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APR is the official journal of ASPG which was formed in 1978 for the purpose of encouraging and stimulating research, writing and teaching about parliamentary institutions in Australia, New Zealand and the South Pacific (see back page for Notes to Contributors to the journal and details of AGPS membership, which includes a subscription to APR). To know more about the ASPG, including its Executive membership and its Chapters, go to www.aspg.org.au

Australasian Parliamentary Review

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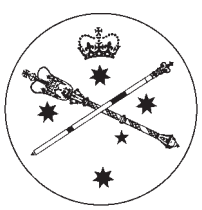

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From Your Editor

Colleen Lewis

Colleen Lewis is an adjunct professor at the National Centre for Australian Studies, Monash University

Welcome to the Autumn/Winter 2015 edition of *Australasian Parliamentary Review*. It contains articles from parliamentary officers and papers presented at the Australasian Study of Parliament Group's (ASPG) highly successful 2014 National Conference held in Sydney in October 2014. It also includes Robyn Smith's regular and much appreciated contribution *From the Table*s, which offers an overview of some administrative and procedural developments in Australian parliaments. The usual Book Review section contains two reviews, which alert us to recent publications relevant to the study of parliament. I strongly encourage members to contribute to this section. It does not need to be a lengthy piece – 1000 words is usually adequate but can be shorter or longer depending on the nature of the book being reviewed.

This edition starts with an examination of the case for a Parliamentary Privileges Act for New South Wales. Stephen Frappell, Clerk Assistant – Procedure in the New South Wales Legislative Assembly offers an excellent overview of parliamentary privilege in that state. His article then presents an argument for partial codification of the immunities of the Houses and points out that other Australian parliaments have been more successful than New South Wales in legislating in the area of privilege.

Focusing on the first 25 years of self-government in the Australian Capital Territory (ACT) Parliament, Andrea Cullen, Secretary, Standing Committee on Public Accounts in the ACT Legislative Assembly, focuses on civil society's participation in the ACT's committee system and explains the importance of parliaments doing all they can to foster strong relationships with citizens. Citing esteemed parliamentary scholar, Philip Norton, she reminds us that the nature of that relationship lays the foundation for the level of trust citizens have in their sovereign institution.

The six conference papers that were presented at the Australian Study of Parliament Group's National conference, in Sydney in October 2014 address, from various perspectives, the theme of the conference: *How Representative is Representative Democracy.*

Professor Anne Twomey, Professor of Constitutional Law, University of Sydney, in examining 'The High Court on Election Funding' explains that regulating campaign

finance laws can be difficult from a constitutional and practical perspective. While acknowledging the complexities that surround this issue, she makes the point that difficulty and complexity do not constitute valid reasons for inaction.

Dr Liam Weeks, College Lecturer, Department of Government, University College, Cork, questions the often-accepted argument found in the party-centric literature that effective and efficient parliaments require well-functioning political parties. Using examples from Australia, the United States of America, Canada, two British dependencies and the Falkland Islands, he points to parliaments that operate well despite not having all-powerful party systems. Weeks concludes by calling for more research into the necessity of political parties, especially in view of the low regard in which many citizens hold them.

Dr Richard Herr OAM, Faculty of Law, University of Tasmania, assesses how the procedures for the institutional transfer of Westminster principles was and is being affected by tensions that result from traditional cultures and processes and liberal expectations in two of Australia's Pacific Island neighbours: Samoa and Fiji.

Analysing the role of parliamentary debate in the New South Wales Legislative Council and drawing on observations from Council committee work within a deliberative democracy framework, David Blunt, Clerk of the Parliaments and Clerk of the Legislative Council, Parliament of New South Wales, makes a number of reflections and concludes by proposing four recommendations: two are relevant to political theorists and two that he suggest could be beneficial to participants in parliamentary processes.

Using a comparative institutional perspective, Emeritus Professor Marian Sawer AO FASSA, Australian National University, School of Political and International Relations, examines different forms of specialized bodies and their capacity to undertake functions such as legislative scrutiny and providing a channel for community groups and gender experts to participate in the legislative process. In doing so, she examines existing parliamentary bodies that specialise in gender equality matters such as structure, membership, mandate, working methods and relationships and highlights their relative absence in Australia.

Michael Tatham, Clerk of the Legislative Assembly of Northern Territory examines Aboriginal representation in the Northern Territory (NT) Legislative Assembly from 1974 to 2014. He points to 'an unsatisfied longing for the Northern Territory to be the "authoritive voice" for Aboriginal Australia'. Tatham analyses current and previous NT Legislative Assemblies in the context of what he says are the distinctive historical attitudes of the electorate to governance matters.

Surveys and a review of the literature form the basis for former Liberal National Party Member for Gympie in the Queensland Parliament, David Gibson's article. He argues that there is still much to be done to address existing obstacles that act as barriers to people with disabilities and prevent many from being part of the political and democratic process within a society. Acknowledging the complexity surrounding civic

participation, he argues that physical and social barriers still exist. Gibson locates his argument within the framework of 'how representative is representative democracy'.

This edition also includes a precise by Dr Harry Phillips, Parliamentary Fellow (Education) Western Australian Parliament, Honorary Professor Edith Cowan University and Adjunct Professor Curtin University, of a seminar hosted by the Western Australia Chapter for its ASPG members. It raises several issues that will be of interest to all members and does so in a manner that is more conversational than are articles. Several ASPG chapters host seminars that attract excellent and well-informed speakers but the benefits gained from listening to the experts often stays within the Chapter. Précising such events and publishing them under a separate heading in the journal, allows all ASPG members to benefit from the knowledge disseminated at such gatherings. I strongly encourage all chapters to do as Western Australia has done, and submit an account of the main issues discussed and debated at their Chapter's seminars.

I close by reminding everyone of this year's ASPG National Conference, which will be held in Wellington, New Zealand 30 September – 2 October. It will provide excellent presentations, discussions and debates on the theme *Modernising Parliaments*, which is particularly relevant to today's rapidly changing world. While tradition is important, so too is the willingness and capacity to change to reflect modern values, processes and procedures. I look forward to seeing you all there.

Colleen Lewis
May 2014

Articles

A Case for a Parliamentary Privileges Act for New South Wales

Stephen Frappell

Stephen Frappell is Clerk Assistant – Procedure in the New South Wales Legislative Council

INTRODUCTