent Parliamentary Standards Authority (IPSA); and in 2010, a Compliance Officer for IPSA.

For Australia, I will concentrate specifically on developments in Queensland, where following the Fitzgerald inquiry into police and political corruption in the late 1980s, the Criminal Justice Commission was established in part to examine allegations of official corruption involving politicians. A code of conduct for MPs was adopted at about the same time. In 1998, following concerns about a deterioration in the public’s confidence in Ministers and MPs, the Parliament created the position of Integrity Commissioner. A Ministerial Code of Ethics was also imposed on Ministers by the Premier. Later, after the conviction of a former Minister on bribery offences, successive governments required all their MPs (including Ministers) to discuss their declarations of interest with the Integrity Commissioner. Following the 2012 election the Ministerial Code was strengthened and the Integrity Commissioner given an monitoring role to ensure compliance with declarations of interests. The Parliament also re-criminalised an offence of lying to Parliament.

I will begin with Britain — or more precisely with England, because devolution has meant that Scotland, Wales and in a different way Northern Ireland, have not been directly caught up in what has been happening in the Palace of Westminster. Also, my focus will be on Members of the House of Commons, though I will refer briefly to developments in the Lords.

When I submitted my abstract for consideration by the organisers of the conference I was not aware that in July last year a special issue of the *Australian Journal of Professional and Applied Ethics* was published on the subject of Parliamentary ethics. The first paper, by Dr Noel Preston, was titled ‘Integrity Queensland-style — and the importance of being fore-warned and fore-armed’. The second was by Professor Charles Sampford, ‘Parliament, Political Ethics and National Integrity Systems’. It too had a lot to say about the Queensland system. And the third was by Nicholas Allen, ‘Ethics regulations at Westminster: mapping long-term institutional change’. Allen’s doctoral thesis ‘explored how a series of institutional changes, dating from the mid-1990s and loosely known as the Nolan reforms, affected the House of Commons’ ethics regulatory regime, some aspects of MPs’ behaviour, MPs’ ethical attitudes and public attitudes towards Parliament’, to quote his home page at Royal Holloway, University of London. In 2011 he also published an article in the journal *Public Integrity*, titled, ‘Keeping MPs honest? Ethics reforms in the British House of Commons’. In what follows I will be using Allen’s historical background to the reforms that occurred in Britain. Purely factual information was accessed from the websites of the various institutions that I refer to. I also found very useful an analysis of integrity in public life published on its website by the UK

Democratic Audit. I should add that my understanding was enhanced as a result of separate meetings I had in June this year with Sir Alex Allen, the Prime Minister's Adviser on Ministerial Interests, and Sir Christopher Kelly, the current chair of the Committee on Standards in Public Life.

Until very late in the 20<sup>th</sup> century, issues concerning the integrity of the members of both Houses at Westminster were a matter for internal governance. As Nicholas Allen explains in his *Public Integrity* article, 'The dominant idea underpinning the pre-1995 regime was self-regulation.' In fact, MPs self-regulated and Parliament 'exercised minimal oversight of MPs conduct'.<sup>74</sup> In 1975 the House of Commons introduced a Register of Members' Interests, covering financial and other interests that might influence parliamentary behaviour, and created a Select Committee on Members' Interests to oversee the register.<sup>75</sup> This followed a scandal in which several MPs were implicated in a corrupt relationship with an architect.

The next crisis arose in 1994 when a newspaper, *The Guardian*, reported that two Conservative MPs had accepted money from a lobbyist for asking Parliamentary questions. The cash-for-questions scandal precipitated the creation by the then Prime Minister, John Major, of an advisory Committee on Standards in Public Life, known as the Nolan Committee, after its first chairman, Lord Nolan.

The Committee on Standards in Public Life is an independent advisory non-departmental public body (NDPB), sponsored by the Cabinet Office. The Chair and Members are appointed by the Prime Minister. Seven of its members, including the chairman, are chosen through open competition under the rules of the Office of the Commissioner for Public appointments. The remaining three members are nominated by the three main political parties. The committee lacks any statutory powers, has no ability to compel witnesses or implement its recommendations. It does not investigate individual misconduct.

Its initial terms of reference were: 'To examine current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities, and make recommendations as to any changes in present arrangements which might be required to ensure the highest standards of propriety in public life.'

Its first report in 1995 recommended major changes, following this conclusion:

We cannot say conclusively that standards of behaviour in public life have declined. We can say that conduct in public life is more rigorously scrutinised than it was in the past, that the standards which the public demands remain high, and that the great majority of people in public life meet those high standards. But there are weaknesses in the procedures for maintaining and enforcing those standards. As a result people in public life are not always as clear as they should be about where the boundaries of acceptable conduct lie. This we regard as the principal reason for public disquiet. It calls for urgent remedial action.

The Committee set out what it called the seven principles of public life. These were later incorporated into the Ministerial Code of Conduct and remain the standards by which the Committee itself continues to provide advice. The principles are:

- **Selflessness:** Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.
- **Integrity:** Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.
- **Objectivity:** In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
- **Accountability:** Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
- **Openness:** Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
- **Honesty:** Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
- **Leadership:** Holders of public office should promote and support these principles by leadership and example.

In its report the Committee was critical of the fact that some 30 per cent of backbench MPs held paid consultancies that related to their Parliamentary role. While it thought that Parliament would be less effective if politicians had no outside interests, it considered that MPs should be banned from lobbying on behalf of clients. Presumably they can still lobby on behalf of their constituents. Members of the public are entitled to go to the 'lobby' in the Palace of Westminster during sitting times to request a meeting with their MP to lobby them about issues of concern to them.

It considered that full disclosure of consultancy agreements and payments, and of trade union sponsorship agreements and payments, should be introduced immediately. It also thought the rules on declaring interests, and on avoiding conflicts of interest, should be set out in more detail. Then it recommended a Code of Conduct for MPs. It considered that the House of Commons should continue to be responsible for enforcing its own rules, but said that better arrangements were needed. It said,

By analogy with the Comptroller and Auditor General, the House should appoint as Parliamentary Commissioner for Standards, a person of independent standing who

will take over responsibility for maintaining the Register of Members' Interests; for advice and guidance to MPs on matters of conduct; for advising on the Code of Conduct; and for investigating allegations of misconduct. The Commissioner's conclusions on such matters would be published.

When the Commissioner recommends further action, there should be a hearing by a sub-committee of the Committee of Privileges, comprising up to seven senior MPs, normally sitting in public, and able to recommend penalties when appropriate.

The Commons in fact adopted these recommendations, establishing the Standards and Privileges Committee with a broad remit to supervise MPs' conduct, and creating the position of the Parliamentary Commissioner for Standards, to become the House's principal ethics adviser and investigator.

As Allen describes it, in handling complaints of misconduct, the commissioner's role is akin to that of an investigating magistrate: after conducting the necessary inquiries, the commissioner reports to the committee both the findings of fact and an opinion on whether a breach of the code has occurred. The committee then reaches a final judgment and publishes a report. The committee can also recommend sanctions against the concerned MP—something the commissioner cannot do—which may include a formal apology to the House, the repayment of monies if appropriate, and the suspension or even expulsion of the member. In an eight year period the committee recommended the suspension of twelve MPs for periods ranging from three days to one month.

The number of complaints about MPs has ranged in recent years from about 130 to 226 (at the height of the MPs' expenses scandal (of which more later). Most are not considered worthy of investigation, but about a quarter to and third are, and about a dozen or so are upheld each year.<sup>76</sup> Occasionally MPs are suspended from the House for a period of days or weeks.<sup>77</sup>

The Committee on Standards in Public Life has produced more than a dozen reports covering the regulation of political finance, standards of behaviour in local authorities, the House of Commons and the House of Lords, MPs' expenses and allowances and 'Defining the Boundaries within the Executive: Ministers, special advisers and the permanent Civil Service.' It also comments on consultation papers issued by other bodies — for example, this year it made recommendations about the regulation of lobbyists, in response to a paper issued by the Government.

The Committee's report on 'Defining the boundaries' was published in 2003 and recommended the establishment of an Independent Adviser on Ministerial Interests. This was finally achieved in 2006. Again, the appointment is made by the Prime Minister and the adviser is supported by the Cabinet Office. The responsibilities of the adviser are:

- To provide an independent check and source of advice to government ministers and their Departmental Permanent Secretaries specific matters of conduct,

including how best to avoid potential conflict between Ministers' private interests and their ministerial responsibilities.

- To investigate — when the Prime Minister, advised by the Cabinet Secretary, decides it would be appropriate — allegations that an individual minister may have breached the Ministerial Code of Conduct.

Departmental Permanent Secretaries are mentioned because the Ministerial Code requires Ministers to provide their Permanent Secretary with a full list in writing of all their interests that might be thought to give rise to a conflict. The Ministers' statements are reviewed by the Independent Adviser and by the Propriety and Ethics team in the Cabinet Office. The list is published, and must be updated twice yearly.<sup>78</sup>

There have been controversies about the position. In 2011 the Minister for Defence, Dr Liam Fox, eventually resigned over a significant breach of the Ministerial Code involving an informal aide, Adam Werrity. Although the Department had long held concerns about Werrity's activities, nothing was done. And the breach of the Code was investigated not by the Independent Adviser, but by the Cabinet Secretary, Sir Gus O'Donnell.<sup>79</sup> Then in 2012, the Independent Adviser was once more not consulted over a scandal involving the relationship between Jeremy Hunt, the Culture Secretary and his office, and News International, in relation to its bid to buy the remainder of the shares in BSkyB that it did not then own. Hunt's senior adviser was forced to resign following the revelation of supportive communications between him and an agent of News International, during the time the government was assessing the News bid. Earlier the responsibility for assessing the bid had been removed from a senior Liberal Democrat minister, Vince Cable, who had expressed doubts about it because of the attitude of News papers to his party. Hunt was given the responsibility having expressed support for it. All these matters were examined in the hearings on media integrity conducted by Lord Justice Leveson. But as I said, none of it was referred to the Prime Minister's Independent Adviser. Incidentally, Hunt was subsequently given a new and more important portfolio, Health Secretary, in a reshuffle in September.

There was widespread concern expressed about the fact that the Independent Adviser could not instigate his own inquiries. The Chair of the Committee on Standards in Public Life pointed out that his committee had recommended that the Adviser be given that power in 2007. In March this year the Commons Public Administration Select Committee reported that the role was not 'independent' in any meaningful sense. This was because:

- The role: the independent adviser lacks independence in practice, as he is appointed personally by the Prime Minister, is supported from within the Cabinet Office, and cannot instigate his own investigations
- The appointment process: the closed process by which the adviser is appointed is not suitable for an 'independent' role

- The choice of candidate: the choice of a recently retired senior civil servant is not a suitable choice for a role which requires demonstrable independence from Government.

The Committee suggested that the retirement of Sir Philip Mawer as independent adviser shortly after the resignation of Dr Fox should have 'provided the Prime Minister with a timely opportunity to demonstrate the value he places on having complaints against Ministers investigated in a demonstrably independent way'. This opportunity was missed and a recently retired former senior civil servant, Sir Alex Allan, was appointed through a closed recruitment process, which only became public knowledge after the event.<sup>80</sup>

The next addition to the integrity machinery came in 2009. Early that year the Committee on Standards in Public Life said that it was bringing forward an inquiry into the system of allowances and expenses for MPs. Then in May, as Allen points out

...the *Daily Telegraph* published leaked details about all MPs' claims between 2004 and 2008. Some MPs had reportedly claimed for extremely dubious or petty items, including antique duck houses, cleaning bills for moats, bath plugs, plasma televisions, and so on. Other MPs had 'flipped' or redesignated their main addresses, enabling them to redecorate both homes at public expense and, in a few cases, avoid paying tax. And, throughout, officials in the House of Commons Fees Office, the body overseeing these matters, had apparently turned a blind eye to, if not actually encouraged, a culture of 'claiming to the max' among MPs. The public was outraged. Prime Minister Gordon Brown's government responded by rushing onto the statute book a new Parliamentary Standards Act, which established new bodies to oversee MPs' expenses and opened the way for significant changes to the existing regulatory structures.<sup>81</sup>

Some of the MPs did more than flout the rules, they broke the law through false accounting and fraud. Some were prosecuted and a few went to gaol. Many retired from political life at the subsequent election. The new legislation, passed in July 2009, 'set out details for a new Independent Parliamentary Standards Authority (IPSA), which would take responsibility for authorizing MPs' expense claims, maintaining the House of Commons Register of Members' Financial Interests, and overseeing the allowance system. The bill also included provisions for a new statutory commissioner for parliamentary investigations who would investigate alleged breaches of the new rules, a statutory Code of Conduct for MPs, and three new criminal offenses.'<sup>82</sup> The provisions were watered down before the Bill was enacted.

Re-enter the Committee on Standards in Public Life. Following its review of MPs' allowances and expenses and of the new Act, IPSA's remit was further reduced and limited to drawing up and administering a scheme for MPs' expenses, as well as monitoring compliance with the scheme, paying MPs' salaries and pensions and setting MPs' salary levels.<sup>83</sup> In doing so, IPSA would be assisted not by a statutory

commissioner, but by a compliance officer to enforce the rules and investigate complaints.

The House of Lords was much slower in introducing integrity measures. Following recommendations by the Committee on Standards in Public Life the Lords introduced a Code of Conduct and a mandatory register of interests in 2001. These are overseen by sub-committees of the Lords' Committee for Privileges. Following allegations of improper expenses claims by peers, the position of Commissioner for Standards was created to investigate complaints about financial support arrangements and breaches of the Code. It adopted a revised Code of Conduct that came into effect in 2010.<sup>84</sup>

As I noted at the beginning, the reforms in Queensland can be traced back to the crimes and scandals identified by the Fitzgerald inquiry in the late 1980s. One of the first integrity outcomes of the Fitzgerald report was the creation of the Criminal Justice Commission (CJC), modelled to a considerable extent on the NSW Independent Commission Against Corruption. Just over a decade later, the CJC had become the Crime and Misconduct Commission (CMC), after being merged with a Crime Commission created by a later government. The CMC's functions still include investigation of complaints against public sector misconduct by police, politicians, public sector officers and public officials, and working with public sector agencies, including the Queensland Police Service (QPS), to fight misconduct, including corruption. In relation to MPs, the CMC can only investigate allegations of official misconduct, and that is defined to mean misconduct that if proven would involve a criminal offence.

A second result of the Fitzgerald report was the creation of the Electoral and Administrative Review Commission (EARC). This body was mainly concerned with making recommendations to government about reforms. In many ways the 20 or so areas where it was required to investigate gave it a similar kind of remit to that of the Nolan Committee, but other than recommending a new system of Parliamentary Committees, it had little direct interaction with MPs. The new parliamentary committee system was not significantly implemented until last year, albeit with some bizarre changes to reduce the role of the Speaker. These were partly changed after the election. However the system had to be further changed to reflect the huge dominance of the LNP in the Parliament, and it remains to be seen how effective the committee system will be with such an imbalance in the numbers.

One important reform that occurred in 1995, as a result of the EARC proposals, was the formation of a Members' Ethics and Parliamentary Privileges Committee (MEPPC), with two major tasks: reviewing legislation providing for a Members' Register of Pecuniary Interests, and drafting a Code of Ethics for MPs. That Code was not finally adopted until 2001.<sup>85</sup> The declarations of interest of MPs are open to public scrutiny, and in the past few years are accessible on the Parliamentary website. However declarations by MPs about their related persons are confidential and accessible only by a few nominated integrity entities.

In 1998 the Government, with the support of the Opposition decided to amend the Public Sector Ethics Act to create the position of Queensland Integrity Commissioner. That move was prompted by a recognition by both sides of politics at the time, that popular opinion of politicians was, as my predecessor put it, 'at an abysmally low level'.<sup>86</sup>It was apparently thought that if politicians had a confidential sounding board available to give advice before a possible blunder was made, this would contribute to the image of politicians. As it turned out, the Act provided that the 'designated persons' who could seek advice were not restricted to politicians. Ministers and their staff could ask for advice, as could government MPs (Opposition MPs were later added to the list), statutory officers, the heads of government departments, and senior executive and senior officers (but only with the consent of their chief executive) and some others who could be added by Ministers. In total, more than 5,000 people met the description of a 'designated person'. In recent years about 50 requests for advice have been made each year, and almost half of these have been made by Ministers or MPs. Until 2010, designated persons could only ask for advice about conflicts of interest. In that year, this limitation was changed and the advice that could be sought expanded to include any ethics or integrity issue.

There were two further scandals that affected the Queensland Parliament and had implications for the integrity system, and both concerned the same MP/Minister. In 2006 Gordon Nuttall, then Minister for Health, was alleged to have lied to an Estimates Committee, where he had been questioned over his knowledge of the problems surrounding the proficiencies of overseas trained doctors. He denied ever having been briefed on these, but was directly contradicted by the then senior executive director, Health Services who advised the committee that Nuttall had been briefed. This led to the accusations that Nuttall had lied to the Committee, then an offence under section 57 of the Queensland's Criminal Code. In August 2005, Nuttall stepped aside from the Ministry while the Crime and Misconduct Commission (CMC) investigated claims he had given a false answer to a Parliamentary estimates committee. The CMC reported back in December 2005, recommending the Attorney-General prosecute Nuttall under section 57 of the Criminal Code. The prosecution was not proceeded with as Premier Peter Beattie recalled Parliament to revoke the relevant section of the Criminal Code so Parliament could deal with such matters itself as a contempt of Parliament. However Beattie decided not to refer the matter to the MEPPC, instead using the Government's majority in the Parliament to clear Nuttall and repeal s. 57 of the Criminal Code. And as Nuttall had resigned his Ministerial position and apologised to Parliament, no further action was taken in relation to the contempt charge.

The following year Beattie referred to the CMC allegations that Nuttall had accepted bribes. He was convicted in 2009 and sentenced to seven years gaol, and the following year convicted of different corruption charges, earning him a further seven year sentence. The first Nuttall conviction resulted in a major review of Queensland's integrity system, though few of the changes directly affected the Parliament. However following the change of government in March 2012, the new

Government acted to restore section 57 of the Criminal Code. One of the changes that was introduced in 2010 in a new Integrity Act, was a provision allowing MPs to meet with the Integrity Commissioner to discuss their declarations of interest, to help determine whether any conflicts of interest might arise. The then Premier, Anna Bligh, told her Ministers and MPs they each must see the Integrity Commissioner once a year (and they did). The new Premier, Campbell Newman, instructed his MPs that they too must arrange to meet with the Integrity Commissioner. These meetings do not take very long, but they do focus the attention of MPs on integrity issues.

The change of government also resulted in a review of the Ministerial Code of Ethics — to be renamed, Code of Conduct. An important addition to the Code is the inclusion of rules implementing individual ministerial responsibility. The code also put into effect an undertaking by the incoming Premier that the declarations of interest by his ministers would be subject to random checks. These are to be carried out by the Integrity Commissioner (at times of his choosing), and Ministers are instructed by the Ministerial Code to provide the Commissioner with any information he requires.

Noel Preston differentiates between what he calls compliance and integrity models that are respectively anti-corruption or pro-ethics.

A compliance approach is characterised by a watchdog, investigative and legalistic style stressing accountability and assuming that misconduct is inevitably present in political activity. An integrity approach is characterised by an educative, supportive and preventive style stressing responsibility and assuming that most participants in the political process are motivated to act with propriety.

...  
...[A] good governance arrangement includes the valuable attributes of both a compliance and an integrity model aiming for a balance which protects against misconduct and promotes good conduct at the same time. The argument here is that an integrity model offers most for a parliamentary ethics program.<sup>87</sup>

He argues that the Queensland approach is to follow an integrity model, particularly since the Integrity Commissioner became an officer of the Parliament in 2010. Applying his criteria, it is clear that the British approach is much more heavily weighted on the compliance side.

The body in Britain that is directed more towards the integrity approach is the Committee on Standards in Public Life. Its role has been to set standards, and to educate those in the political system, particularly members of both Houses of Parliament. It was created with the goal of improving trust and confidence in public service. But according to its current chair, Sir Christopher Kelly, ‘[i]n practice higher standards and greater trust have not moved in tandem’.

I am pretty confident that the activities of the Committee have raised standards. But public trust has moved in the opposite direction — and was given further impetus by MPs’ expenses.

The decline in public trust has been such that in successive surveys of public opinion Members of Parliament as a class tend to be rated down at the bottom with red top journalists and estate agents.<sup>88</sup>

It is much the same here. In less than 30 years the public perception of the ethical standards of politicians, state and federal, has halved, the Roy Morgan poll recording this year that only 10 per cent of respondents considered federal and state MPs to have high or very high ethical standards. Advertising people and car salesman rank lower, if that is any consolation. And there have been times when the actual ranking of our politicians was lower than it is now.

At the beginning I queried seeing whether the traditional role and independence of MPs have been affected in any meaningful way by the changes that have occurred. Tentatively, I would suggest the answer is 'yes'. It is true that both in Britain and in Queensland (to a lesser extent), MPs remain responsible for any sanctions that are imposed on those who fail integrity tests. But in Britain the number of external reviewers of MPs' conduct has increased to the point where Privileges Committees and the like would be under too much public pressure for them to be able to deal out punishments that were of the slap-on-the-wrist variety, where serious misconduct had occurred. And in Queensland, the changes to the Criminal Code to reinstate lying to Parliament as an offence moves trial and punishment outside the Parliamentary arena.

Are these developments making a difference? So far as Britain is concerned, I defer to Sir Christopher Kelly. I agree with the observation of Nicholas Allen who points out that more extensive and active regulation has institutionalised ethics as a feature of political contest and helped to institutionalise negative media coverage.

There is a more clearly identifiable ethics regime, as well as apparent transgressions, for journalists to write about.

...The British public may think less of its lawmakers' standards of conduct today even as those standards have actually improve. Put another way, the public might have a more benign view of their parliamentarians if there was less regulation at Westminster, but they might also have less honest politicians.<sup>89</sup>

Back in Queensland (and Australia generally) I think the ethics/honesty/reputation issue as measured by the public reflects not the view of the honesty etc of MPs generally, but of the truth/lies of election campaign promises. We have had plenty of that over recent decades — Howard's core and non-core promises, Keating's tax cuts, Howard's never-ever GST, and Gillard's no carbon tax. In my view the standard of political discourse has crashed, stunningly, to an abysmal low, and that has added to the vitriolic 'liar, liar, liar' exchanges that undermine the standing of our politicians in the general community. And what is said in private, or anonymously on the net, is far worse. Like the speech of Alan Jones to a Young Liberals audience recently when he said that the Prime Minister's 'old man recently died a few weeks ago of shame — to think that he had a daughter who told lies every time she stood for parliament.' That comment was disgraceful enough. When

a few in the audience apparently expressed disapproval of his comments Jones went on to claim the media had somehow brainwashed the federal Liberal Party to go easy on the Prime Minister because, ‘she’s a woman’.... No, no look, hang on, this is where we are weak. This is where we are weak’, Jones said. ‘Can you believe that they have gone, the federal party, because they’ve been brainwashed by the media to “oh back off, she’s a woman, go easy”’.<sup>90</sup>

But all of that is, in my opinion, an entirely different argument. My view from close by is that on the whole individual MPs are very conscious of ethical issues — I talk to them and remind them of what is required of them — and that they try to observe the standards that have been set. Almost all of them, anyway. What is new, is that politicians are increasingly being challenged about, and called to account for, their ethical behaviour before they were elected and required, particularly if they have served as ministers, to observe new rules or standards after they leave office. ▲

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## **Unproclaimed legislation — the delegation of legislative power to the executive**

**Alex Stedman**

### ***Introduction***

A bill, having passed both houses of the NSW parliament and received the Governor's assent, does not necessarily come into immediate effect as a law. An assented bill is deemed to commence on the date of assent, 28 days after assent, or on a specified later date. Some bills however, through the commencement provision found in clause 2, specify that they are to commence on another day in a Governor's proclamation published in the *Government Gazette*. Commencement by proclamation, otherwise referred to as the proclamation device, allows a government to delay the operation of an act until administrative arrangements or delegated legislation are in place to allow the statute to operate. Although this may be administratively convenient, it confers a great power to the executive, effectively allowing the ministry to determine when, if ever, a law or part of a law duly passed by the parliament will have effect.<sup>1</sup> Some commentators, including a former NSW Auditor-General and a former Deputy Clerk of the Australian Senate, have argued that the proclamation device provides an executive, irrespective of political persuasion, the ability to create for itself a loophole whereby the legislative decisions of parliament can effectively be ignored.<sup>2</sup>

### ***The NSW parliament***

To examine the practical effects of the proclamation device, it is necessary to very briefly detail the composition of the NSW legislature and its two distinct houses: the Legislative Assembly, where members are elected via a preferential voting system, through which to gain a seat requires the support of at least half of an electorate following the distribution of preferences; and the Legislative Council, where members are elected through proportional representation, so that the number of seats won by a party is effectively proportionate to the number of votes received. The party or coalition of parties holding the majority of seats in the Legislative

Assembly forms government.<sup>3</sup> The rationale for dividing the state's law making apparatus into two differently elected and constituted bodies is to safeguard the legislative process by preventing it from being the exclusive domain of any one political party. In other words, to ensure that a divergence of views and considerations, representative of the whole community, have a voice in shaping the laws that govern the state.<sup>4</sup> If voting patterns in NSW are any guide, its citizens are against the complete control of their parliament by any one political faction. Since 1988, no political party or formal coalition has held a concurrent majority in both houses, meaning all governments have had their legislation subject to rigorous parliamentary scrutiny and debate. The proclamation device however, as this article will demonstrate, potentially challenges community trust in a diverse legislature when one notes the issue identified above — executives have the option of determining when, or even if, certain laws, otherwise already agreed upon by the parliament, can begin.

### ***The passage of and assent to legislation***

The law making process in NSW is similar to that of other Australian and westminster-style parliaments.<sup>5</sup> Broadly a bill, once drafted, is introduced in one house where it must pass through four stages: introduction and first reading; second reading; consideration in committee of the whole (if required); and third reading. Bills are more often introduced in the Legislative Assembly because, for government bills, it is where a ruling party or coalition of parties has the majority required to pass a bill quickly if desired. It is also the house where the majority of ministers sit — currently 19 out of 22. The two houses have the same powers regarding bills aside from 'money bills' which must be introduced in the Legislative Assembly. If a bill passes the first house it moves to the second, which is typically the Legislative Council acting as a house of review, where it must again pass each stage. Amendments to bills are more likely to be introduced in the Legislative Council as there is a greater chance of them being agreed to. If a member, typically an opposition or crossbench member, wishes to amend a bill, the upper house examines it clause by clause and amendments may be proposed and voted on. If any amendments are successful the bill is amended to reflect the change. A bill having passed the Council returns to the Assembly. If a bill is returned with amendments, the Assembly will either agree to the amendments or exchange messages with the Legislative Council until the wording is agreed. In the event of a deadlock between the two houses a referendum, provided for by Section 5B of the *Constitution Act 1902*, may be used to ultimately resolve the issue.

In terms of the procedures for assent, the relevant provisions are found in section 8A of the *Constitution Act 1902*; and standing orders 239 of the Legislative Assembly and 160 of the Legislative Council respectively. The provisions relating to the commencement of Acts can be found in section 23 (1) of the *Interpretation Act 1987*. Section 8A of the *Constitution Act 1902* provides that every bill having passed the Legislative Assembly and the Legislative Council shall be presented to the Governor for royal assent and that once assented to will become an act of the

legislature. The standing orders of both houses require the Clerks to certify the bill before being presented to the Governor for assent. The Governor, having assented to the bill, will forward a message to both houses notifying assent.<sup>6</sup> The *Interpretation Act 1987* specifies that a bill once assented to will commence 28 days after assent, the date of assent, a specified later date, or on another day through a Governor's proclamation.<sup>7</sup> A proclamation is made at the request of the relevant minister within the Executive.<sup>8</sup> As with the passage of the bills, the procedures for assent in NSW are broadly similar to that of other Australian jurisdictions, although there is a difference regarding the commencement of legislation by proclamation. All states and territories, as well as the Commonwealth, provide that legislation can commence by proclamation. However, some jurisdictions also have provisions whereby, if an act or section of an act is left unproclaimed for a specified period, it will automatically come into effect, whereas other jurisdictions such as NSW have no such provision, meaning legislation can remain unproclaimed indefinitely. The jurisdictions where acts commence by proclamation, however, come into effect automatically if they remain unproclaimed for a specific period are: Victoria (12 months), South Australia (two years), the Australian Capital Territory (six months) and the Commonwealth of Australia (six months or 12 months, with the period specified in each individual Act).<sup>9</sup> In Queensland, acts which are to commence by proclamation come into effect the day after the first anniversary of their passage unless within one year of the date of assent a regulation is issued to extend the period before commencement to no more than two years.<sup>10</sup> The Commonwealth previously operated without a system for the automatic commencement for unproclaimed Acts but, as noted by *Odgers' Australian Senate Practice*, in the late 1980s adopted an automatic commencement provision 'following criticism of the misuse of the power to proclaim legislation',<sup>11</sup> the criticism being '... concern over delays in proclaiming Acts and the reasons given for those delays... (observations) that legislation stated by ministers to be urgent at the time of its passage through the Senate was often not proclaimed for months or years after assent'.<sup>12</sup> Standing Order 139 (2) of the Australian Senate also requires a list to be tabled annually, detailing all provisions of acts which are to commence by proclamation but have not been proclaimed, together with reasons for their non-proclamation and a timetable for their operation.<sup>13</sup> *The Annotated Standing Orders of the Australian Senate* notes that, since the requirement for the tabling of an unproclaimed list was first adopted in 1988, the number of Acts with unproclaimed provision(s) has diminished.<sup>14</sup>

### ***The legislative will of the parliament versus the executive***

The power to enact legislation is the primary function of parliament. If the legislative decisions of the parliament can be overridden by the executive using the proclamation device, then it could be reasonably argued, as A.C. Harris — a former NSW Auditor-General — did by saying '... the balance of power between the Executive Government [and the Parliament] has departed measurably from the balance inherent in the theory of parliamentary democracy'.<sup>15</sup> The problem of unproclaimed legislation was brought to the attention of the NSW parliament in 1990 on the motion of a crossbench member of the Legislative Council, the Hon

Elisabeth Kirkby of the Australian Democrats. Ms Kirkby's motion, modelled on Standing Order 139 (2) of the senate, required a list of unproclaimed legislation to be tabled in the house every six months together with a statement of the reasons for their non-proclamation and the proposed proclamation dates.<sup>16</sup> In moving the motion, Ms Kirkby argued it would provide a vital oversight function for the parliament and make the Executive more accountable.<sup>17</sup> The motion was agreed to, although no return was provided in response to the house's order because the parliament was prorogued on 6 February 1991.<sup>18</sup>

### ***Amended provisions remain unproclaimed***

Following Ms Kirkby's motion, six years passed before unproclaimed legislation was again considered by the parliament. The reason for unproclaimed legislation coming to the parliament's attention on this occasion was due to the failure of the executive to commence an opposition amendment to a bill that had been agreed to in the Legislative Council. On 23 May 1996, the Legislative Council in committee of the whole agreed to an amendment proposed by the then opposition to clause 322 of the *Industrial Relations Bill 1996*.<sup>19</sup> The amendment had the effect of providing individual contract drivers the same enterprise bargaining rights as employees and employee organisations in the carrier driver industry.<sup>20</sup> The amendment, although opposed in principle by the government, was agreed to on the voices;<sup>21</sup> the bill was sent to the Assembly for concurrence where it was agreed to without amendment and, ultimately, assented to by the Governor.<sup>22</sup> The act was subsequently proclaimed to commence on 2 September 1996, however, the proclamation excluded subsection 322 (3) and schedule 5.4, with subsection 322 (3) being the aforementioned opposition amendment agreed to in the Legislative Council.<sup>23</sup> On 22 October 1996, the leader of the liberal/national opposition in the Legislative Council, the Hon John Hannaford, moved to censure the labor Attorney General and Minister for Industrial Relations, the Hon Jeff Shaw, for failing to proclaim the commencement of subsection 322 (3) and schedule 5.4. The motion was successfully amended by crossbench member the Hon Ian Cohen of the Greens to express concern that subsection 322 (3) and schedule 5.4 had not commenced and also to require the Attorney General, on the second sitting day of each month, to table a list of all legislation not proclaimed 90 days after assent. Mr Cohen argued that although in some instances non-proclamation could be justified on policy and administrative grounds it:

... needs to be a priority of government to proclaim amendments that are passed by the Parliament. We need a power within the Parliament that maintains a certain degree of responsibility on the part of the Executive Government. It is extremely important that the Executive does not deliberately thumb its nose at the Parliament. It is also extremely important that there be appropriate accountability.<sup>24</sup>

The first list of unproclaimed legislation was presented on 13 November 1996.<sup>25</sup> The requirement was subsequently re-adopted in later sessional orders before being incorporated in the current standing orders in 2004, as standing order 160 (2).<sup>26</sup> Regarding subsection 322 (3) of the *Industrial Relations Act 1996* it was ultimately

proclaimed to commence on 14 February 1997,<sup>27</sup> while schedule 5.4 never commenced and was repealed by the *Statute Law (Miscellaneous Provisions) Act (No 2) 1996*.

On 16 November 1999, a similar issue occurred. In this instance, the Legislative Council debated a motion of the Hon John Jobling who moved that the Special Minister of State and Assistant Treasurer, the Hon John Della Bosca, attend in his place at the table of the house to explain his failure to act should section 61 (6) of the *Motor Accidents Compensation Act 1999* remain unproclaimed by a certain date.<sup>28</sup> The provision referred to in Mr Jobling's motion concerned an amendment that had been moved by an independent member of the crossbench, the Hon Helen Sham-Ho, to the *Motor Accidents Compensation Bill 1999* during the committee of the whole stage on 29 June 1999. The amendment, which had been agreed to on the voices with little debate, provided legal rights of appeal to motor accident victims in instances of disputed medical assessments between claimants and insurers where it could be established that the decision-making process used to make the assessment had been unfair. When she moved her amendment, Ms Sham-Ho, stated it was not her intention for it to allow the courts to have hearings as to the merits of any case, given that the bill's objectives were to minimise the legal costs associated with claims and for motor vehicle accidents to be regarded as a medical problem not a legal one.<sup>29</sup> The bill subsequently passed all stages, receiving the Governor's assent on 8 July 1999, and by 10 September 1999 all provisions except section 61 (6) had been proclaimed to commence.<sup>30</sup> Speaking to Mr Jobling's motion, Mr Della Bosca referred to an article in *Caveat*, a journal produced by the Law Society of NSW, which stated that Ms Sham-Ho's amendment was the result of Society lobbying and that its effect was not what had been advanced during the committee of the whole debate, rather it was a provision that would give the courts 'an unaffected discretion to review medical assessors' assessments and to replace them with their own assessment'.<sup>31</sup> Mr Della Bosca then hypothesised that Society had protected its interest in maintaining the legal costs associated with motor vehicle accidents, given section 61 (6) had provided lawyers the means to 'completely misstep the new medical assessments system and suborn the will of the House and the Parliament'.<sup>32</sup> Mr Della Bosca advised the house that he had written to Ms Sham-Ho to explain why section 61 (6) had been unproclaimed and then foreshadowed that he would be amending the Act to '... make it absolutely clear that the right of the court to make a substituted assessment is limited to circumstances where the original assessment is set aside on the grounds of procedural unfairness and substantial injustice'.<sup>33</sup> Debate on Mr Jobling's attempt to have Mr Della Bosca attend the house was adjourned on the motion of Rev the Hon Fred Nile on division (Ayes, 24/Noes, 11).<sup>34</sup> Mr Jobling ultimately withdrew the motion and it was discharged from the Notice Paper on 28 February 2001.<sup>35</sup> The *Motor Accidents Compensation Amendment (Medical Assessments) Bill 2000*, which gave effect to Mr Della Bosca's promise that a court would not have an unfettered power to reject a certificate given by a medical assessor, was introduced into the Legislative Council on 3 May 2000. The bill subsequently passed the parliament on 31 May 2000 and,

while it was not subject to a rigorous debate, it is worth noting the comments made by a crossbench member the Hon Dr Arthur Chesterfield-Evans, Australian Democrats, who stated:

I must confess I was angry that such legislation has not been proclaimed. In a sense, this bill is an alternative to the proclamation of an amendment that was debated and passed in this House previously, which I think is a bad situation...people I have spoken to in the upper ranks of the legal profession were absolutely unaware that large amounts of legislation remain unproclaimed. Many people still believe that the function of the Governor in proclaiming legislation is almost a ceremonial function once Parliament has debated legislation and made a decision. This legislation is living proof that unproclaimed legislation can be changed.<sup>36</sup>

### ***The Legislation Review Committee***

In addition to the requirement for governments to table the unproclaimed legislation list, the Legislation Review Committee (the Committee) provides further oversight through reviewing all legislation brought before the NSW parliament. The Committee's functions regarding bills are outlined in Section 8A of the *Legislation Review Act 1987* which requires, among other things, it report to the parliament as to whether a bill by express words or otherwise includes an inappropriate delegation of legislative power. To that the end the Committee will always note where the commencement of an act is delegated to the executive, once passed by the legislature.<sup>37</sup> The Committee will also note where administrative requirements necessitate that the bill commence by proclamation and thereby does not constitute an inappropriate delegation of legislative powers. In some instances the Committee has also written to the relevant minister seeking advice as to the likely commencement date of an act.<sup>38</sup>

### ***Possible further reforms***

In 2010, the NSW parliament established the Joint Select Committee on Parliamentary Procedure to inquire into reform proposals for the Commonwealth House of Representatives stemming from the *Agreement for a Better Parliament: Parliamentary Reform*, which followed the 2010 Federal Election and the return of a minority Labor Government.<sup>39</sup> Recognising that the Assembly and the Council are differently constituted houses with very different processes and procedures, the Joint Select Committee resolved to divide into two separate working groups comprising members of the respective houses.<sup>40</sup> Each working group considered the reform proposals identified in the *Agreement for a Better Parliament: Parliamentary Reform* relevant to their particular House.<sup>41</sup> One of the many parliamentary processes and procedures considered by the Joint Select Committee in its report was the commencement of legislation. The Council working group made several observations concerning the commencement of legislation, namely:

The failure of some bills to include a provision specifying a date of commencement has led in some instances to delay in the proclamation of certain pieces of legislation...[T]here have also been instances where the Executive Government has not proclaimed amendments made to a bill in the Council, even though the amendments were subsequently agreed to by the Assembly and assented to by the Governor...[S]uch a position effectively places the Executive Government above the Parliament in law making. It is an inappropriate delegation of power from the Parliament to the Executive Government.<sup>42</sup>

To address its concerns regarding the provision for the commencement of legislation, the Legislative Council working group made two recommendations. The first was that the government 'include in the list of unproclaimed legislation tabled in the Legislative Council under standing order 160 (2) reasons why the legislation has not been proclaimed'<sup>43</sup> and, secondly, that it 'adopt a commencement provision in all bills whereby if the act is to commence by proclamation, but has not commenced within 6 or 12 months after assent, it commences automatically'.<sup>44</sup> To support its recommendations the Council working group argued that the commencement of legislation by proclamation was an inappropriate delegation of legislative power to the Executive Government.<sup>45</sup> Despite the working group adopting the above recommendations, its counterpart in the Assembly argued:

The Legislative Assembly notes the concerns raised by the Members of the Legislative Council that this arrangement [the commencement provision] effectively places the Executive Government above the Parliament in law making. However, the view of the Legislative Assembly Members is that there may be some difficulties in providing a commencement date for all pieces of legislation at the time it passes the House. It was noted that the flexibility in commencement by proclamation allowed the Government to delay the commencement of the operation of a law until administrative arrangements or regulations were in place for the law to operate effectively and that this was often necessary.<sup>46</sup>

What is highlighted in the Joint Select Committee's report is a tension between achieving administrative convenience for the executive and recognising the autonomy of the parliament to make and amend laws.

### ***Commencement provision usage rates***

In order to consider how the commencement provision has been used in NSW, all bills introduced parliament in the years 2001, 2007 and 2011 were examined. The three years were selected to provide a sample of three years with distinct intervals since the attempted censure of the Attorney General and Minister for Industrial Relations. From this analysis, it was evident that the commencement provision was used in six ways, namely bills were to commence: by proclamation; on the date of assent; on a specified date; with some provisions on the date of assent and other provisions on later specified dates; with some provisions on the date of assent and other provisions by proclamation; and with some provisions by proclamation and others on later specified dates. The table below shows the frequency of which each

of the six identified commencement types were used. The data shows that for the years 2001 and 2007 more bills commenced by proclamation than any other means, while in 2011 more bills commenced on the date of assent. When the bills for the three years are totalled almost half (48.8%) were to commence by proclamation, however it should also be noted that the number of bills commencing by proclamation is trending downward with the respective percentages being 65.7% in 2001 and 31.5% in 2011. This change can be explained due to an increasing percentage of bills commencing on the date of assent, but could also be partly due to the fact that 2011 was a relatively small sample given it was an election year in which the parliament was prorogued for almost six months.

<b>Categories for the commencement of legislation:</b>	<b>2001</b>	<b>2007</b>	<b>2011</b>	<b>Total</b>
Proclamation	86 (65.7%)	39 (39.4%)	23 (31.5%)	148 (48.8%)
Date of assent	16 (12.2%)	36 (36.3%)	37 (50.7%)	89 (29.4%)
On a specified date	17 (13%)	9 (9.1%)	7 (9.6%)	33 (10.9%)
With some provisions on the date of assent and other provisions on later specified dates	8 (6.1%)	3 (3%)	N/A	11 (3.6%)
With some provisions on the date of assent and other provisions by proclamation	2 (1.5%)	8 (8.1%)	4 (5.5%)	14 (4.6%)
With some provisions by proclamation and others on later specified dates	2 (1.5%)	4 (4.1%)	2 (2.7%)	8 (2.7%)
<b>Total</b>	<b>131</b>	<b>99</b>	<b>73</b>	<b>303</b>

Following the analysis of commencement provision usage rates, the paper also examined the unproclaimed legislation list to identify whether the number of acts with unproclaimed provision(s) also appeared to be declining. Three unproclaimed lists, tabled in 1997, 2003, and 2012, were selected to provide a sample with three distinct intervals covering the sixteen years since the list was first tabled. As at 16 October 2012, there were 79 acts with unproclaimed provision(s) on the list of unproclaimed legislation.<sup>47</sup> This figure is lower than the comparable numbers for 2 December 1997 and 11 November 2003 where there were 104 and 96 Acts with unproclaimed provision(s) respectively. Consistent with use of the proclamation device trending downward, the number of acts with unproclaimed provision(s) on the list of unproclaimed legislation is also getting smaller. Without being privy to the deliberations of the executive and the Parliamentary Counsel's office regarding legislative drafting, one can only speculate as to why the number of acts on the unproclaimed legislation list has decreased. It could be that the attempted censure of

the industrial relations minister — which ultimately led to the requirement for governments to table the unproclaimed legislation list — together with the ongoing work of the Legislation Review Committee and the 2010 report of the Joint Select Committee on Parliamentary Procedure, has kept the parliament wary of the possibility that the proclamation device is being abused. Whatever the reason, it would appear difficult to argue that increased oversight has not had an impact on minimising any potential misuse of the power to proclaim legislation. The other point to make is that, with the number of bills using the proclamation device declining, it is clear that — while the power to commence legislation by proclamation remains — the use of this power is not escalating out of control.

Moving to other areas of interest on the unproclaimed legislation list, there are currently no recorded acts with provision(s) amended in the committee of the whole stage in the Legislative Council that are yet to come into effect. The most recent example of an act to have been on the list for a significant period, with unproclaimed provisions amended by the Legislative Council, was the *Law Enforcement (Powers and Responsibilities) Amendment (Detained Person's Property) Act 2008* which had been on the list for close to four years before being repealed by schedule 4.3 of the *Crimes Legislation Amendment Act 2012* on 24 September 2012.<sup>48</sup> The following table lists the categories under which the acts with unproclaimed provision(s) fall.<sup>49</sup> The numbers are spread across a variety of policy areas indicating that commencement by proclamation is not limited to any one portfolio, rather it is something that applies to the many areas where governments legislate.

Act Category	Number
Social and Community Services	7
Resources and Energy	4
Uniform Legislation	9
Regulatory	11
The Environment	9
Industrial and Workplace Relations/Occupational Health & Safety	11
Public Utilities and Infrastructure	2
Consumer Protection/Fair Trading	4
Local Government	1
Law and Order	11
Health	6
Transport	2
Planning	2
<b>Total</b>	<b>79</b>

The oldest act on the list of 16 October 2012 is the *Miscellaneous Acts (Disability Services and Guardianship) Repeal and Amendment Act 1987*. Section 3 of that act is unproclaimed and if proclaimed would repeal the *Youth and Community Services Act 1973*.<sup>50</sup> There are three acts, introduced prior to the current coalition government's term beginning May 2011, on the list where the entire act remains unproclaimed. These are: the *Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act 2009*, the *Court Information Act 2010*, and the *Public Health Act 2010*. One of the wholly unproclaimed Acts, the *Court Information Act 2010*, was introduced by the then labor government to promote open justice in the state's courtrooms by establishing a new system of access to information held by the courts that balanced the competing considerations of open justice and individual privacy.<sup>51</sup> When introduced, the then Parliamentary Secretary for Justice noted that the bill was the product of an extensive and comprehensive consultation process undertaken by the Attorney General's department and had been broadly supported by a number of stakeholders including the NSW Chief Justice.<sup>52</sup> While another act of the former government on the list, the *Mine Health and Safety Act 2004*, legislation designed to secure the health, safety and welfare of persons in connection with mines, has left a clause, which would prevent a mine operator from providing a financial benefit or incentive to a person to discourage reporting of a health or safety matter, unproclaimed.<sup>53</sup> The clause was trumpeted as an important element of the bill by then Minister for Mineral Resources during his second reading speech<sup>54</sup> and was also strongly supported by the then shadow minister,<sup>55</sup> yet eight years after the bill was assented to the clause remains unproclaimed.

In both instances, the above acts had the support of the majority of members in both houses and passed unamended without lengthy or hostile debate. Promoting open justice and increasing mine safety are both laudable policy objectives, so one must ask if a bill receives broad support, is intended to benefit the state and passes through the parliament quickly to become law, should it not commence as soon as practicably possible if there are no justifiable reasons for delay?

### ***Conclusion***

As mentioned in the introduction, the proclamation device allows a government to delay the operation of an act until administrative arrangements or delegated legislation are in place to allow the statute to operate. The issue here is not the administrative convenience this affords but the reality that this effectively allows an executive to determine when, or even if, a law duly passed by the NSW parliament will have effect. Writing about the commencement of legislation by proclamation in the 1980s, Ms Anne Lynch, a former Deputy Clerk of the Australian Senate, argued that:

1. what, in effect, the Parliament is doing is delegating its most important function, that of legislating, to the executive to implement the will of the people as expressed through its parliamentary representatives. Thus, in practical terms,

- it places in the hands of the bureaucracy an enormous power to gainsay or even override the wishes of the people;
2. if legislation is passed without a time limit set on its implementation, it provides encouragement because there is no pressure to have structures and administrative details in place by a defined date to the bureaucracy to be tardy in implementing schemes determined by Parliament;
  3. it can be a method of window dressing, so that the executive can declare that an Act of Parliament has been passed in order to help a disadvantaged group within a community without ever having to mention that there is no intention to implement the proposals contained therein because of, for example, a lack of money;
  4. it can also be used as an instrument of blackmail for example, 'we will pass this legislation, but will not bring it into effect until you, the citizen, behave in a particular way which we do not like'; and
  5. finally, and in my view most significantly, the failure to proclaim a law whether in whole or, as now more frequently and insidiously occurs, in part leaves those with a need to be concerned about what the law is in a state of constant indecision and doubt. It is, one might have thought, reasonable to expect that the law is known to operate as a result of its passage through all three constituent parts of the Parliament; that is, by passage of a bill through the House of Representatives and the Senate and Assent by the Governor-General. This together with a known date of operation alone gives certainty to the law.<sup>56</sup>

The Commonwealth parliament has since addressed the issues identified by Ms Lynch through its adoption of an automatic commencement provision.

Unproclaimed legislation was first debated in the NSW Legislative Council in 1990 and nothing was achieved of any practical effect to address the situation. It was not until the attempted censure in 1996 over the failure to commence parts of the *Industrial Relations Act 1996*, that the Legislative Council adopted a mechanism to provide any formal oversight to laws commencing by proclamation — the unproclaimed legislation list. The requirement for governments on the second sitting day of each month, to table a list of all legislation not proclaimed 90 days after assent, has since been incorporated in the Legislative Council's standing orders while further oversight has been provided by the Legislation Review Committee. Further, both the number of bills commencing by proclamation and acts with unproclaimed provision(s) have trended downward showing that the proclamation device has been used less frequently. Despite this progress, the executive still has the capacity to create a loophole through which it can ignore the legislative decisions of parliament. To support parliamentary democracy in NSW, and to better enable the parliament to hold the executive to account, it is easy to make a case in support of the recommendations made by the Legislative Council working group on the Joint Select Committee on Parliamentary Procedure regarding unproclaimed legislation. Namely, that the government include in the list of

unproclaimed legislation reasons as to why the legislation has not been proclaimed, and adopt a commencement provision in all bills whereby if the act is to commence by proclamation, but has not commenced within 6 or 12 months after assent, it commences automatically.<sup>57</sup> If adopted, these recommendations would have two effects: first, the administrative convenience afforded to the executive, by allowing a reasonable period of time to delay the operation of an act until administrative arrangements or delegated legislation are in place to allow the statute to operate, would be maintained; secondly, the parliament's most important function, democratically elected parliamentary representatives implementing the will of the people by developing legislation, would be undoubtedly strengthened. ▲

## References

- <sup>1</sup> Lovelock and Evans, 2008, *New South Wales Legislative Council Practice*, the Federation Press, Leichardt, p 391.
- <sup>2</sup> Harris, 1997, 'Accountability and the New South Wales Parliament', *Canberra Bulletin of Public Administration*, No. 83, p 72, and Lynch, 13 May 1987, 'Proclamation of Acts — When...How...If?', *The House Magazine*, p 5.
- <sup>3</sup> Lovelock and Evans, 2008, op. cit, pp 12–13.
- <sup>4</sup> *Ibid*, p 13.
- <sup>5</sup> For further information see: Lovelock and Evans, 2008, op. cit, 'The Legislative Process' pp 340–92.
- <sup>6</sup> Lovelock and Evans, 2008, op. cit, p 389.
- <sup>7</sup> *Interpretation Act 1987* (NSW), s 23(1)(a)(b) and (c).
- <sup>8</sup> For an example see: <http://www.legislation.nsw.gov.au/sessionalview/sessional/sr/2012-531.pdf>, retrieved 31 October 2012.
- <sup>9</sup> *Interpretation Act 1984* (Vic), s 10(a); *Acts Interpretation Act 1915* (SA), s 7(5); *Legislation Act 2001* (ACT), s 79; and *Odgers' Australian Senate Practice*, 2012, 13<sup>th</sup> edn, Evans and Laing (eds), p. 341.
- <sup>10</sup> *Acts Interpretation Act 1954* (QLD), s 15(DA).
- <sup>11</sup> Evans and Laing (eds), 2012, op. cit., p 341.
- <sup>12</sup> *Ibid*, p 340.
- <sup>13</sup> Laing (eds), *Annotated Standing Orders of the Australian Senate*, [http://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/aso/sol39](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/aso/sol39), retrieved 31 October 2012.
- <sup>14</sup> *Ibid*, p 424.
- <sup>15</sup> Harris, op. cit, p 73.
- <sup>16</sup> *LC Minutes* (11/10/1990) 463.
- <sup>17</sup> *LC Debates* (11/10/1990) 8225.
- <sup>18</sup> Evans and Lovelock, 2008, op. cit, p 486, and *Journal of the Legislative Council, Minutes of Proceedings, 1990–1991*, 181, p 755.
- <sup>19</sup> *LC Debates* (23/5/1996) 1429.
- <sup>20</sup> *LC Debates* (23/5/1996) 1429.
- <sup>21</sup> *LC Debates* (23/5/1996) 1427–29.

- <sup>22</sup> *LC Minutes* (5/6/1996) 199; and *LC Minutes* (17/6/1996) 210.
- <sup>23</sup> *LC Debates* (22/10/1996) 5094.
- <sup>24</sup> *LC Debates* (22/10/1996) 5118–19.
- <sup>25</sup> *LC Minutes* (13/11/1996) 442.
- <sup>26</sup> Lovelock and Evans, 2008, op. cit, p 486.
- <sup>27</sup> *Government Gazette No 18* of 14 February 1997, p 545.
- <sup>28</sup> *LC Minutes* (16/11/1990) 219–20.
- <sup>29</sup> *LC Debates* (29/6/1999) 1551.
- <sup>30</sup> See historical notes for the *Motor Accidents Compensation Act 1991* available at NSW Legislation: <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+41+1999+cd+0+N>, retrieved 4 December 2012.
- <sup>31</sup> *LC Debates* (16/11/1999) 2821.
- <sup>32</sup> *LC Debates* (16/11/1999) 2821.
- <sup>33</sup> *LC Debates* (16/11/1999) 2821.
- <sup>34</sup> *LC Debates* (16/11/1999) 2824.
- <sup>35</sup> *LC Minutes* (28/2/2001) 854.
- <sup>36</sup> *LC Debates* (24/5/2000) 5647.
- <sup>37</sup> The Legislation Review Committee is a current joint statutory committee, established 8 May 2003, and re-established 22 June 2011. The Legislation Review Committee has two broad functions: to scrutinise all bills introduced to Parliament; and all regulations subject to disallowance according to the criteria set out in those sections.
- <sup>38</sup> New South Wales Parliament, Legislation Review Committee, 2003, Report No 2, *Legislation Review Digest*, p 3.
- <sup>39</sup> New South Wales Parliament, Joint Select Committee on Parliamentary Procedure, 2010, Report No 1, *Reforms to parliamentary processes and procedures*, p xi.
- <sup>40</sup> *Ibid* p 1.
- <sup>41</sup> *Ibid* p 1.
- <sup>42</sup> *Ibid* p 58.
- <sup>43</sup> *Ibid* p 58.
- <sup>44</sup> *Ibid* p 59.
- <sup>45</sup> *Ibid* p 59.
- <sup>46</sup> *ibid*, p.26.
- <sup>47</sup> The list can be accessed at [http://www.parliament.nsw.gov.au/prod/lc/lctabdoc.nsf/AllTabledPapers?SearchView&query=\(unproclaimed\\*\)&searchorder=4](http://www.parliament.nsw.gov.au/prod/lc/lctabdoc.nsf/AllTabledPapers?SearchView&query=(unproclaimed*)&searchorder=4), accessed 31 October 2012.
- <sup>48</sup> NSW Legislation, *Crimes Legislation Amendment Act 2012*, <http://www.legislation.nsw.gov.au/xref/inforce/?xref=Type%3Dact%20AND%20Year%3D2012%20AND%20no%3D67&nohits=y>, retrieved 31 October 2012.
- <sup>49</sup> Please note that the above categories are deliberately broad so as to provide scope in which to identify patterns concerning acts with unproclaimed provision (s). The Acts above have also been categorised subject to the author's interpretation.
- <sup>50</sup> NSW Legislation, *Miscellaneous Acts (Disability Services and Guardianship) Repeal and Amendment Act 1987*, <http://www.legislation.nsw.gov.au/sessionalview/sessional/act/1987-262.pdf>, retrieved 31 October 2012.

<sup>51</sup> *LA Debates* (19/3/10) 21774.

<sup>52</sup> *LA Debates* (19/3/10) 21774.

<sup>53</sup> See historical notes for the *Mine Health and Safety Act 2004* available at NSW Legislation: <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+74+2004+cd+0+N>, retrieved 31 October 2012.

<sup>54</sup> *LA Debates* (7/5/04) 8637.

<sup>55</sup> *LA Debates* (14/5/04) 9088.

<sup>56</sup> Lynch, 1988, 'Legislation by Proclamation Parliamentary Nightmare, Bureaucratic Dream', *Papers on Parliament No. 2*, Department of the Senate, Parliament House, Canberra, p 6.

<sup>57</sup> New South Wales Parliament, Joint Select Committee on Parliamentary Procedure, 2010, *op. cit.*, pp 59–69.

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## **Through the lens of accountability: referral of inquiries by ministers to upper house committees\***

**Merrin Thompson**

### ***Introduction***

The New South Wales Legislative Council is alone among upper houses around Australia in providing for the referral of inquiries to committees by a minister of the Crown. The resolution establishing the standing committees upon the commencement of each parliament states that a committee ‘is to inquire into and report on any matter relevant to the functions of the committee which is referred to the committee by resolution of the House’, and that a committee ‘may inquire into and report on any matter relevant to the functions of the committee which is referred by a Minister of the Crown’.<sup>1</sup> While such references are common amongst lower houses, they stand at odds with the Senate model of referrals only via the chamber itself, and challenge core principles of bicameralism that emphasise the role of the upper house in holding the executive government to account. Allowing the government of the day to determine the work of an upper house committee is anathema to the principle that the house of review is independent of executive government and is master of itself and its subsidiary bodies. It is the autonomy of the upper house which enables it to examine the matters it sees fit. Yet ministerial references to Legislative Council standing committees have been in place for 25 years and are taken for granted by members of all political persuasions as a valuable component of the Council’s committee system. This paper defends the Legislative Council’s provision for ministerial references to standing committees, using the Law and Justice Committee as a case example. Referring to historical debates informing the establishment of the committee system, it reveals that the Council’s standing committees were intended by both government and opposition members to be different to the adversarial, ‘problem’-focused committees of other upper houses, and rather, to work cooperatively with ministers to develop more effective policy.

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The paper then explores the views, gathered via interviews, of former committee members, parliamentary clerks and the head of a government department, with regard to the risks and benefits of ministerial references in the context of the upper house. It is argued that, whilst the provision challenges important conventions concerning the independence of the upper house, it nevertheless has a legitimate and valuable place in a house of review. The reasons are, first, it is supported by procedural safeguards which uphold the control of the house over the work of committees; secondly, it is complemented by a range of mechanisms which enable the Legislative Council to fulfill its scrutiny role; thirdly, it enables detailed investigation of policy issues and the development of informed policy proposals; and fourthly, it facilitates deliberative democracy through the engagement of minority interests in the policy process. The paper argues that, by occurring in the context of a second house elected by proportional representation, the provision for ministerial references facilitates the power-sharing relationships characteristic of strong bicameralism, by providing a mechanism by which the executive can and does cede some control over the consultation and deliberation process. Thus, by facilitating the engagement of non-executive actors in the policy process, ministerial references enrich the review function of the upper house. The methodology used is of semi-structured interviews with key informants whose views are essentially opinion-based. Thus, its analysis cannot be said to have a factual or objective basis. Perhaps a more effective evaluation of the impact on the independence of the upper house would be achieved by comparing the outcomes of committee work on similar policy matters in different jurisdictions. Nevertheless, the interviews and analysis yield compelling arguments about the place of ministerial references in an upper house and interesting insights into the role of the upper house and its committees.

### *Review of the literature*

#### **Bicameralism and the accountability of government**

A substantial focus in the literature on bicameralism has been on the role of the upper house in holding the executive to account. As one commentator argued, 'effective parliamentary scrutiny of the executive lies at the heart of a system of parliamentary government.'<sup>2</sup> Since the United Kingdom Bill of Rights 1688 established that the Crown required the approval of the parliament to govern, the business of has not simply been to make laws but also to scrutinise the government of the parliament day, thereby safeguarding against poor administration and the abuse of power.<sup>3</sup> It is well recognised, however, that that the domination of the lower house by the executive limits the scrutiny exercised by that house, such that a second house which is differently constituted and thereby less likely to be government controlled is a vital forum for accountability.<sup>4</sup> A key vehicle through which the accountability function of upper houses is exercised is through committees, whose role is to undertake inquiries on behalf of the parliament and conduct the annual budget estimates process. Lovelock and Evans underscore the

value of parliamentary committees in scrutiny of the executive by observing that while anyone can undertake inquiries by asking questions and considering answers, 'parliamentary inquiries are distinguished by the power of parliament to compel witnesses to attend and to answer questions, and the protection of the inquiry process by parliamentary privilege.'<sup>5</sup>

### **The role of the upper house and its committees in policy development**

While the literature on bicameralism has much to say about the accountability role of the upper house and its committees, their role in policy development has not been explored in a substantial way. One noteworthy contribution is made by Halligan, Power and Miller, who substantiate this role in relation to both houses. In their comprehensive study of the committee systems of the Australian parliament, they argue that while the ultimate role of parliament is to hold the government to account, committees of both houses also fulfill other traditional parliamentary roles by contributing to lawmaking and detailed consideration of public policy.<sup>6</sup> They argue that committees have contributed significantly to the revival of parliament as an institution over the last four decades, enabling members of parliament to 'find new and effective ways of pursuing policy agendas', and for non-government parties to engage in meaningful deliberations about public policy.<sup>7</sup> They go on to affirm the bipartisan work that is not characteristic of the accountability function.<sup>8</sup> Writing alone, Halligan suggests that, '[t]here remains huge untapped potential for parliamentarians to further explore the strategic dimension of investigation, often on a cross-party basis.'<sup>9</sup>

### **The upper house, committees and deliberative democracy**

The engagement of non-government actors in the policy process is the core of deliberative democracy. Like Halligan et al, John Uhr highlights that parliament can be and is so much more than the holding of government to account. In his 1998 book, Uhr links deliberative democracy with parliament's representation of minority interests and its engagement of them in political debate, observing a 'ladder of parliamentary business which moves between reactive parliamentary mechanisms of government accountability through to proactive parliamentary mechanisms contributing to public appreciation and debate over law and policy'.<sup>10</sup> In a 2008 paper, Uhr explicitly links deliberative democracy to bicameralism through the representativeness of upper houses elected via proportional representation, which has enabled a broader range of parties to take their place in the legislature, thereby engaging them and the public more broadly in deliberative processes.<sup>11</sup> In this context, Uhr suggests that bicameralism 'is about power-sharing relationships', and argues that 'strong bicameralism describes an institutional environment for multiparty political deliberation that can nurture effective political negotiation and generate feasible policy compromises.'<sup>12</sup>

### **Ministerial references to committees**

Little attention has been given in the literature to ministerial references to committees. While the Senate makes no provision for referral of inquiries by a minister, the House of Representatives does, and they are standard practice in other lower houses. The Senate's discomfort about the possibility of government control of its inquiries is readily apparent in the literature. Writing in the context of the Howard Government's changes to the structure of Senate committees made possible by its watershed majority in both houses, former Clerk of the Senate, Harry Evans, points to the general dangers of executive control of upper house committees:

In this situation, there is a danger of a parliamentary committee system becoming a mere stage set, with committees inquiring only into matters determined by the government on terms of reference approved by ministers, the conduct of inquiries determined in accordance with the government's wishes, evidence selected according to the government's view of the subject and reports written to reflect that view. In short, a committee system can become a mere echo chamber in which the government simply listens to its own voice.<sup>13</sup>

If the executive's ability to refer inquiries to upper house committees is so unusual, and the risks of executive control are so serious and clear, how did the provision for ministerial references to NSW Legislative Council committees come about, and what role were they intended to have within the context of the upper house? These questions will be explored following a description of the Council's committee system.

### ***The Legislative Council committee system***

The Council has two complementary sets of standing committees that undertake inquiries on its behalf: the Law and Justice, Social Issues and State Development Committees, known collectively as the 'standing committees'; and a set of five 'general purpose standing committees' or GPSCs, each of which conducts scrutiny over specific government portfolios. Both sets exist for the life of the parliament in which they are appointed. In addition, alongside its Privileges and Procedures Committees, the Council provides for select committees to inquire into matters referred by the house, which then cease to exist once they have reported to it. The standing committees are government dominated by design, and undertake policy-oriented, in-depth, longer-term inquiries into complex matters, generally operating on a consensus basis with bipartisan findings and recommendations. By contrast, GPSC committees have a majority of non-government members and are generally characterised by inter-party conflict. Their inquiries are more accountability-focused, examining controversial decisions and matters of government administration, and tend to be shorter-term. The GPSCs are also responsible for the annual budget estimates process.<sup>14</sup> The resolution establishing the standing committees sets out that they *must* inquire into matters referred by the house and *may* inquire into matters referred by a minister.<sup>15</sup> Prior to 2007 the resolution set out that a committee 'shall' inquire into matters referred by either the house or a minister.<sup>16</sup>

The change from 'shall' to 'may' in relation to ministerial references was made in order to clarify the power of a standing committee to decide not to adopt such a reference.

### ***The establishment of the standing committee system***

The provision for ministerial references to Legislative Council standing committees has existed as long as the modern standing committee system, which was established with bipartisan support in 1988. In the early to mid 1980s, several debates took place in the Council that informed the establishment of the modern committee system. While these debates did not specifically address the issue of the source of references, a reading of them indicates that both government and opposition members sought a role for these committees which gave detailed consideration to substantive policy issues such as 'drug addiction', and 'indigenous people'.<sup>17</sup> Also, while opposition members at least sought an accountability role for the committees, they envisaged that the committees should not be used as a mechanism by which to embarrass the government, but rather, should work cooperatively with ministers to investigate matters 'which will give the government of the day the opportunity to show initiative, to solve problems, and to plan for the State's future.'<sup>18</sup> The Select Committee on Standing Committees was given the task of designing the new committee system and, after considering various models including that of the Senate, it proposed a new approach that was less adversarial and more forward-looking.<sup>19</sup> Its unanimous report, released in 1986, recommended that references be initiated by the Council, the government, and committees themselves, with the succinct explanation that, 'undue restrictions on the reference mechanisms cannot be justified.'<sup>20</sup> The Standing Committees on Social Issues and State Development were established in 1988 under the Greiner Liberal/Country Party Coalition government, followed by the establishment of the Standing Committee on Law and Justice in 1995 under the Carr Labor administration. The more accountability focused GPSCs were appointed in 1997.

### ***Ministerial references: views of interviewees***

Twenty-five years on from the establishment of the Legislative Council's standing committees, how are ministerial references perceived by key stakeholders? Are they operating as they were intended, and what are the perceived risks and benefits of such references? Have the risks associated with allowing executive references been realised? In order to examine these questions, semi-structured interviews were conducted with three former members of the Law and Justice Committee: a government chair, an opposition member and a cross-bench member. In addition, seven former or serving parliamentary clerks were interviewed including the present Clerk and Deputy Clerk of the Legislative Council, two former Clerks, the Clerk of the Law and Justice Committee, and the Clerk of the Senate. Finally, the head of a government department gave his perspective as a senior policy actor involved in the initiation of references and the consideration and implementation of

their recommendations. The interviews focussed on participants' views of such references within an upper house and the risks and benefits of the provision. These elements are explored from the perspective of two clear groups of participants — those with reservations about ministerial references, and those in support of them. The former group comprised three clerks, while the latter comprised several, each of the members and the head of department.

### **Views on the place of ministerial references in an upper house**

Two clerks had strong reservations about ministerial references. For these participants, allowing the executive to direct the work of a committee constitutes a dangerous handing over of control by the house to determine its own agenda and undermines the role of the upper house in holding the executive to account. For example, the Clerk of the Senate described the provision as 'anathema' to the Senate model:

The idea of a minister ... giving a reference, which is basically an instruction to a Senate committee, has never been part of our procedures. The Senate owns its committees and only the Senate can direct what they do. In a very practical procedural way it recognises that Senate committees are delegated bodies of the House ... Everything that they do is subject to the direction of the House.

A third clerk expressed ambivalence about the provision, sharing the above views whilst also recognising the policy contributions of the Council's standing committees.

By contrast, all those who supported ministerial references saw them as a non-controversial and valued element of the Council's committee system. Each of the members was puzzled by the fact that ministerial references could be seen to be inappropriate. Asked to respond to the 'anathema' position, these interviewees pointed to the perceived benefits of ministerial references — as outlined below. Several also pointed to the procedural safeguards which they saw as maintaining the house's control over its own agenda: the requirement that a committee resolve to adopt a reference and the corresponding ability not to adopt it; the requirement that once adopted, the committee report the reference to the house, at which point the house can pass a resolution to amend or reject the reference;<sup>21</sup> and the capacity of the house, should it be so concerned about a reference, to make an instruction about how an inquiry should be carried out.<sup>22</sup> Noting these safeguards, one senior clerk explained his position as being that, 'I don't think the executive should tell a committee what it must look into, but I see no problem in it making a recommendation on what it could inquire into'. Several participants also argued that while the government might refer the inquiry, and might have the chair and 'the numbers' on the committee, the presence of opposition and cross-bench members means that the government controls neither the inquiry process nor its outcomes. Two senior clerks argued that, rather than undermining the Council's role as a house of review, the provision facilitates that role by enabling detailed investigation of complex policy issues.

### **Perceived risks**

Participants identified several closely interrelated risks associated with ministerial references to upper house committees. In keeping with their fundamental concern about inappropriate executive control of the upper house, the interviewees with reservations about ministerial references pointed to the first risk that the mechanism is open to exploitation, such that committees might be misused for party political purposes and become a tool of the executive. It was suggested that such references will inevitably be safe, non-controversial ones that keep backbench members busy and maintain the government's agenda. A second, related risk was articulated by one clerk in terms of opportunity costs: that government-referred inquiries might divert committee resources from the core upper house role of holding the executive to account. Finally, another clerk with reservations identified the risk that the executive might use the committee as 'fall guy' on controversial policy issues: rather than initiating its own approach to a difficult policy issue, by referring it to a committee, the government keeps it at arms' length and lets the committee 'take the heat' for difficult decisions.

### **Perceived benefits**

Those in support of ministerial references identified a number of interrelated benefits. The principal benefit identified by both clerks and members is that they enable detailed investigation of complex policy issues and provide a well-informed potential way forward for policy. Each of the members clearly valued the opportunity to examine in detail sometimes controversial policy issues. They also valued the cross-party process of inquiries, whether or not they proceeded on a consensus basis. A second perceived benefit was that ministerial references inform committee members and other parliamentarians on matters that may come before parliament. The members saw that, in undertaking an inquiry, not only were they informing themselves on issues, they were also informing their parliamentary colleagues. The committee clerk observed that members see a report prepared by a parliamentary committee as having particular authority and feel comfortable relying on its content because they are familiar with the inquiry process. Another clerk highlighted recent examples of debates informing conscience votes on legislation for adoption by same-sex couples and altruistic surrogacy, during which the majority of members from across the chamber made extensive reference to committee reports. Thirdly, both members and clerks underscored the value of engaging diverse community members, interest groups and experts in the inquiry process via submissions and public hearings. This was seen as a more transparent and inclusive process compared with consultations conducted by government agencies. A fourth perceived benefit was that these inquiries informed the executive. Here, the head of department suggested that the authority attached to committee reports makes it easier for a government and its individual members to make decisions about particular policy issues. From his perspective, ministerial references have proven particularly helpful in respect of issues with both a social and legal dimension, which he suggested governments often have trouble grappling

with. In his view, parliamentary committees are able to look at the issues more objectively, at least in part because of their diverse membership. He reported that in his experience, the standing committees generally come up with sensible and informed recommendations that are both respected and readily digested, and that are not necessarily identified with any particular party.

### **Responses to perceived risks**

Several interviewees who supported ministerial references were asked to respond to the risks identified by those against it. While the weight of opinion amongst the group that supported ministerial references was that in the vast majority of cases the provision was used with integrity, both the former chair and two senior clerks acknowledged that there had been instances of misuse by the executive. The former chair reported that she had observed other committees seek a certain outcome for the government (of which she was then a member) from particular inquiries. The instances where clerks recalled misuse included an inquiry into a federal government issue in the lead-up to an election, and a further three where a ministerial reference was perceived to have been made to ‘head off’ an inquiry by a non-government dominated committee. In relation to the latter, it was noted that if the house had been so aggrieved about a reference it could have stepped in, and in one instance did so by amending the terms of reference and issuing an instruction to delay the commencement of the inquiry.<sup>23</sup> Both clerks were firmly of the view that these abuses were in the minority, and that on the whole, the mechanism had been appropriately utilised. Responding to the perceived risk that government-referred inquiries divert committee resources from the core upper house role of holding the executive to account, both senior clerks argued that there has been a strong accountability element to many inquiries referred by ministers, which commonly examine the performance of government and make recommendations for the improvement of administration. One clerk expressed his confidence that both the standing and GPSC committees are effectively resourced.

Interestingly, responses to the risk that a committee might be used by the government as the ‘fall guy’ for controversial policy debates and decisions were generally pragmatic. Both the former chair and cross bench member accepted that the government ‘diverted flack’ from itself during several Law and Justice Committee inquiries, while the latter underscored the significant input of diverse stakeholders, the depth of consideration of the issues, and the questioning of participants from a number of viewpoints, suggesting that, ‘to some extent the airing of those conflicting views is as important as anything.’ The committee clerk spoke about the members’ commitment to the process despite their disparate views. She saw great value in the committee conducting itself as a microcosm of the house, with its diversity of membership and views, coming together to consider an issue in detail on behalf of the house. Finally, a senior clerk agreed that the ‘fall guy’ suggestion did seem to be the case for many of the recent Law and Justice Committee inquiries, but saw this as a ‘win-win situation’: ‘It’s good for the

development of public policy, it's good for the reputation of the committee system and the House, and it may as a by-product be good for the government as well.'

### *Discussion*

This paper has considered the unique provision for ministerial references to upper house committees of the NSW Parliament, examining the debates informing the establishment of the standing committee system, and analysing the views of a number of parliamentary clerks and committee members and a senior public servant on the risks and benefits of the provision. It is noteworthy that broadly, those who had worked within the Senate model of committees had reservations about ministerial references, while almost all those whose experience was of the Legislative Council model strongly supported it. On the one hand, this points to a limitation of the study: it could be said that each participant was likely to defend the system within which they worked. On the other, the convergence in the strong support of a number of clerks, the senior public servant and each of the members also points to some value in the provision as well as the legitimacy attached to it in that legislature. While the debates documented earlier do not refer to ministerial references as such, it can perhaps be inferred from them in tandem with the report of the Select Committee on Standing Committees that the provision for ministerial references to Legislative Council standing committees was introduced with a noble purpose supported by all parties at the time: that these committees would work differently to those of other upper houses which were narrowly focused and adversarial, and rather, would work constructively with the government of the day in the interests of better policy and administration. The interviews suggest that in the vast majority of cases, this purpose has been upheld over a period of 25 years. Thus it can be said that while the provision does constitute a significant break with convention, it has been governed by alternative conventions that have nevertheless operated effectively to uphold the integrity of the standing committee system.

A principal concern about the provision for ministerial references is that they subvert the authority of the house, which is privileged to determine its own agenda and that of its subsidiary bodies. On first thought it is alarming that an upper house has resolved this way, conferring certain powers on ministers in relation to the work of committees. However, as several interviewees pointed out, a number of procedural safeguards ensure that the control of the house has been retained: the resolution of the house establishing the committees provides that a committee may — or may not — adopt the reference from the minister, and gives the house right of veto. This means that the reference operates as a request, not an order, by a minister. The fact that the house has acted to amend an inquiry's terms of reference and to delay its commencement is testimony to the fact that the Council's autonomy and authority remains intact.

With regard to the capacity of a committee to decline a reference, it noteworthy that this was clearly delineated as recently as 2007 because it was considered by the Clerk at the time that the wording that a committee 'shall' undertake an inquiry

referred by a minister was inconsistent with the authority of a committee as a subsidiary body of the house. While there had not been any instances where a committee sought to decline a reference but found that it could not, it was considered important to clarify that committees are not subject to executive direction. Since then, amendments to references have occasionally been made, and there has been one instance where a reference was not acted upon by a committee — in a decision related to committee workload rather than political considerations.

Interviewees provided a number of counterarguments to another key concern that ministerial references detract from the accountability function of the house of review. There has been a strong element of scrutiny built into many inquiries referred by ministers, such that while they might be forward looking and investigative, rather than reactive and problem-focused, they nevertheless illuminate and make recommendations on what needs to improve in government administration. Also, even if the government chair is very disinclined to air criticism of government (as has only rarely been the case), the presence of opposition and cross-bench members on a committee ensures scrutiny of the issues. Further, these references are counterbalanced by strong accountability mechanisms in the Council, including: the provision for referral of inquiries by the house to standing and select committees (as with the Senate); the provision for self-referred and house-referred inquiries to the non-government dominated GPSCs; the annual budget estimates process; the power of the house to call for executive documents; and question time. Adding to the procedural legitimacy of the provision is that it was introduced by a house elected by proportional representation and without a government majority, and has remained in place under the same conditions since that time, to the extent that it is taken for granted as both valuable and uncontroversial by clerks and members alike. Governments of both persuasions have made use of it, and if it were abused by the government of the day, the non-government majority could overturn it.

Two benefits of ministerial references identified by participants are reflected in the literature. The first is the in-depth investigation of policy issues which was validated by both Halligan et al. and Uhr as a valuable role for parliamentary committees, while the second is the way that such references facilitate the engagement of community members and interest groups in the policy process. Yet, arguably, these perceived benefits could also apply to other inquiries, whatever the source of referral, and whether they are undertaken by an upper or lower house committee. Together, two important factors point to the unique and valuable place that ministerial references can take in an upper house. The factor concerns the representativeness of the standing committee undertaking the inquiry, which comprises three government, two opposition and one cross bench member (and a government chair with a deliberative vote). On Uhr's analysis, such multi-party deliberation is made possible by the system of proportional representation by which the Legislative Council is elected. This kind of deliberation is much less likely to occur in a lower house, because of its majoritarian composition and the executive's clear domination of processes there. The second important factor is that the

committee — and the various inquiry participants — are effectively invited to the policy table by the executive through the process of a ministerial reference. The interviews suggest that the provision for ministerial references facilitates the ‘power-sharing relationships’ that Uhr sees as characteristic of strong bicameralism. While in making a reference the government is in no way handing over control of a policy issue, it is ceding authority over at least part of the consultation and deliberation process, and is inviting a range of non-executive actors, both in the parliament and in the community, to have some influence. In this forum, Uhr suggests, effective negotiation can take place and successful compromises can be reached, which may go on to inform future policy and legislation. Thus, the outcome of policy development can actually be heightened through the ability of a committee to receive a reference from the executive. Arguably, these practices are consistent with the role of a house of review, enriched as it is by a membership which is more representative of the community than that of the lower house. This role is to hold the executive to account and to give informed consideration to matters of legislation and policy. In this sense, rather than being an anathema, not only are ministerial references to committees of the Legislative Council a procedurally legitimate provision; they are also a valuable means by which it fulfils its review function. Looking through the lens that accentuates the accountability role of the upper house, it may appear strange that ministers work collaboratively with parliamentary committees and actually share some of their power with non-executive policy actors for altruistic reasons. On the other hand, it is encouraging and enlightening that to date governments have largely upheld the integrity of the Legislative Council’s standing committee system, inviting others to assist them to pursue more effective policy, just as it appears the architects of the system intended. ▲

## Endnotes

<sup>1</sup> Paragraph 5(1)(a) and (b), Standing Committees: Appointment of Committees, *Legislative Council Minutes*, 9 May 2011, pp. 75–7.

<sup>2</sup> B. Harris (2006), ‘Parliamentary scrutiny of the executive — a proposal for constitutional reform’, *Canberra Law Review*, 9, pp. 19–44, p. 19.

<sup>3</sup> H. Evans (2007), ‘The Senate, accountability and government control’, paper for the Australian Research Council Project, Strengthening Parliamentary Institutions, Australian National University Parliamentary Studies Centre, Canberra, p. 1.

<sup>4</sup> H. Evans (2009), ‘The role of the Senate’, in P. Waring (ed.), *Harry Evans: Selected Writings*, Papers on Parliament No. 52, Department of the Senate, Parliament House, Canberra, pp. 93–9, p. 97.

<sup>5</sup> L. Lovelock and J. Evans (2008), *New South Wales Legislative Council Practice*, The Federation Press, Sydney, p. 487.

<sup>6</sup> J. Halligan, J. Power and R. Miller (2007), *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles*, Melbourne University Press, Melbourne, pp. 10 and 4–5.

<sup>7</sup> *Ibid.*, p. 2 and 4.

<sup>8</sup> *Ibid.*, p. 5.

- <sup>9</sup> J. Halligan (2008), 'Parliamentary committee roles in facilitating public policy', *Australasian Parliamentary Review*, 23(2), pp. 135–56, p. 152.
- <sup>10</sup> J. Uhr (1998), *Deliberative Democracy in Australia: The Changing Place of Government*, Cambridge University Press, Melbourne, p. 96.
- <sup>11</sup> J. Uhr (2008), 'Bicameralism and democratic deliberation', in N. Aroney, S. Prasser and J.R. Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution*, University of Western Australia Press, Perth, pp. 11–28, p. 25.
- <sup>12</sup> Uhr (2008), *op. cit.*, pp. 24 and 25.
- <sup>13</sup> Evans (2007), *op. cit.*, p. 10.
- <sup>14</sup> Lovelock and Evans, *op. cit.*, pp. 529–30.
- <sup>15</sup> Paragraph 5(1)(a) and (b), Standing Committees: Appointment of Committees, *Legislative Council Minutes*, 9 May 2011, pp. 75–7. The resolution also provides (under paragraph 5(1)(c)) for a Standing Committee 'to inquire into and report on any annual report or petition relevant to the functions of the committee which has been laid upon the Table of the Legislative Council', however this provision has never been utilised.
- <sup>16</sup> Paragraph 9(1)(a), Government Business: Notices of Motions, *Legislative Council Minutes*, 8 June 1988, pp. 173–6.
- <sup>17</sup> *Legislative Council Debates*, 17 March 1982, p. 2685.
- <sup>18</sup> *Ibid.*, 17 March 1982, p. 2684; *Ibid.*, 28 February 1985, p. 3963.
- <sup>19</sup> *Ibid.*, 19 November 1986, p. 6619.
- <sup>20</sup> Select Committee on Standing Committees of the Legislative Council (1986), *Standing Committees*, NSW Legislative Council, p. 37.
- <sup>21</sup> The authority for the first safeguard lies in paragraph 5(2) of the resolution establishing the standing committees, which sets out that whenever a committee resolves to inquire into a matter referred by a minister, the terms of reference or the resolution is to be reported to the house on the next sitting day. See Standing Committees: Appointment of Committees, *Legislative Council Minutes*, 9 May 2011, pp. 75–7. Committees are a creature of the house, so in relation to the second safeguard, the house retains final authority over any references. It is also possible for the house to refer the inquiry to another committee. See Lovelock and Evans (2008), *op. cit.*, p. 558.
- <sup>22</sup> Standing Order 182 sets out that the house may give an instruction to a standing committee to extend or restrict its terms of reference. See Lovelock and Evans (2008), *op. cit.*, p. 558.
- <sup>23</sup> In 2005 the Minister for Police referred an inquiry into public disturbances at Macquarie Fields. The house amended the terms of reference by removing a requirement to investigate the extent to which the actions of a member of parliament compromised police operations in the Macquarie Fields area. The house subsequently issued an instruction to the Committee to delay the commencement of the inquiry until the conclusion of any police operational review and police investigation into the emergency call response. See Lovelock and Evans (2008), *op. cit.*, p. 558 and Standing Committee on Social Issues (2006), *Public Disturbances at Macquarie Fields*, Report No. 38, Legislative Council, p. iv.

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## **Strengthening parliaments in nascent democracies: the need to prioritize legislative reforms<sup>1</sup>**

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### ***Introduction***

Despite multi-million dollar spending by donor countries such as Australia and New Zealand on parliamentary training (see Dinnen, 2004; Hayward-Jones, 2008; Henderson, 2003; Hughes, 2003; Hughes & Gosarevski, 2004; Mellor & Jabes, 2004; Parliament of the Kingdom of Tonga, 2011; Payne, 2007), the effectiveness of parliaments, which is hereby defined by the ability of parliaments to be responsive to voters' needs, has not had significant improvements in the Pacific region<sup>2</sup> (Hudson & Wren, 2007; Power, 2008). Some of the reasons suggested to be responsible for the weak state of Pacific parliaments include, a clash between traditional and modern systems of governance (Boege, Brown, Clements & Nolan, 2008; O'Brien, 2011; Richardson, 2009), smallness of population and ethnic heterogeneity (Hughes & Gosarevski, 2004; Powell, 2007) as well as the weakness of political parties in the region (Alasia, 1997; Chand & Duncan, 2004). However, successes in countries faced with similar challenges elsewhere in the world, such as Mauritius and Botswana (Hughes & Gosarevski, 2004), suggest that such challenges are surmountable in the presence of better ways to strengthen these parliaments (Saldanha, 2004). This paper argues that, in order to improve the effectiveness of parliaments in nascent democracies, targeted and meaningful legislative reforms should be employed prior to employing other approaches to

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<sup>1</sup> This paper is part of PhD thesis submitted at Monash University which deployed multi-case study design comprising five countries which apart from Tonga, included the Marshall Islands, Papua New Guinea, Timor-Leste and Vanuatu.  
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<sup>2</sup> The Pacific region referred to only covers the developing nations (Islands) of the region

strengthening parliaments. Tonga is used to demonstrate this reality. Analysis of parliamentary training programs is made and subsequent reforms suggested which, if applied in timely way, could significantly improve the effectiveness of Tonga's parliament. Importantly, some of the recommendations drawn have a wider relevance to improving the effectiveness of parliaments in other emerging democracies. The paper, first, introduces what is defined as parliamentary effectiveness. It then presents the possible link between training and parliamentary performance. The discussion on the methodology of choice is then put forward before the main findings of the study are presented. Tonga's history of legislative reform is outlined and further meaningful reform suggested. The final section presents the conclusions drawn from the study.

### ***Parliaments and performance***

Parliaments perform three main functions namely legislation, representation and oversight (Norton, 1997). As complex as they are, these functions usually overlap. For instance, a parliament can represent the electorate by passing or blocking a particular law (legislate) in the manner that is beneficial to the electorate. It may also represent voters by scrutinising the government's actions (provide oversight), thereby ensuring that the government is responsible for its actions. The way parliaments perform their functions depends on the political system they operate in. For example, in conventional parliamentary systems such as that in Australia, parliaments usually pass the laws that are mostly formulated by the executive. In contrast, laws are mostly developed by parliaments in a typical presidential system such as that in the United States. Parliaments in parliamentary systems are also associated with a fourth and unique function that involves the formation (or otherwise) of executive governments. In the end, regardless of the political systems in which parliaments operate, they can generally be described as representative bodies. However, they can only be effective representative bodies if they are responsive to the needs of the electorate. This is because their legitimacy, which is necessary for their symbolic and sometimes physical survival, is not only based on the fact that they are voted in by the electorate but also on their ability to be responsive to voters' needs in between elections. In turn, parliamentary responsiveness can create responsible governments. It is in this context that parliamentary effectiveness is hereby defined by the extent parliaments are responsive to the needs of the electorate. Note however that the effective performance of parliaments can partly be explained by the ability of MPs to ably perform their roles. This is crucial as parliamentarians (MPs) are at the centre of the functioning of parliaments (Kunnath, 2011). It is against this background that training programs have been offered to various parliaments around the world, including that in the Kingdom of Tonga. The possible link between training and improved parliamentary performance is further elaborated below.

### ***Training and Parliamentary Performance***

Studies by Meleisea (2005) and Morgan (2005) have found that the most common challenge facing Pacific MPs is their inability to soundly perform their roles. It is not surprising then that training has long been considered as one of the most potent tool that, if used correctly, can strengthen Pacific parliaments (see Beetham, 2006; Hudson & Wren, 2007; Power, 2008). The importance of training emanates from the fact that it can improve Knowledge, Skills and Abilities (KSAs) of MPs in the manner that may improve their legislative, representative and oversight capacities (Morgan & Hegarty, 2003; Hudson & Wren, 2007). Kunnath (2011) concurs with this argument by pointing out that enabling MPs to perform their roles effectively and efficiently is important since ultimately the effectiveness of parliaments depends on the quality MPs. Similarly, theories from both adult education (as depicted by Delahaye, 2000; Knowles, 1973; Merriam, 2001; Peterson & Provo, 2000) and Human Resources Development (HRD) fields (as shown by Ahmad & Schroeder, 2003; Tharenou, Saks & Moore, 2007; Wright, Gardner, Moynihan & Allen, 2005; Yamnill & McLean, 2001), suggest that improved KSAs among MPs could in turn help parliaments to be more effective.

### ***Research Method***

In order to examine sentiments of Tongan MPs towards the effectiveness of training and reforms on improving parliamentary effectiveness, this study used case study design (Yin, 2009). Subsequently, semi-structured-interviews were administered to 11 MPs who were purposefully selected to provide the main source of data of this study. Since the monarchical constitution of Tonga does not provide for political party system (Banks, Muller, Overstreet & Isacoff, 2010), the selection of MPs to be interviewed was based on whether or not a particular MP belongs to the nobility. Consequently one noble MP was interviewed together with 10 commoner MPs. The use of interviews has the advantage of enhancing reproducibility (Brugha, Bebbington & Jenkins, 1999). Reproducibility entails the reliability and validity of interview responses following standard coverage and structure of questions found in semi-structured interviews (Brugha, et al., 1999; Dearnley, 2005). The quality of the data was further enhanced by triangulating the interview data with the Constitutional and Electoral Commission (CEC) report, Tonga's constitution and relevant literature (Yin, 2009). The data collected were interrogated following Creswell's (2009) approach in which emergent themes such as MPs' perceived effectiveness of training in impacting their performance and that of their case parliaments are examined. Subsequently, the performance was measured by the extent to which perceptions of MPs provided reliable and valid measures of MPs' performance and that of case parliaments, including reasons that contributed to such performance based on Freeman's (1983) method. Furthermore, this paper conceptualises and measures training using an absolute measure following Wright, Gardner and Allen (2005). Accordingly, the amount of training (e.g., seminars, workshops etc.) received by MPs is defined as the average number of training days available to MPs from the beginning of this current parliamentary term till June, 2012.

## *Findings*

The average length of terms served by the interviewed MPs is four (12 years). However, this figure is largely inflated, because almost half of them (five out of 11) were serving their first-ever term. The average therefore could have been inflated given the fact that the rest of the interviewees (who are largely reformists) had served three or more parliamentary terms. This can be explained by the democratic movement that started in late 1980s which consequently produced reformists who have since become the mainstay in the Tongan parliament (Campbell, 2005; Powles, 2009). The majority of MPs (10 out of 11) stated that they have never been mentored. This can be explained by the absence of political party system in Tonga, the platform that has been used elsewhere in the Pacific for mentoring purposes. It should however be noted that while the absence of party system affects negatively the commoner MPs organisation-wise, the nobility is highly organised. The data shows that the provision of training programs in Tonga's parliament was mainly offered and/or coordinated by the United Nations Development Program (UNDP). Indeed while training programs were mostly sponsored by UNDP, they were delivered by UNDP officials, selected local and external trainers and in very few occasions by the office of the Clerk. Generally, these programs were limited to orientation (immediately after election), induction and brief seminars which were largely geared towards ensuring that MPs understand their basic roles and standing orders. The main mode of training was public lectures which were subject to much criticism by Tongan MPs as explained later. Using the absolute measure of training (see Wright, et al., 2005), the average amount of training received by the MPs is six days in a year. Also, the number of training days available to MPs ranged from five to 21. Note that only one MP had more than five training days. This was because, unlike other MPs, this particular MP made use of personal connections to gain access to training programs organised and provided outside Tonga. As for the remaining MPs, five days was the average. Note that in comparison to other developing Pacific nations, the average training received by Tongan MPs is quite high as it exceeds that in neighbouring countries such as the Marshall Islands, Papua New Guinea and Vanuatu. Results from this study show that generally the majority of MPs (seven out of 11) perceive training programs provided to them as too ineffective to enhance their performance and, in turn, that of their parliament. While respondents were quickly to point to the fact that training programs provided to them were poorly designed and delivered, they, eventually upon further questioning, acknowledged that in the end the effectiveness of training did not significantly matter much. This is because the effectiveness of Tonga's parliament is perceived by most MPs (10 out of 11) to be largely hampered by factors others than the ability of MPs to effectively and efficiently perform their duties. Findings on the perceived effectiveness of training in Tonga's parliament provide informative empirical evidence on the fact that the ability of MPs alone cannot ensure effectiveness of parliaments in nascent democracies. This is explained in two ways. First, more than half the interviewed MPs (six out of 11) were at least in their second term meaning more than half the serving MPs had at least one term

experience at the time of interview. This issue is important, since experience is considered by adult educationists (e.g., Burns, 2002; Dewey, 1933) to be one of the main contributors to the smooth transfer of KSAs during training sessions and thus improved performances because past experiences are regarded as a necessary condition for adult learning. It is thus paradoxical that despite possessing reasonable parliamentary experiences Tonga's MPs faulted the potency of training programs in improving their effectiveness and that of their parliament. Secondly, the findings are informative because the majority of MPs (10 out of 11) were found to possess at least a university degree qualification. These findings are ironic as they were expected to be consistent with higher levels of KSA transfer and better performances since higher educational background, is according to HRD theorists (e.g., Brunnello & Nedio, 2001; Hirsch & Wagner, 1993), associated with enhancing the ability of adult learners to absorb training materials and hence become more effective. The next logical question that one can ask is why, despite favourable conditions for it — that is parliamentary experience and education qualifications — has training failed to achieve its objective in Tonga's parliament? The next sections examine issues that may explain this conundrum.

### ***Tonga's path to legislative reforms***

Numerous legislative reforms have been undertaken in Tonga from as early as in mid-19th Century (Marcus, 1978; Ward, et al., 2009). However, these reforms have failed to improve the effectiveness of Tonga's parliament since they mostly served to consolidate legislative power of monarch at the expense of Tongan people (Campbell, 1994; Hills, 1991; Marcus, 1978; Powles, 2009). For instance, the 1838 Tonga's law code established the King of Tonga as 'the law and the centre of everything in Tonga' (Campbell, 1994). This was to be followed by the 1839 Vava'u Code that provided the King with absolute temporal powers as Chief Judge with the authority to do 'whatever he wishes' in consultation with the nobles (Ward, et al., 2009, p. 3). The 1875 constitution concentrated power on the monarch while simultaneously reducing the power of the chiefs (Marcus, 1978) as it formally created the nobility whose status was to be endorsed by the monarch. It also centralised the ownership of land to the government and specifically to the King who technically owned all the land in the country (Marcus, 1978) a move that has largely contributed to the big wealth-gap between the monarchy and commoners that is still vivid to date. Indeed, Sodhi (2006) reveals that the monarchy still controls much of the economic life in Tonga and owns up to two-third of Tonga's land which is considered to be the source of real power in the country given limited resource endowment. The beginning of a serious reform movement in Tonga began in 1989 when despite the *en masse* commoner MPs' walk out from the parliament, the noble MPs went on to pass 11 legislation (Campbell, 1994). This sent a clear message to the Tongan people that commoner MPs and by extension all commoners in Tonga were disrespected by the monarch and the nobility (Campbell, 1994). This forced Tongan people to gradually start to warm to commoner MPs (Campbell, 1994). The result was resounding wins for reformists in the 1990 parliamentary elections (Campbell, 1994). Attempts to influence public policies in Tonga initially

involved different strategies such as the use of the pulpit, media, petitions to the King as well as public rallies and seminars (Campbell, 2005). However, since these attempts did little to influence the change of attitudes in the part of the government, there was a growing feeling in Tonga that only constitutional reforms could bring about significant changes in the country (Campbell, 2005). This is because there was a general perception amongst Tongan people that the constitution of Tonga gave the monarch powers to act in a manner that was unresponsive to Tongan people's concerns as he was beyond reproach (Campbell, 2005). Indeed Tongan people had realised that the increase in number of commoner MPs in the parliament did not guarantee real change in Tonga as the issue of accountability was not yet entrenched in the Tongan constitution (Campbell, 1994). It is against this background that the issue of enforcing accountability that is ensuring that the government is for the people and accountable to the people became the centre of debate in Tongan politics from 1987 onwards (Campbell, 1994). Reformist debates were further fuelled by the then increasingly declining in the economy of Tonga which increased living costs of Tongan people (Campbell, 1994). This eventuality coupled with various allegations of rampant corruption by nobles and the increase in the number of educated Tongans from mid-1980s, served to fuel the reform movement in Tonga (Campbell, 1994). However, while these events improved the possibility of commoner MPs to dissent, collective responsibility by noble MPs meant that the status quo always remained intact (Campbell, 1994). Indeed both the nobles and the ministers (ex-officio MPs) felt accountable to the King while at the same time the King was not accountable to anyone. Moreover, successive failed attempts to impeach corrupt ministers coupled with the ease with which some of the reformists MPs were lured in some mysterious way into siding with the nobles on critical parliamentary votes exposed the flaws in democratic institutions (Campbell, 1994). The slow pace of embracing reforms in Tonga by the monarch only served to enflame frustrations amongst Tongan people (Campbell, 2005; Powles, 2009). But it was the scandals surrounding the powerful son and daughter of King Tupou IV in early parts of the last decade which significantly tarnished the image of monarch (Powles, 2009). This was coupled by the resignation of the youngest son of the King from his prime ministerial position in 2005 following another set of scandals (Powles, 2009). The mounting pressure following these eventualities paid off as for the first time in the history of Tonga a commoner MP was installed as the new Prime Minister (PM) in 2006 (Ward, Vaea, Halapua, Taufē'ulungaki & Fonua, 2009).

Not to be confused with the will to embrace reforms, Powles (2009) described the installation of the first commoner PM as a political move by the monarch to neutralise the growing tensions against its existence. Indeed, proving that the reforms were far from complete at the time, the first commoner PM Dr Sevele was quoted suggesting that despite the wave of reforms in Tonga at the time it was important that 'the three pillars of Tongan society-the royal family, the nobility and the people were left intact' (Ward, et al., 2009, p. 7). This was a surprising move by the PM as it is these so called pillars that have perpetuated the hegemony of the monarch and the nobility over ordinary Tongans. Suggesting for the need to

preserve this seemingly exploitative system, confirmed Dr Sevele's status as 'the King's PM'. The obvious siding of the commoner PM did little to convince Tongan people to take his appointment as a sure sign that the monarch was bowing to reformist demands. That said, the mounting pressure for reform agenda in Tonga eventually paid off as the government gave in and formed the National Committee for Political Reform (NCPR) in 2005 (Ward, et al., 2009). The NCPR which was headed by a noble was entrusted with the responsibility to gather recommendations relating to constitutional reforms from all Tongans and 'not just the views of certain group of people' (Ward, et al., 2009, p. 7). Meanwhile, the government amended clause 7 (which relates to freedom of press) of the constitution with the view to expand its power so as to control freedom of press (Powles, 2009). Frustrated by this decision, the reformists took their battle against the conformists to the Tongan Court of Justice (Pohiva, 2002). Subsequently, in one of the major blows to the monarch in the history of Tonga, the Chief Justice ruled out that the amended clause was unconstitutional as it contradicted the fundamental constitutional rights of freedom of speech provided in the constitution (Powles, 2009). This was the genesis of the constant use of courts by reformists each time they thought the parliament was not responsive to the electorate. Having collected information from Tongan people the NCPR recommended for formulation of a road map to finding a middle ground on reforms to be undertaken. Nevertheless, the government was sluggish to act on NCPR's recommendations as it instead presented its own 'road map to political reforms' in Tonga and moved to form the so called Tripartite Parliamentary Committee (TPC) to draw up a 'consensus' rather than blindly accepting the NCPR recommendations (Ward, et al., 2009). This move by Tonga's government was obviously construed as a delaying tactic and/or an indirect way to disapprove NCPR's recommendations (Ward, et al., 2009). The indecision in implementing the NCPR's report and the then ever increasing royal scandals proved to be the final straw as far as Tongans were concerned. Indeed it resulted in fierce protests in Tonga which uncharacteristically turned violent on the 16<sup>th</sup> November 2006 (Powles, 2009; Ward, et al., 2009). So severe was the violence that the substantial part of the downtown Nuku'alofa, the capital city of Tonga was reduced into ashes (Powles, 2009).

Under pressure, the TPC finally submitted its report in two parts in 2007. However, the expectations of most Tongan people that the findings would be implemented ready for the 2008 parliamentary election proved to be premature as the TPC pointed to the 2006 major events which sadly included the death of King Tupou IV (Ward, et al., 2009) as the main reason for the need to delay the implementation of its reports. It recommended for either 2009 or 2010 as a suitable implementation time (Ward, et al., 2009). Importantly though, the TPC recommended for the establishment of the Constitutional and Electoral Commission (CEC) Act which was assented by the monarchy on the 23<sup>rd</sup> of July 2008 (Ward, et al., 2009, p. 10). The CEC had an obligation to draw up priority reform areas (Ward, et al., 2009) that needed to be implemented in time for the 2010 parliamentary elections in Tonga. Working on tight schedule, the CEC managed to propose what would later

become the 2010 constitutional reforms. However, this paper contends that even the 2010 constitutional reforms are not deep enough to positively and significantly affect the effectiveness of the Tonga's parliament. The next section shows why.

### ***Why meaningful legislative reforms are necessary in Tonga***

This paper suggests that the main reason behind the failure of training programs in making the Tonga's MPs and parliament more effective can be traced to the structural powers the Tongan monarch and, by extension the nobility have over the parliament. These powers are prohibitive since they prevent MPs/the parliament from being responsive to voters' needs. In other words, legislative arrangements in Tonga limit the ability of MPs to positively and significantly have an effect on parliamentary outcomes, regardless of the KSAs they possess. The structural powers are divided into five main themes. These are: (i) the make-up of the parliament; (ii) the influence of the monarch in selecting noble MPs (iii) the veto power possessed by the monarch; (iv) eligibility for the Speakership and (v) the wealth and political power possessed by the monarch and by extension the nobility. These are further examined below.

The first structural power that prevents the parliament from functioning more effectively is the make-up of the parliament that practically guarantees the presence of nine noble MPs in parliament. This provides the monarch and the nobility with an advantage politically, particularly when it comes to forming the government and dominating the parliamentary policy agenda. This is because, in a parliament consisting of only 26 parliamentarians, nine MPs make up more than a third of the total. Consequently, it takes only five MPs to cross the floor to join the noble MPs (as it so happened in the 2010 elections) for them to form government and thereafter control the legislative agenda. It thus does not matter how knowledgeable Tonga's MPs are, as long as the constitution continues to guarantee nine seats to nobles, it is difficult for the parliament to arrive at outcomes that do not protect the interests of royalty. The second structural power pertains to the way the noble MPs are selected. Preserved intact from the 1875 constitution is a provision that guarantees the inclusion of nine noble MPs who are selected, largely based on who the King approves to be an MP (Maloney & Struble, 2007). The point of contention here is that, as long as the King is central in determining who among the nobles gets to be selected as MPs they almost always are bound to be loyal to the monarch rather than being responsive to the needs of the electorate (Hills, 1991; Marcus, 1978; Sodhi, 2006). This means that, regardless of the KSAs the noble MPs possess, their decision-making routines are tied to fostering the interests of the monarch for their survival as MPs.

Furthermore, since the King traditionally reserves the power to reverse the appointments of noble MPs, (Maloney & Struble, 2007), it is difficult for them to contradict the policy stand of the monarch regardless of their possessed policy knowhow and inclinations. An example of the power of the King over the noble

MPs was evidenced by the decision of King George Tupou V<sup>3</sup> to add four more nobles to the 33 existing body of nobles a few weeks prior to the 2010 parliamentary elections, thereby lessening their chances of being selected as a MP without consulting any sitting noble, (Motulalo, 2011). Predictably, this move angered the then sitting nobles (Motulalo, 2010). Nevertheless, when asked to comment about the King's decision, the then Speaker, Lord Tu'ilakepa replied, 'If that is the King's wish, what else is there for us [nobles] to decide?' (Motulalo, 2010). The then Solicitor-General had a similar reaction to the abrupt decision, pointing out that 'when the King appointed them [the new nobles], they became nobles' (Motulalo, 2010). It should not come as a surprise, then, when noble MPs are bound to ensure that 'the country is still ruled by chiefs for the King' (Salmond, 2003), implying that their KSAs play an insignificant role, if any, as far as being responsive to the needs of Tongans is concerned. Indeed according to a noble MP, his main role as an MP is 'to protect the interests of the nobles and the King by ensuring their rights are not violated in any way'. The third structural power that prevents the parliament from functioning more effectively is the veto power that the monarch possesses. Note that even in traditional parliamentary systems, such as that in Australia, the monarch or her representative (the Governor-General) has a constitutional power to veto legislation at her informed discretion (Banks, et al., 2010). However, neither the monarch nor the Governor-Generals of these countries have been known to have exercised this constitutional power (The Commonwealth Parliamentary Association, 2009). The monarch in Tonga has, however, used his veto power regularly over the years. Indeed, as recently as in December 2011, King George Tupou V withheld his royal assent on an arms and ammunition Act which was overwhelmingly passed by the parliament. The King's reason was that the Act was 'inimical to welfare, wellbeing and safety of his subjects' (Parliament of Tonga, 2011). Sincerity in vetoing the Act aside, the regular use of the veto power by the Tongan monarch implies that, regardless of the KSAs possessed by MPs, the outcome of the parliament will always be responsive to his will rather than the needs of Tongans.

Another structural power that affects the effectiveness of the Tongan parliament is the eligibility criterion for choosing the Speaker. This is a problem because the constitution stipulates that the position of Speaker can only be held by a noble MP (Fonua, 2009). The need for control of this position arises because the Speaker chairs debates and controls the inclusion of the parliamentary agenda in parliament. Limiting this position to noble MPs alone means that the monarch and by extension the nobility exercise absolute control over the parliamentary agenda and ultimately outcomes. It is not surprising, then, that a commoner MP argued that a 'stronger speaker who is not biased to the nobility' is needed if Tonga's parliament is to improve its performance. This demand is based on the fact that, regardless of their KSAs, commoner MPs cannot be effective if they are not given the opportunity to influence the parliamentary debate. The inability of commoner MPs to influence and/or formulate legislation is evidenced in their view that the parliament does not

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<sup>3</sup>King George Tupou V suddenly passed away on the 19<sup>th</sup> of March, 2012

provide them with a platform to raise issues pertinent to their constituents. For instance one MP claimed that he could not afford to sit in parliament and 'baby-sit the government year in year out'. Yet another pointed out that he used to speak 'louder and [more] freely while outside the parliament than inside it'. Consequently, there have been a number of instances where commoner MPs have resorted to going to court rather than debating salient issues in parliament. For instance, according to a number of commoner MPs interviewed there is credible evidence that the soft loan provided by China to rebuild areas which were destroyed during the 2006 riots have been diverted to other areas, including T\$32 million that was spent to extend the King's palace without the government seeking assent from the parliament as should be the case (e.g., MP 53, Tonga). As a result, 10 commoner MPs signed a resolution in 2011 proposing to take legal action against the government for misuse of public funds. While this issue remains *sub judice* and therefore one must be cautious in not pre-empting the final verdict, the fact that, in a parliament of 26 MPs, ten MPs cannot influence what is debated speaks volumes in terms of the difficulties commoner MPs continue to face when trying to have important matters relating to the use of public funds debated in the parliament.

The final structural power that hinders the effectiveness of parliamentary performance in Tonga is wealth and political power possessed by the monarch and by extension the nobility. Indeed, throughout Tonga's history, the wealth of the monarch and the nobility has given them a 'license' to dominate political scenery in Tonga (James, 1994; Marcus, 1978; Sodhi, 2006). Powles (2012) gives an evidence to this reality by citing a recent example when the honourable Akilisi Pohiva gathered nine signatures from commoner MPs and gave notice of intent to move a motion of no confidence against the noble-led government on the 18<sup>th</sup> June 2012 prior to house recess. By the time the house reconvened on the 17<sup>th</sup> of July 2012, the motion had already died as one of the commoner MPs who previously supported the motion crossed the floor in mysterious circumstances only to be appointed a minister in the noble-led government a few weeks after.

It follows that the parliament may never be responsive to Tongans' needs if the wealth and political power of the monarch and by extension the nobilities, situation is left to continue as it is. Indeed according to one MP 'most of the commoner MPs cannot get jobs and wealth outside the parliament, the government (the monarchy) gives them both'. Another MP added the fact that 'the nobility has power, land, money and title that is why it is difficult to compete with them'. Note also that, even if the commoners were to promise ministerial positions, not all of them could have secured them. This is because the 2010 constitutional reforms restricted the maximum number of ministers to ten members in addition to the PM (Fonua, 2009). As a result, there is always bound to be some few disgruntled commoner MPs who will be ready to cross the floor and join the noble MPs' camp in search for ministerial positions as it so happened following the 2010 general elections in Tonga. Indeed according to one MP, under the current system, 'the government always gets what it wants because normally four to five people's MPs would cross to support the monarchy backed government'. The problem is, when they cross the

floor, they (the commoner MPs) fully support the King's course. For instance, when the MP from Tongatapu 10 constituency reported in October, 2011 on what he called 'the top priority need from his constituency' that his voters demand that all MPs including the noble MPs should be popularly elected, it was the commoner MP, the honourable minister. Ma'afuTukuiaulahi, who confronted the report and labelled it 'unfounded and controversial' (Parliament of the Kingdom of Tonga, 2011). In summary, given structural deficiencies within the constitution of Tonga, training cannot improve the effectiveness of the parliament. This is because the way noble MPs and the Speaker are selected, the regular exercise of the Crown's veto power and the impact of wealth and political power of the nobility in determining democratic outcomes makes it difficult for all MPs to function in a manner that responds to the interests of Tongans. It is, therefore, imperative that reforms to address this situation be undertaken if genuine improvements are to be achieved. It is in this context that the next section suggests reforms which could aid parliamentary effectiveness in Tonga.

### ***Suggested reforms***

This paper recommends a number of constitutional reforms which, if undertaken, may enhance parliamentary democracy in Tonga. First, it recommends that a second (upper) chamber of parliament which resembles that in the neighbouring Marshall Islands (Banks, et al., 2010) be introduced in Tonga. This chamber would comprise noble MPs whose sole task would be to advise the lower house only on matters pertaining to the traditions and customs of Tonga (Fraenkel, 2002). Thus, as in the Marshall Islands, any other noble who wishes to be part of the lower house should be popularly elected in the same way as are commoner MPs. Such a move would help to ensure that all MPs in the lower house are accountable and therefore responsive to the people of Tonga, as all MPs in the lower house would be accountable to voters. Note, however, that on the matter of establishing the second chamber, the CEC (2009) claimed to have found 'no evidence that would justify a second chamber in terms of the need or cost' (paragraph 222). However, there are not many reasons that can justify an action more than that which ultimately makes a parliament more effective. In other words, if forming a second chamber can allow the lower chamber to be more responsive to the needs of Tongans the cost of establishing the former is worthwhile. In fact, if the 2006 political violence in Tonga taught us anything, it is the fact that the consequences of ignoring people's needs are usually costlier. It follows from this that any initiative that can potentially make the parliament more responsive should be embraced at all costs. On the other hand, the second chamber is important as it will serve to preserve the presence of the nobility in parliament without making it unresponsive. In order to understand this point one has to look at the 2010 election where no single noble was successful when it came to popular voting. Assuming the presence of a single chamber that is entirely popularly voted in, today there would not be a single noble in parliament something which would be rather unfortunate. The formation of a second chamber is therefore essential to preserving Tonga's tradition. Alternatively, if the option for establishing the second chamber is not attractive to the Tongan people, the

constitution should be amended to ensure that all MPs, including prospective noble MPs, are popularly elected. As explained previously, this potentially removes the influence of the monarch on the parliament and hence improving parliament's responsiveness to Tongan people. This version is indirectly supported by the CEC (Constitutional and Electoral Commission, 2009) which reported that, 'the ultimate control of an ineffective poor or dishonest government lies in the hand of the electorate through the ballot box' (paragraph 192). Furthermore, the need for a chamber where all MPs are popularly elected was originally alluded to by the CEC before mysteriously being taken out of the final report. Indeed according to Powles (2012, p. 28), CEC initially strongly argued for either no noble to be in parliament or for the election of nobles' seats by the whole electorate. To this the CEC originally reported, 'Measured against current perceptions of democracy in much of today's world, there can be no justification for the presence of the nobles in the assembly' (CEC, paragraph 319). For some reasons though CEC retracted from this informed position and recommended for no change to the current system. In addition, the constitutional provision that restricts the position of Speaker to noble MPs (Constitution of Tonga, Clause 61) should be amended to allow all MP to be eligible. This would potentially ensure that the office of the Speaker is as neutral as possible. Such an amendment would signal a new direction in the Tongan parliament and society at large, because it would help to remove a discriminatory and potentially elitist constitutional provision that excludes part of the population from the right to seek the position. As well, as is the case in parliamentary constitutional models such as that in the neighbouring New Zealand where the Crown is represented by the Governor-Generals, the Tongan King's power should mostly be ceremonial (Banks, et al., 2010). This should necessarily include restricting the Crown from actively affecting legislative outcomes via veto power currently vested in him (Powles, 2012). Commenting on the issue Powles (2012) argues that Tonga does not qualify to be labelled 'parliamentary monarchy' in the mould of countries such as New Zealand as he has discretionary powers to, if he wishes, take precedent over those of the law-making assembly particularly in terms of his veto powers and the power to dissolve the parliament at any time. Making the King's legislative powers ceremonial is therefore imperative if the effectiveness of Tonga's parliament has to improve. Finally, the laws that restrict commoner MPs to debate with the view to amend any law regarding the wealth possessed and/or acquired by the monarch and the nobility and their wealth (Constitution of Tonga, Clause 104) should be revisited. Furthermore, genuine efforts to ensure transparency, particularly regarding the use of wealth to lure politicians, during and after election must be made so as to level the political field among noble and commoner candidates. In the long-run though, there has to be deliberate efforts geared towards redressing uneven wealth distribution in Tonga. This is because, as long as the commoners do not hold real wealth, it will be next to impossible for the current situation to be improved as wealth has consistently been found to have a significant correlation with political outcomes (Callahan & McCargo, 1996; Gherghina & Chiru, 2010; Jacobs, 2012; Lioz & Bowie, 2012; Milyo & Groseclose, 1999; Riley, 2012).

## **Conclusion**

This paper has examined the salient reason behind the failure of strategies of strengthening Pacific parliaments despite the employment of huge amount of resources in the region. Using the case study of Tonga, it is argued that - despite a significant investment in training and more than a century of reform - the lingering control the monarch has over the operations of the parliament has continued to limit its effectiveness. Five principal reforms, if adopted, could improve the parliament's effectiveness in Tonga. Note however that the author neither suggests that training should be abandoned as a tool for enhancing the effectiveness of parliaments nor does he pretend to be qualified to criticise the constitutional and cultural arrangements of Tonga, a sovereign country with the world's second oldest constitution (Banks, Muller, Overstreet & Isacoff, 2010). On the contrary, the case of Tonga is used to support the simultaneous use of parliamentary strengthening approaches, in this case training and legislative reforms in the quest for enhancing parliamentary effectiveness in nascent democracies. Specifically, it is argued, in order to have successful legislative strengthening programs in emerging democracies, legislative reforms have to be given the first priority. This argument is consistent with that advanced by practitioners such as Hudson and Wren (2007) and Pelizzo (2010) that combining more than one approach of strengthening parliament can potentially yield better legislative results. ▲

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## **PARLIAMENTARY CHRONICLES**

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## **Electoral law and the campaign trail\***

### **Harry Phillips**

In 2011, the WA parliament legislated to establish four-year fixed-terms in its Legislative Assembly. The first of these, due on 9 March 2013, will align with the current arrangements in the Legislative Council, which sees the composition of that House change on 22 May of an election year. The 13 September 2012 seminar conducted by the WA ASPG Chapter was, therefore, titled 'Electoral Law and the Campaign Trail'. Keynote Speaker Professor Peter van Onselen, a political analyst and contributing editor to the *Australian Newspaper*, focussed on the apparent consequences of fixed term governments in the Australian states and territories and, to a lesser extent, on the impact of compulsory voting. Whilst currently a resident of Sydney, van Onselen did make the significant point that state politics in the west was given a more concentrated focus in the media. In his view, coverage of federal politics in the 'eastern states' is dominant. Four members of parliament responded to the address and added their own observations and experiences of electoral campaigning. First was Vince Catania who, in a short career, has served a term in the Council as a labor representative and then a term in the Assembly, first for labor, then as an Independent, until finally settling with the National Party. WA greens MLC Lynn MacLaren said 'she loved elections' and recounted simultaneously conducting a campaign for both Houses under very different voting systems. McLaren mentioned the importance of public funding for votes in each chamber, whilst another MLC, Michael Mischin, the newly appointed Attorney General, provided a perspective of the election picture as an incumbent government member. Finally, current Father of the House Eric Ripper MLA, reflected upon many state and federal elections and considered the planning and delivery of successive campaigns had been conducted in the context of a 'settled policy' of electoral law. Ironically, his own entry to parliament in a March 1988 by-election was facilitated by a temporary trial of above the line preference voting in the Assembly, to help overcome the problem of informal voting.

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\* Summary of proceedings of the WA Chapter of the Australasian Study of Parliament Group 2012 dinner seminar. Thanks go to Liz Kerr, Clerk Assistant in the WA Legislative Assembly, for her review of the piece.

Most Australian states and territories have adopted four year fixed term parliaments. The traditional 'westminster' practice of providing the government the opportunity to recommend the general election date, still resides by convention with the federal, South Australian and Tasmanian parliaments. Nevertheless, as van Onselen pointed out, when former premier Alan Carpenter nominated a date for an election six months ahead of the expected time, it rebounded with a predicted electoral victory being converted to narrowly losing office. It was widely believed that the Premier had sought an undue advantage by calling the election so early. In WA, the rarely broken tradition had been for governments to serve their full terms. According to van Onselen, Carpenter was 'the non-politician' who 'politically' called an early election to supposedly catch off-balance the newly restored opposition leader Colin Barnett. In fact, most of Carpenter's leadership team (which Eric Ripper confirmed at the seminar), was not informed about the decision and while no electoral momentum could be gained by the government, an effective opposition advertisement campaign asking electors to name three major things labor had achieved in office contributed to the surprise result.

The discussion that followed was both insightful and curious. The Clerk of the Assembly, Peter McHugh, sought elaboration about the advantages and disadvantages of fixed terms, and although van Onselen hypothesised that they tend to lead to near permanent election campaigns, he conceded they do provide the organisational wing of parties the capacity to plan, placing the opposition on a more equal footing. Whilst a supporter of fixed terms, van Onselen said he would prefer the duration to be three years and spoke of the danger of opposition 'complacency' in the interim, particularly if a change of government (such as in NSW) was accompanied by the likelihood of two consecutive fixed four-year terms in opposition. Observations were made about the lead-up to the 2013 state election, including that it was 'a little scary' that Mark McGowan would be leading his labor party to the next election before Tony Abbott's likely ascension to the Prime Ministership. The risky decision by Nationals Leader Brendan Grylls to contest the safe labor held seat of the Pilbara, was described by one person as 'courageous', a view widely agreed with in political circles. Professor van Onselen's comments about compulsory voting, invariably supported in public opinion polls, were more limited. He queried the often voiced view that the removal of compulsory voting would tend to favour the liberals, as in his view, labor, with union support, may be better able to mobilise its vote. Voluntary voting would exacerbate the 'large chunk of the community' who were disengaged. This led to another consideration in his address whereby he considered that ministers in the Legislative Council, could more tellingly be used as 'shock troopers' to assist in the campaigns of Assembly members particularly those in marginal seats. The ministers, with virtual guarantee of their own re-election in a region, had access to resources that could be targeted at marginal district seats.

Vince Catania, with his experience in both Houses, conceded that upper House members can play invaluable roles in lower House elections. What had possibly not been publicly heard before were his comparisons between the 'workloads' of

members of either the Assembly or Council. In Catania's opinion 'nothing beats' the appearance of a candidate's photograph on a bill-board and their name on an Assembly ballot paper. Despite a recognition that MLCs work hard, he controversially contended that the workload in the Assembly, with its single member districts, was 50 to 60 per cent higher than he experienced in the Council. He strongly supported the fixed term reform which in his opinion provided an opportunity to plan visits to all sections of the electorate. In rural constituencies it is necessary to travel widely to enhance 'the recognition factor'. In his vast electorate he noted that 'mail outs' to constituents may take weeks to be delivered. Furthermore, he noted the impact of funerals which could mean that a large congregation of aboriginal mourners may travel to another town to temporarily deplete the numbers at a scheduled meeting.

WA green Lynn MacLaren had been a legislator during the historic 'one vote one value' legislation for the Legislative Assembly. Before commencement of her first full term from May 2009 as an MLC, she had also gained considerable experience as a campaigner as she had also worked in the office of former WA greens MLC Jim Scott, federal greens Senator Scott Ludlow and long standing WA green MLC Giz Watson. MacLaren recognised the very different office rules, electoral laws and electoral resources available to federal and state members. The fixed term reform was a measure she described 'as a blessing'. She preferred the March fixed election date to avoid the sometimes long lapse of time between the election and the assumption of office for the Legislative Council seats on 22 May, during which time public sector employment can't be sought. The 'polly in waiting' status has a 'bizarre effect' when personal life 'can go into chaos'. In fact there is both a 'human cost' as well as a 'financial cost.' A key observation made by MacLaren was that greens campaigning was simultaneous for both the upper and lower House. Apart from the likelihood of election to the Legislative Council, green voter preferences often play a significant role in the electoral outcomes for the Assembly. Greens too, in a practical sense were aiming to secure better legislative outcomes rather than gaining government or even opposition. Since the 2007 legislation of public electoral funding, set at over one dollar per vote at the 2008 state election, the green's ability to secure some 11 per cent of the valid vote in each House, meant the planning of electoral expenditures had to be carefully monitored. What has not yet been established for fixed term elections had been the pattern for the expenditure of campaign funds and the new set of timings for announcements. What monies should be held closer to the election?

Like MacLaren, new Attorney General Hon. Michael Mischin, indicted how the electoral law provisions impacted on his entry to politics. He had to step down temporarily from his senior role at the Office of the Director of Public Prosecutions, where in conjunction with employment at the Crown Solicitor's Office, he had served for 24 years. However, election to the Legislative Council in September 2008 meant that he lost permanent salary for 8 months before taking his north metropolitan seat on 22 May 2009. He had earlier foregone salary when he was a Senate candidate in 2007, at which time he also assisted in the House of

Representatives campaign. He indicated he did play a role in the Assembly campaign but more in terms of promoting the Liberal brand than as 'a shock trooper'. Mischin conceded that fixed terms were significant as it does enhance campaign planning, yet he agreed it created a new uncertainty about the timing of campaign announcements, or as he put it, 'when do you let the dogs loose'? Electors, in his judgement, tend to not to be interested in politics unless things are going badly. While noting long campaigns can be 'boring', he warned that massive electronic communication changes were helping to change the face of election campaigns during which much can happen which a party 'can't control'.

Former Deputy Premier and Treasurer, Eric Ripper, made particular reference to the 2005 state election for which his party strategy group met daily for more than three months. His input helped ensure the financial viability of the policy package components. The group attempted to gain favourable media coverage for each of the carefully considered policy announcements, which were made virtually every day for 31 days after the issue of the writs. This meant Premier Geoff Gallop was centre stage, often with 'kids' in the background. A decision was made to apologise for earlier taxation hikes, and so successful was the campaign that by election day, it was calculated that some 100,000 voters, who deserted the Mark Latham brand of labor in the 2004 federal election, came back to the state party. For the 2005 state election, the government had left no stone unturned to avoid power failures which had affected the state on many hot summer days in February 2004. In the meantime, Colin Barnett's liberal campaign had floundered on questions about the viability of his canal proposal from the Kimberley to Perth, which was then exacerbated with the discovery of a typographical costings error during a final press conference on the eve of the election. Ripper also agreed that the introduction of fixed terms would remove the advantage that governments once held to plan the final campaign. Business too, would support the move as most in that sector felt that election speculation was economically damaging. Ripper noted the impact of social media and the challenges it brings for party strategists. His experience led him to warn of the danger of being ambushed by interest groups or the media. However, a major concern was the integrity of the electoral roll, particularly the absence of many potential indigenous voters. In his view there is scope to use data from government agencies to automatically enrol all citizens, young and old.

During the discussion Greg Boland expressed concern that the 'quasi' fixed term meant that, with parliament rising in November, the people's voice would be not be heard at least until the following April. What will happen in the hiatus between the election and the next Legislative Council taking office on 22 May 2013? Interestingly, Notre Dame politics lecturer Martin Drum queried whether the unusually long term of the alliance government, some four and a half years, would mean the electorate may judge that the government has had an opportunity to implement its program and be denied the normal 'fair-go' of a second term. In response Michael Mischin, who felt the demands of being an MLC and Minister were exacting, regarded the 2013 election as another opportunity to test the theory 'that oppositions don't win elections, but governments lose them' ▲

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## **From the Tables**\*

### **Robyn Smith**

#### *Australian Parliament*

Former Speaker Peter Slipper tendered his resignation to the Governor-General on 9 October 2012 after months of controversy during which he remained the Speaker but did not preside over proceedings in the House of Representatives. That job fell to Deputy Speaker Anna Burke who was elected to the position on the same evening.

Slipper was the second Speaker to resign in 11 months, the first being Harry Jenkins, and the fifth time in the history of the House of Representatives that a sitting Speaker has resigned. The more usual course is for a Speaker to retire once the parliament has been prorogued for a General Election.

The House Committee of Privileges and Members' Interests continues to grapple with a proposed Code of Conduct for Members. This innovation arose from various agreements entered into by the Prime Minister with the Independents during the course of negotiations to form minority government following the 2010 August General Election.

The Joint Committee on the Broadcasting of Parliamentary Proceedings spent 12 months in consultation with media representatives, senators, members and parliamentary officers to revise rules governing media coverage of proceedings. This resulted in new media rules being tabled in the Senate and the House of Representatives on 28 November. The rules were last reviewed in 2008. The Usher of the Black Rod and Serjeant-at-Arms have responsibility for administering the rules which seek to balance the media's right to report parliamentary proceedings whilst respecting the privacy of senators and members and allowing them, other building occupants and visitors to Parliament House to go about their business. A

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\* *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)

new video on demand service, called *ParlView*, is also under consideration by the presiding officers.

In the Senate, a privileges matter was decided which addressed the hoary issue of senators (or members) seeking reimbursement for legal costs incurred during the course of their duties. The matter arose from an allegation by one senator against others concerning possible improper influence relating to political donations and the asking of a series of questions without notice by Australian Greens senators. The Committee of Privileges found no causal link between the two, but in the process of defending themselves, two senators incurred significant legal costs and sought to have them reimbursed. Ultimately, after considerable advice was taken and with due consideration to Privilege Resolution 2(11) dealing with costs incurred by witnesses before the Privileges Committee, the requests for reimbursement were declined.

### ***Australian Capital Territory***

A General Election on 20 October resulted in a dead-heat between the Labor and Liberal Parties with eight seats each, and the election of one Greens member. Former Speaker Shane Rattenbury was the sole Green who entered into negotiations with the ALP to form government and became a Minister in that government. The agreement entered into provides that the Auditor-General, Electoral Commissioner and Ombudsman will be Officers of the Parliament; pursuit with the Commonwealth Government of amendments to the *Self-Government Act* to allow the Assembly to determine its size (critical mass being an issue in the ACT); a degree of freedom for the Greens Minister relating to Cabinet solidarity and public statements unrelated to his portfolio areas; and holding an ‘older persons Assembly’ in 2013 and 2015.

Given the close numbers in the Assembly, an Opposition MLA was elected Speaker on 20 October.

Five General Purpose Standing Committees were established in November, each consisting of four members — two government and two opposition — with the Chair having no casting vote. This is a departure from previous practice and a reduction of one committee. Opposition members now Chair two committees, including the Public Accounts Committee, whilst government members chair the remaining three.

Standing Orders were amended to allow the Greens Minister to introduce business for one sitting hour on Thursday. This is known as Executive Members’ Business. A further amendment provided that proposed amendments to legislation must be lodged with the Clerk for circulation 24 hours prior to the sitting day on which they are proposed to be moved.

In a matter of reflecting on the Speaker, two Members of the Assembly were called to account for material contained in pamphlets which were party political in nature and therefore breached the Assembly's Code of Conduct. The material was circulated in July, a time when the Assembly was not sitting. Whilst the members were asked to, and ultimately did, apologise to the Speaker, the members concerned asked the Ombudsman to investigate the Speaker's Determination dealing with guidelines for electorate publications. The Ombudsman advised that he has no jurisdiction to investigate the actions of the Speaker, Ministers or Members of the Legislative Assembly, however he is able to investigate actions of the Office of the Legislative Assembly. The Members then sought to have a range of questions answered by the Clerk. Advice was sought from the Solicitor General whose view was that the Ombudsman had no jurisdiction over the Office of the Legislative Assembly and that any such investigation could be a breach of parliamentary privilege. The Ombudsman advised of closure of the complaint in December 2012 but requested that the Chief Minister ask the Assembly to consider his jurisdiction in relation to matters of this kind.

### ***New South Wales***

The Independent Commission Against Corruption (ICAC) has been investigating the matter of allegations concerning mining exploration licences (Operations Jasper and Acacia) and the provision of a motor vehicle to a former NSW government minister (Operation Indus). In the course of its investigation, the Commission sought to inspect interest disclosure returns made by members, and this gave rise to the question of whether such disclosures attract parliamentary privilege as a 'proceeding of parliament'. It was a difficult question and various authorities concluded that there was no clear basis for determining the question one way or the other. There were two methods of dealing with the matter: one was a judicial response, meaning that a court could decide; the other was a legislative one. The government went with the latter option and introduced the Independent Commission Against Corruption Amendment (Register of Disclosures by Members) Bill 2012 which provided that ICAC may use members' interests disclosure returns for any investigation and recommendation and that parliament is taken to have waived any privilege applying to the register for that purpose.

In August, Speaker Hancock made a considered ruling concerning a trend of Members refusing to withdraw offensive remarks under Standing Orders 72 and 73. She advised Members that she would be enforcing these Standing Orders and that refusal to withdraw, she would name Members under Standing Order 250(3) or have them removed under Sessional Order 249A. In the course of her ruling, Speaker Hancock pointed out to Members that the apology sought was not just for the Member who had been offended, implying that disrespect reflected on the House.

### ***New Zealand***

The Privileges Committee has been referred a matter by the Speaker which involves determining whether parliamentary privilege is attracted by statements made by an official to a Minister for the purpose of replying to questions which are not themselves part of parliamentary proceedings. This arises from the case of *Attorney-General and Gow v Leigh* [2011] NZSC 106 in which the court held that such statements did not attract parliamentary privilege and were therefore actionable. The question for the Privileges Committee is whether absolute privilege applies to advice which is given for the proper functioning of the House and has implications for advice provided by the Clerks, their staff, departmental officials and member of the public who engages in parliamentary proceedings. The Committee has also to examine the matter of comity — mutual respect and restraint between the legislature and the judiciary. No timeframe has been set for the Committee's report.

The same committee has been charged with examining three agreements with external law enforcement parties and how those agreements affect the privilege of the House. The agreements are: (1) with New Zealand Police on policing functions within the parliamentary precincts; (2) with New Zealand Police on procedures for execution of search warrants on premises occupied or used by Members of Parliament; and (3) an MOU with the New Zealand Security Intelligence Service on collection and retention of information about Members of Parliament.

Standing Orders were amended in 2011 to provide for extended sitting hours to deal with matters which have not been reached during a normal sitting period. These amendments were intended to reduce the number of bills going through the House on urgency. Since the amendments, of the 30 sitting weeks in 2012, 11 were extended and urgency has been used on only one occasion, which was passage of a bill necessary for the Budget.

New legislation, namely the *Legislation Act*, passed in December 2012. Its purpose is to modernise and improve the law relating to the publication, availability, reprinting, disallowance, revision and official versions of legislation and to bring the law relating to these elements of legislation into a single act.

### ***Northern Territory***

A General Election on 25 August resulted in a change of government and a surprise watershed result for the Country Liberal Party, which picked up three 'bush seats' hitherto considered Labor Party strongholds. Each party maintained its *status quo* in urban seats. The Country Liberals emerged with 16 seats to Labor's eight with the Independent Member for Nelson holding his seat after a particularly vitriolic campaign. Former Chief Minister Paul Henderson retained his seat but immediately stepped down from the leadership and sat in the Assembly without a shadow

portfolio. His former Deputy, Delia Lawrie, became Leader of the Opposition. Chief Minister Terry Mills has not enjoyed the usual honeymoon period for a new government; austerity measures introduced quickly have alienated the electorate and internal ructions within his own party have had a destabilising effect. Mills announced an interim ministry on 29 August in which he held 38 portfolios and his Deputy, Robyn Lambley, held two. On 3 September, he announced a more permanent arrangement, which was reshuffled on 2 October and again on 7 March.

A change to the Routine of Business in the Assembly has Question Time at 10am rather than 2pm. The capacity for an automatic adjournment at 9pm has been abandoned and the Legal and Constitutional Affairs Committee has been given responsibility for the Subordinate Legislation and Publications Committee, which has traditionally been a separate committee. The latter committee has received a reference from the Speaker in respect of e-tabling of documents and is expected to report in May.

Attorney-General John Elferink announced in November that he would appear before the Full Bench of the Supreme court as Counsel assisting the Solicitor General in a Crown appeal against a decision preventing relieving magistrate Sarah McNamara from hearing cases involving the Central Australian Aboriginal Legal Aid Service (CAALAS) because her husband is the Principal Legal Officer and there could, therefore, be a perception of bias. He appeared to misunderstand his status in the legal system. Being the Territory's first Law Officer, the Solicitor General appeared as Counsel assisting him. Elferink is the first Attorney-General to appear in a matter before the courts, although a predecessor, Shane Stone, appeared in a ceremonial sitting on the occasion of the retirement of Chief Justice Austin Asche in 1993. Other Attorneys have made appearances at similar ceremonial sittings.

### *Queensland*

Speaker Simpson has confronted the same issues as NSW's Speaker Hancock in respect of Members refusing to withdraw offensive words. On 1 November, Speaker Simpson pointed out to Members that refusing to follow a direction from the Chair is, in fact, a reflection on the Chair and that the Chair has the right to require withdrawal of unparliamentary language without being prompted by an objection from another Member.

The issue of media access to the Chamber in the Queensland Parliament has resulted in suspension of media organisations from the Chamber following breaches of the guidelines and specific orders from the Chair in relation to filming activities in the public galleries and close-up photography of material on Members' desks. The first breach occurred during debate on the Civil Partnerships and Other Legislation Amendment Bill on 21 June 2012; the second occurred on 13 September.

In the period July to December 2012, 30 matters of privilege were raised by Members with the Speaker and were ruled upon and a further nine were referred to the Ethics Committee. The majority of complaints related to alleged deliberate misleading of the House. Most were dismissed, which prompted the Speaker on 11 September to remind Members not to use the privileges of the Assembly for trivial, tedious or political reasons. Eight matters remain before the Ethics Committee.

In May 2011, former Member Gordon Nuttall was found guilty of 41 counts of contempt of Parliament and was fined \$2000 for each count. By May 2012, nothing had been received by way of payment. Nuttall asked that the Parliament reconsider his submission (made in May 2011 when he appeared at the Bar of the House) for clemency based on his imprisonment and forfeiture of assets imposed by the courts. The Speaker informed the House on 7 June that she considered the failure to pay a matter of privilege and referred it to the Ethics Committee. That Committee noted that the Public Trustee was manager of Nuttall's estate and that sales of assets had taken place pursuant to the *Criminal Proceeds Confiscation Act*. The Public Trustee has informed the Committee that a small interim payment to all creditors can be made and that once Nuttall's remaining assets have been liquidated, all debts, including the fine owing to the Parliament, could be paid. On that basis, the Committee resolved that it was not necessary to determine whether Nuttall was wilfully disobeying an order of the House, which would be a matter of contempt. The Committee's report, Number 123, was tabled on 11 September.

In something of a departure from tradition, Cabinet documents were tabled in the House on 31 October by the Leader of the Opposition, Annastacia Palaszczuk. This followed a motion on 12 July by the Minister for Health, Lawrence Springborg, seeking the documents which related to the former Labor Government and Queensland's troubled IBM health payroll system. The motion was not an order of the House pursuant to the *Parliament of Queensland Act*, but called on the Opposition to provide the documents to him rather than the Parliament. In the event, the documents were tabled with the Opposition Leader indicating that this was a one-off event that she would be 'highly unlikely to ever do so again'. On the same matter, on 13 December the Government announced a Commission of Inquiry into the payroll system. The Commission will report to the Premier by 30 April 2013.

The *Criminal Code* has been amended to remedy collateral damage caused by a clash with the *Parliament of Queensland Act 2011* which gave rise to double jeopardy in certain circumstances. Sections of the *Code* were repealed as a result in 2006, but have left the Queensland Parliament vulnerable. For example, prior to the 2012 amendment, it was an offence under the *Criminal Code* to create a disturbance when Parliament was not sitting, but not when it is sitting, which is when most people take grievances to their elected representatives. The amendments, made on 2 August 2012, reflect the intention that freedom of speech and debate is abrogated to the extent required by the offence of giving false evidence to the Assembly or a Committee and clarify that the offence applies to Members of Parliament as well as non-members.

### ***South Australia***

With a General Election due in 2014, the parties are beginning to square off in preparation. Relatively new Labor Premier Jay Weatherill had a major Cabinet reshuffle in which he eased out a number of senior Ministers and reduced the size of the Cabinet from 15 to 13. Speaker Lyn Breuer was also replaced by former Attorney-General in the Rann Government, Michael Atkinson.

The Opposition, dogged by leadership rumours for the latter part of 2012, replaced its leader Isobel Redmond with Steven Marshall, rather than the much-mooted former Foreign Affairs Minister Alexander Downer who would have to have been parachuted in Campbell Newman style and lead the party from outside the parliament. Marshall similarly reshuffled his shadow ministry and reduced it to 12 Members.

### ***Tasmania***

In late August, a sessional order was created which provides for co-sponsorship of bills. This immediately gave rise to the Premier and the Leader of the Greens, who is also Education Minister, introducing a bill to provide for same-sex marriage. Usually, standing and sessional orders require reference to the Standing Orders Committee and require a two-thirds majority in the House for adoption.

In November, a disagreement between the Houses on the University of Tasmania Amendment Bill gave rise to the establishment of a Reasons Committee, a procedure which has not been used for some 20 years. At issue was an amendment to which the Legislative Council did not agree. The Reasons Committee reported the reasons why the House had voted for the amendment in the first instance. The report was considered by the Council on 15 November, the Council agreeing to a fresh amendment of the Assembly and dropping its insistence on the original amendments it had proposed.

### ***Victoria***

News for the second half of the year has been overtaken by very recent events in Victoria, including the resignation of Premier Ted Baillieu after controversial MP Geoff Shaw resigned from the Liberal Party, reducing the government's majority to potentially one. For his part, Shaw had been investigated by the Ombudsman for alleged misuse of his parliamentary vehicle. The Ombudsman recommended that the matter be referred to the Privileges Committee of the Legislative Assembly.

The new Premier is Dr Dennis Napthine, who was elevated to the job on his 61<sup>st</sup> birthday. Napthine was first elected to the Victoria Parliament in 1988 during the Kennett years. Following Kennett's defeat, he served as Leader of the Opposition.

Victoria has a new 'integrity' regime, which is headed up by the Independent Broad-based Anti-corruption Commission (IBAC) and the Victorian Inspectorate, with IBAC being the principal body for receiving and investigating complaints about serious corruption in the public sector and police. The Office of Police Integrity has been abolished. The Victorian Inspectorate will oversee the day-to-day operations of IBAC, the Ombudsman and the Auditor-General. Three parliamentary committees have been formed to monitor the regime: (1) IBAC Committee, a joint committee, which reviews the performance of IBC, Public Interest Monitors and the Victorian Inspectorate; (2) Accountability and Oversight Committee (AOC), also a joint committee, which reviews the performance of the Ombudsman, Freedom of Information Commissioner and the Victorian Inspectorate's oversight of the Ombudsman; and (3) the Public Accounts and Estimates committee, which will review the performance of the Victorian Inspectorate's oversight of the Auditor-General's office.

A Social Media Inquiry has been completed by the Standing Orders Committee. This inquiry arose out of reflections on the Chair when a Member tweeted about the Speaker's impartiality late in 2011. The Committee's report, which has yet to be considered by parliament, did not recommend any changes to Standing Orders, but suggested guidelines for Members and people in the galleries. The Committee also found that the rules in relation to reflecting on the Chair are poorly understood and need to be both followed and enforced.

### ***Western Australia***

Parliament was prorogued on 14 December 2012 in preparation for the March General Election, which is expected to be comfortably won by incumbent Premier Colin Barnett's Liberal Party.

Prior to the prorogation, amendments were made to the *Electoral Act 1907* in relation to the identity of people seeking to enrol to vote to bring it into line with enrolling to vote in Commonwealth elections and abolishing the crime of electoral defamation.

On 3 December the Criminal Investigation (Covert Powers) Bill was passed by both Houses. The legislation protects an undercover operative and a person in a witness protection program from being asked questions by the Parliament or a Committee if a certificate is provided by the Police Commissioner to the relevant Clerk before the person gives evidence. It also makes it a criminal offence to disclose the identity of a person in a witness protection program. Parliamentary privilege is preserved in the legislation.

The issue of parliamentary privilege was also exposed in the Evidence and Public Interest Disclosure Legislation Amendment Bill 2011. This legislation contained provisions to regulate any proceeding before 'a person acting judicially' where a journalist has declined to disclose a source. It gave rise to the question of whether

Parliament or a Committee falls within the definition of ‘a person acting judicially’ and, if so, potentially removes the self-governing powers of the parliament to determine privilege matters. The Council referred the bill to the Standing Committee on Procedure and Privileges which now has before it a draft Standing Order which seeks to implement the broad aims of the bill without endangering parliamentary privilege and exposing parliamentary proceedings to the possibility of judicial review.

In October, the Legislative Assembly agreed to a proposal from the Council to establish a Joint Standing Committee on Audit which fulfils a requirement of the *Auditor General Act 2006* that a Committee be established to advise the Treasurer on the annual budget of the Office of the Auditor-General. The Committee will also undertake a review of the *Auditor-General Act*. ▲

## **BOOK REVIEWS**

Anne Twomey is Professor of Constitutional Law, University of Sydney  
***Reluctant Democrat — Sir William Denison in Australia 1847–1861***  
Federation Press, 2011, Annandale, pp xv + 446.RRP \$59.95.

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When Victoria held its celebration for the sesquicentenary of responsible government in 2006, it spent its celebratory fund on fireworks. In contrast, in New South Wales, the Premier, Bob Carr, decided to use the money instead to support works of serious scholarship on the history of Parliament and Government in New South Wales and the development of the political system over that 150 years. The result has been the publication of an extraordinary collection of books, sponsored by the Sesquicentenary of Responsible Government Committee, which will leave an invaluable ongoing legacy for the people of the State. In New South Wales, very small investments of government support have reaped lasting benefits with which a fireworks display cannot begin to compete.

This biography of William Denison is the 36<sup>th</sup> book published with the support of the Sesquicentenary Committee, and once again it is evidence of the exceptional quality of these works, both in depth of scholarship and in readability. Bennett originally suggested that the Committee might consider the editing and publication of the late C H Currey's unpublished and unfinished opus on Sir William Denison. For his helpful suggestion, he was repaid by being press-ganged into producing the work. In the end, it turned into a work of Bennett's own — but it draws upon much of the earlier work of Currey.

Sir William Denison is a crucial character in the political history of New South Wales. It was he who was Governor at the most fundamental constitutional turning point when New South Wales obtained 'responsible government' in 1855. He started his term of office in NSW with the immense powers of an autocratic colonial Governor and finished it with diminished, largely figure-head powers, similar to those exercised by a Governor today. He found the process painful and was not a true supporter of the reform. Nonetheless, he shepherded it through and laid the foundations for the parliamentary system of government we retain today.

Denison's background was aristocratic. He was, however, a younger son who had to make his own way in the world. His eldest brother entered into politics, becoming Speaker of the House of Commons and his second eldest brother entered the Church, becoming Bishop of Salisbury. William, being the third son, was destined for the army. He trained as an army engineer and it was the practical approach he developed from his engineering training that marked his period as Governor. The Army also gave him his first taste of the colonies, sending him to Canada for five years where he was involved in the construction of engineering works on the Rideau Canal.

Denison was fascinated by science and like many aristocrats of his time, he dabbled in scientific experiments and studies of his own initiative. In Canada, he undertook a study of the strength of various North American timbers, using a machine he had devised to test them. He was awarded a prize for the publication of the results of his work. Denison wrote that there is much pleasure 'in the acquisition of knowledge for its own sake, but, when knowledge is combined with utility, when it is available for the benefit of others, the pleasure is infinitely increased.'

This attitude was reflected in Denison's term as Lieutenant-Governor of Tasmania (1847–1855) and Governor of New South Wales (1855–1861). He was in his element when dealing with the building of bridges, the draining of swamps and ensuring the education of children. He sought practical outcomes to problems, cutting across formal niceties to achieve results. It was for this reason that he was first appointed as Lieutenant-Governor of Tasmania. The previous Lieutenant-Governor had been dismissed for general incompetence and a replacement was sought who would be practical, have military skill and scientific understanding. Denison fitted the bill and took up the challenge with enthusiasm.

The problem for Denison, however, was that he had no understanding of constitutional law and no patience with the need to comply with its arcane rules. From the very beginning he stumbled into (and often created) constitutional crisis upon crisis. For me, this was the most fascinating aspect of this book. In many cases the crises and the broader issues that they raised seemed very familiar to modern ears. Take for example the problem of chaplains, set out in Chapter 3. Did the chaplains to the convicts come under the jurisdiction of the Governor (as government officers) or the Church? There were also problems with the funding of appropriations, a recalcitrant upper House and the exercise of executive power.

Denison attacked these constitutional issues with military fervour. One of the earliest controversies arose when the Tasmanian Supreme Court held that the *Dog Act* was invalid, because its imposition of licence fees amounted to a tax and the law did not meet the 'manner and form' requirements for a tax set out in a British statute. Denison was advised that this finding would affect the validity of a number of other laws. He responded by seeking to remove the judges, rather than fix the laws. He succeeded in removing Justice Montagu (who had been using his judicial office to avoid paying debts to his creditors, thus providing a reasonable ground for dismissal) but failed in his attempt to suspend the Chief Justice for 'neglect of duty' in not noticing the invalidity of the *Dog Act* earlier. At that time all laws of the colony had to be presented to the Supreme Court as soon as they were made. A law would then come into effect 14 days later unless one of the Judges found it to be repugnant to — i.e. inconsistent with — the law of England. After failing in his attempt to suspend the Chief Justice, Denison's second response was to cause the enactment of a law that provided that no colonial law could be held invalid on the ground of repugnancy once that initial 14 day period had expired. This law was disallowed by the Queen, on the advice of the British Government, on the ground that it was 'unconstitutional'.

Another early challenge was the blocking of the supply. Those Members of the Legislative Council who opposed the transportation of convicts to Tasmania blocked supply in 1848 on the ground that too much money was being spent by Tasmanian taxpayers on the welfare of British criminals. Denison, unperturbed, ignored the Legislative Council and kept spending without a parliamentary appropriation. Again, it was up to the British Colonial Office to advise Denison that he was acting unconstitutionally and must never take such a course again.

Other constitutional controversies faced by Denison included:

- Sorting out the ‘chicken and egg’ transitional issues involved in moving from a Legislative Council to a bicameral Parliament and a system of responsible government, and seeking the Chief Justice’s advice upon the problems involved (Ch 13);
- Deciding whether religious leaders and Supreme Court Justices should be members of the new Legislative Council (Ch 13);
- Refusing a dissolution to Premier Cowper in 1856 (Ch 15);
- Rejecting Premier Cowper’s advice to ‘swamp’ the Legislative Council with new appointees (Ch 15);
- Offering military support to the Governor-General of India without the support of Parliament (which declined to pay for it) (Ch 16);
- Determining the border between New South Wales and Queensland, and keeping New England as part of New South Wales (Ch 18); and
- Seizing and applying the public seal of the colony against the advice of the Premier, who sought to resign as a consequence (Ch 14).

It fell to Denison to implement a system of responsible government in New South Wales. He viewed it dimly, describing the political notion of ‘responsibility’ as ‘clap-trap, a watch-word devised by the unscrupulous as a means of deluding the unwary, meaning nothing but the right of the majority to make fools of themselves without let or hindrance’. Nonetheless, he did his duty and implemented it as best he could.

This book, as with all Bennett’s books, is a splendid work of scholarship and an insightful window into a different time. Denison’s governorship of New South Wales covered the tipping point from vice-regal rule to responsible government. Perhaps even more than federation, this was the most profound political change in the history of New South Wales. This book will be of great interest not only to aficionados of political history and political biography, but also for those seeking a deeper understanding of our system of government. ▲

Reviewer: Mary Crawford PhD, is a Visiting Scholar at the School of Management, QUT Brisbane, and the former Labor MP for Forde (1987–96)

***Tales from the Political Trenches***

by Maxine McKew. Melbourne University Publishing, paperback, pps 256, RRP \$29.99, ISBN 9780522862218

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In *Tales from the Political Trenches* Maxine McKew explores the political environment of the Rudd Labor government's win in 2007 and its demise in 2010. In it she details her own decision to run for the seat of Bennelong to move 'from questioning to governing' (84). She relives her excitement at defeating the sitting Prime Minister, John Howard and then her disappointment at her loss. She highlights the tension that exists for individuals in trying to balance their own values and the demands of the electorate with the requirements of being a team player in a political party. Further she gives her explanation for the events that saw Kevin Rudd replaced as Prime Minister by Julia Gillard. What tends to thread through the book is her desire to remain a non-factionally aligned member of the Australian Labor Party while operating within its aegis.

There is no doubt that by 2007 Maxine McKew was at the height of her profession. She emerges from the book as someone who is independent, clever, insightful and adventurous. Her career which began in London was developed in Australia and Washington. By 1985 she 'had a national profile, and was working with interesting people, and discussing issues of consequence' (33). In Washington she came to understand the 'core business of the daily trade in information' (33) and by 2007 recognised what was most admirable about creative political leadership: 'the physical and intellectual effort, the call to service, and the wit to know when to junk conventional wisdom' (39). McKew explains her desire to run for office as 'quite simply, 'I wanted to play a role in public life' (51) and despite approaches from NSW Labor in 2004 she felt she would rather be independent than take a safe Labor seat and be tied to party officials.

The arrival of Kevin Rudd offered Maxine an opportunity to view politics through new lens. She sees Rudd as 'smart, serious and hardworking' (53) and more importantly 'his own creation' (54) and someone who 'understands that the sun and stars don't rotate around the Australian Labor Party' (53). When he invited her to be part of his team, she didn't hesitate. It was her partner, Bob Hogg who suggested she run in Bennelong for three reasons: they lived there, it had a changing demographic and very importantly no one else would want to run for Labor so there would be no debts or obligations (56–57). On her own admission McKew ran her own campaign. She rejected any negative campaigning style and took up a more positive stance and asked people to 'reconsider' their vote. She put herself at a

‘distance from many of the party faithful’ and also rejected any advances from the *Not Happy John* crowd (60).

While she acknowledges ‘the discipline and the clarity of Rudd’s key messages were critical to the success of the national campaign’, she admits she nuanced the messages to better suit the constituents of Bennelong. While this brought opprobrium from one of Labor’s officials, she enjoyed the support of Kevin Rudd and Julia Gillard along with other senior Labor figures as well as Bob Hawke and Bob Carr on the campaign trail. The campaign itself is outlined in Margot Saville’s book *Battle for Bennelong* and the fact that support came from all over Australia highlights just how different this was from other marginal seat campaigns. While recognising the historical importance of the win in Bennelong, McKew recognised it as merely a stepping stone to getting things done. She says she had not asked for particular treatment and when Kevin Rudd rang after her victory she had indicated she wanted to be part of the executive.

Her elevation to Parliamentary Secretary meant she had to report to both Kevin Rudd and Julia Gillard. She does acknowledge that Julia is extremely confident as well as being a prodigious worker who can get things done (80), but wishes she had had a better working relationship with her. There is no doubt that, despite the variety and constancy of the electorate work, McKew enjoyed the challenge. She found she could help people often in small ways and make a difference to their lives. She was also able to bring national programmes such as the Education Revolution to Bennelong and show those who had voted for her that she could deliver. However, she again ran into trouble, this time from the PM’s office, when she spoke out about her portfolio, child care, and was reported on the front page of the *Sydney Morning Herald*. She acknowledges herself that the Rudd government had gone to a ‘command and control’ model (109) by not allowing MPs to contribute in a democratic way to the messages that needed to go out to the electorate. She argues that people were unwilling to speak out and Caucus became a rubber stamp for ministers — there was not even a pretence at committees seeing and discussing legislation before it came to Caucus (116). Added to this unease was her feeling of being unable to adjust to the institutionalisation of life in parliament on sitting days. She found parliamentary life restrictive and it is one of her few regrets that she did not seek more guidance from the Government Whip, Roger Price, on how to better manage her new environment. She admits this may seem extraordinary for someone who has been around the political arena for thirty years but also argues that many enter parliament as part of their strategic plan (119–120). Further she goes on to admit that she ‘always felt like an outsider in Parliament House’ (165).

It is in this context that the events of the evening of the 23 June 2010 need to be situated. For Maxine McKew there is no doubt — Rudd was the leader who had beaten Howard, made the apology to Indigenous Australians and faced down the financial crisis (165) and needed to be supported. She does concede that Rudd was also culpable and needed to be more consultative. She also argues that senior

ministers should have tackled Rudd about his behaviour before moving on him. However, there is no elaboration of any of Kevin Rudd's actions, or of why so many backbenchers moved so quickly. What is argued is that the ousting of a prime minister took away any moral authority the Labor party had and Julia Gillard has struggled ever since right through the 2010 election and beyond (169). Maxine McKew sees Julia Gillard's behaviour as PM as less than edifying and merely as a political operator (197). McKew raises issues around the mining tax, the Henry Review, and the dropping of the ETS and seeks to find answers as to why a group of people would so quickly desert an election winning leader. There is a suggestion that both Kevin Rudd and Maxine McKew owe their political success to the fact they did not come from traditional Labor backgrounds but had Labor values (227). On the other hand, their supporters and workers were firmly embedded in the ALP's structures and it is the workers like Stan (223) who have voted and worked for the ALP for 51 years who continue to carry the progressive cause for politics forward. Further she goes on to suggest that leadership is in crisis around the world (232) and it is difficult to get the media to discuss serious issues (234) in the current climate.

While it may not answer any of the questions around the leadership changes of 2010, the book does offer insights and some of the excitement around election campaigns and the day to day life of parliamentarians. It also suggests that outsiders find it very hard to be part of the political process and that to work effectively for change a leader has to be consultative and be driven by ideas. In the end Maxine McKew is hopeful of a Labor renewal. ▲

Reviewer: David Clune is an Honorary Associate in the Department of Government and International Relations, University of Sydney

***Politics, Society, Self***

by Geoff Gallop. UWA Publishing, 2012, viii + 325 pp, RRP \$29.95

***What is to be Done?: The struggle for the soul of the labour movement***

by Jim Macken. The Federation Press, 2012, x + 69 pp, RRP \$16.95

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There is, sadly, no established tradition in Australia of those involved in politics writing seriously about the subject. In the UK, by contrast, practitioners have made notable contributions: historians like Churchill, diarists like Harold Macmillan and Dick Crossman, theorists such as Tony Crosland and polymaths like Roy Jenkins, who throughout his career produced a steady flow of quality history, memoirs and essays. There are some indications that this may be changing with the publication of Bob Carr's diaries, John Howard's best selling memoirs and important books by Rodney Cavalier and Frank Sartor. These two works by labour movement figures are also an encouraging sign.

Geoff Gallop's *Politics, Society, Self* is a collection of speeches and occasional writings. Such volumes can vary greatly in quality, from the disconnected outpourings of those who are convinced that every word they write should be immortalised in print to collections that fit together so well they seem purpose-written, for example, John Hirst's *Sense and Nonsense in Australian History*. Gallop's book is more in the latter category, containing lucid, intelligent and thought-provoking essays about politics and religion, the future of parties and governments, 'left liberalism', social policy, post-New Public Management public administration, federalism, human rights and mental health. He tries to make sense of and provide some solutions to the problems and crises that beset the modern state. Gallop is well qualified to do so, having been an academic, practitioner of politics, Premier of WA, and having successfully battled personal problems. His writing combines theoretical rigour with practical insight.

While forthright about his views, Gallop is a voice of reason in a climate of increasingly extreme public debate. Influenced by Bernard Crick, he defends politics as the process by which:

...we peacefully resolve conflict. It's all about negotiation and compromise and, in a democracy, it is underpinned by civil and political liberty and regular elections. It is a messy business that allows for the expression and management of interests. Consensus is never assumed but is an objective towards which politicians need to direct their efforts.

Gallop's causes are the much maligned 'Third Way' of Tony Blair (a personal friend), the tempering of economic rationalism by social inclusion, a 'new radical centre', a charter of rights and a republic. He also champions parliament, states' rights, action on climate change and sustainability. If there is a weakness in his prescriptions, it is a tendency towards broad, high-minded generalisations that are light on practical details about implementation.

Unfortunately, this worthwhile volume has not received the quality of presentation it deserves. The cover is drab and the pages already yellowing. While the economics of publishing are undoubtedly difficult, better editing would have removed unnecessary repetition and made the work flow more smoothly. Proper proofing should have eliminated the sloppy typos that mar the book. Most egregiously, readers would be surprised to learn on page 47 that Gough Whitlam 'challenged his colleagues' to take up the cause of 'pubic policy'.

The current travails of the Labor Party have had the side effect of producing some interesting writing. Jim Macken has had a long involvement with the labour movement as a unionist, ALP Industrial Group activist, barrister and Judge of the Industrial Commission. Macken has produced a fiery, opinionated tract in the tradition of pioneering Labor publicists such as George Black and Henry Boote. Macken's characterisation of labour history as a selfless struggle by a rank and file-controlled mass movement to better the lot of the 'poor and marginalised' relates to reality the way Robin Hood does to English history. It is the Australian version of the Whig theory of history, although not as subtly or elegantly expressed as by Bede Nairn. That being said, both Robin Hood and 'the light on the hill' are influential and beneficial myths, the latter being an infinitely preferable world view to the sordid cynicism of many current labour movement operatives. Macken describes their mindset as 'an eerie mix of pantheism and epicureanism with the words best understood being ME ... NOW ... MORE'.

Macken traces the difficulties of the labour movement to the 'cultural revolution' of the 1960s with its 'lurch to nihilism' and 'accompanying threads of moral decay and social collapse'. At the same time, industry and commerce changed with the rise of multinational corporations: 'The new God was to be the market: a cruel and inhuman sovereign'. The Whitlam Government 'reflected the ethos of the cultural revolution rather than that of a traditional Labor Government'. The support of the 'unionised, blue collar work force' was taken for granted while the Government courted 'the middle class and radical women's vote'. Hawke and Keating adopted 'ultra-conservative' economic policies that led to:

...the casualisation of the labour force, the mushrooming of temporary employment agencies, a reduction in the real wages of most workers, a progressive loss of long established working conditions, a widening gulf between rich and poor and the disenchantment of the rank and file and middle level union management from union policy decisions.

Unions ignored the threat these developments posed and ‘persisted in pursuing structures and attitudes that were no longer relevant’. The unions and the ALP ‘abandoned the principle of rank and file control. Both thought the centralisation of power would solve the organisational problems they faced’. By the 21<sup>st</sup> century, they were shrinking, unrepresentative organisations controlled by cliques of careerists.

In spite of his romanticising of the past, Macken does not advocate a simplistic reversion to previous structures as the way forward for the labour movement. He argues two basic changes are needed if the unions are to survive and revive. First, the definition of ‘worker’ needs to be greatly widened: workers of whatever class should be able to become unionists. This could be achieved by peak union bodies issuing for a nominal sum a ‘universal OK card’ that would bring any worker under the umbrella of the labour movement. Second, instead of restricting union membership to employees, a ‘small and shrinking class’, any ‘collective of workers’ should be ‘recognised as a trade union and welcomed into the union fold’. The union movement should no longer be affiliated with the ALP as the two bodies’ interests are often far from identical. Instead, a broadened union membership would exercise influence in the Labor Party by voting in primaries. The ALP also needs to democratise and broaden its base: ‘Would it really matter if we had gay branches of the Party? Would it matter if the MUA members on a vessel formed an ALP branch or the workers in a western suburbs factory did so?’ It is doubtful if Macken’s innovative ideas will ever be given a chance as it would involve the current controllers of the labour movement voluntarily yielding their fiefdoms.

Gallop and Macken are dissimilar types of Labor people from disparate eras who have written different kinds of book. Yet both have in common a dedication to their cause and stimulating ideas about how to save it. If the unions and ALP are to be a continuing force in society, such input is much needed. ▲

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***The Australian Policy Handbook: Fifth Edition***

Catherine Althaus, Peter Bridgeman and Glyn Davis, Allen & Unwin, 2013, ISBN 978 1 74237 893 0, 296 pps, paperback AUD\$45.00

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This is the fifth edition of the Australian Policy Handbook which says a lot for its usefulness to what is a discrete readership. After the first three editions the authors, Peter Bridgeman and Glyn Davis, were joined by Catherine Althaus, a policy analyst who is again a co-author. They readily acknowledge that policy development in any sector is an imperfect craft but particularly so in the stressful and often chaotic world of government. As they point out, there are no definitive answers to the many questions raised by those given the task of developing policy. They are to be commended for staying with the task. Through their experience and the valuable feedback and advice stimulated by earlier editions they have continued to pan a mountain of gravel for specks of gold that are of tangible value. The thrust of the text is to articulate some clear guidelines of process that will be of assistance to practitioners, many of whom start their careers knowing little about the task they have been set. The book, therefore, seeks to identify the constants of good policy making, ‘unashamedly written from the perspective of practitioners working from within the formal government machine’, against a background of intellectual rigour, a commitment to procedural integrity and a willingness to experiment and learn through implementation and adaption. One wonders, however, how much it would help the person described in the Acknowledgements as ‘a somewhat-panicked graduate trainee in Queensland Health (who) had never studied politics, policy or administration’ and had to ‘write a food nutrition strategy for Queensland quickly’. Though this was the catalyst for the first edition and presumably remains the driving force behind subsequent editions, one cannot help but wonder whether after five editions our graduate trainee is still left wondering.

This said their analysis of the exceedingly complex environment in which government policy is generated is useful and interesting, certainly interesting to novices such as the graduate described above but questionable as to how useful when one is faced with the immediate dilemma of how to write a policy. If anything it is rather too academic. In a handbook one expects to find material of a more practical nature. It is in essence a treatise on policy making frameworks in the Australian context and as such it is remarkably good. The layout of the pages at times distracts the reader from the main thread of the text. The inclusion of summary statements and quotations as a form of side column and the random style used in presenting tables and figures divides the reader’s attention in a way that is not helpful. It may have been better to blend much of this material into the basic text so it can be read without losing the flow. Throughout there is an underlying dilemma arising from the constantly changing and random reference to particular

policies, an unfortunate emphasis on short term pragmatism as a reason for avoiding basic logic, and the use of jargon such as 'smart practice' and 'best practice' when at best what is meant is 'current recommended practice'. The use of terms such as 'smart' and 'best' indicate they are smart or best when this is seldom the case. There is at times a conflict between the serious and the cynical, for example, the quote from Jeffery Pelt, a character in the film 'Hunt for Red October' (1990) on page 68 seems to have no relevance. At best it is an attempt at humour, at worst a cheap jibe at politicians. These distractions subvert the reader's attention from the real to the surreal.

The book continuously informs the reader of the difficulties and obfuscations facing the policy maker. No doubt they are there but it would have been useful if they had tracked these obstacles in more detail. An example of this occurs when privatisation of prisons is used as a case in which economic tools are used to drive policy and the question is posed, 'What does a market and incentive analysis add to decision making about private prisons?' The eager reader however never gets an answer, instead the text switches to the Howard Government's creation of Job Network. It would have been very beneficial if the prison theme could have been followed through to highlight the point being made. It may also have been of practical benefit if just a few examples had been used throughout building a better understanding of how policy problems work out in the examples chosen.

The discussion on the place and value of evidence as a source of informed opinion rather than an ultimate determinate is useful for, in some cases, the intuition of a politician with an ear to community thinking can leaven the hard evidence to produce a better outcome than could ever be drawn from diametrically opposite material from equally qualified sources. Perhaps policy makers should be encouraged to work more closely with back bench members who are often better informed on community opinion than ministers. The chapter on policy instruments benefits from the fact that the subject facilitates objective description of process. But even here the reader is left wanting more information. The various subsets are briefly sketched whereas, given their importance in the process, a wider discussion of each section would be beneficial.

While the book 'unashamedly' focuses on tools for practitioners within government it does recognize the external factors that help shape policy and the increasing role of external players. Yet one important area that has been overlooked is opposition members. It is to be regretted that too few academics spend time on considering the role of members of parliament in opposition. They seem to forget that the opposition is a government in waiting and that therefore the quality of their policy development will play a vital role at a future date when inevitably they come to government. The great advantage of developing policy in opposition is that the overall strategic direction is targeted to the next election. To a great extent the opposition is free of the time pressure governments are obliged to consider and thus are able to take a more structured approach, over a longer period of time, to 'get it right' or 'get it less wrong'. Members of parliament always learn more about policy

making in opposition than they ever do in government. An examination of this alternative policy making dynamic could provide enlightenment for all who participate in the process in government.

The exploration of consultation processes and the corresponding attitudes of government are of particular interest, highlighting as they do the dichotomy between government's need for quick solutions and the necessity to spend more time initially to get a better outcome. More and more instruments are being created to solve failures within the process. Perhaps in the next edition the authors could give some attention to how systemic failure made be addressed by fine tuning the elements of the policy cycle. How many times can governments afford to fumble their approach to a problem before the cost of failure exceeds the cost of taking more time to methodically work through the process? Examples of fumbled policy abound, the second Sydney airport, mental health, education reform to name but a few to say nothing of the home insulation debacle which gets a mention on page 180. The chapter explores a variety of ways by which governments 'consult' the people and a number of examples given, two being, Deliberative Democracy — Perth's *Dialogue with the City* (2003) and Deliberative Polling — 'Muslims and Non-Muslims in Australia' (2005) run by Issue Deliberation Australia in response to the Cronulla riots. Given that both were some years ago it would have been interesting to have some indication of the success or otherwise of these initiatives. Later in the section on Consultation Traps, in relation to the establishment of NSW Police Accountability Teams (2002), we learn 'The initiative has so far failed to provide evidence of improvement in community consultation or police accountability'. This is an improvement but we need to know why. The authors' support for consultation strikes a positive note for policy making. Overall the Chapter is informative and of practical value.

It is always easy to critique from the sidelines but the authors, who by now are in very familiar territory, could perhaps summon the courage to break away from their current structure to experiment with more structural elements, with hopefully beneficial results. It is also worth considering whether much of Chapter 12 should form the basis of a new Chapter 2. Rather than provide the valuable comments sprinkled through this chapter at the end it would be useful to have this advice from the beginning. For example, the emphasis on integrity which is more pronounced in Chapter 12 than in any previous chapter should be a reoccurring thread of the text. Given that principles and ethics are of paramount importance, but seem to have little place in today's politics, it is important to instill this from the beginning. One gets the impression that what characterizes the fumbles and stumbles is often that the element of integrity and principle is missing.

Policy makers cannot serve too many masters, that is not their job, their job is to create sound, workable, defensible policy. Sound policy wins support for governments. To describe policy as having an element of art seems to be an excuse for lack of exactitude. Certainly it requires innovation and imaginative thinking but most of all it requires a methodical approach to problem solving that should throw

up the best solution in the current climate, for the best price and the least distress. For example, Eugene Bardach's book 'A Practical Guide for Policy Analysis', now in its 4<sup>th</sup> edition, outlines key elements of policy analysis in a logical flow without constraining them to any linear process. This makes the book easy to follow and use. He has three main aims, guiding students through his eight-part policy analysis process, helping students develop useful skills in acquiring data relevant to policy problems, and providing a roadmap for learning how to transfer good practice from one setting to another. Much of the essence of policy analysis and development lies in experience, perhaps no one under the age of 35 should be allowed to write policy, but books such as Bardach's help those developing their policy skills to reach a level of competency quicker.

Clearly the subject is huge but the challenge to provide meaningful but succinct guidance to the ever changing cast of novice players is even greater. Perhaps what we need is a companion book dealing with the practical aspects of policy making rather than more editions in their current form. Perhaps what is needed is a 'Policy Making for Dummies'. ▲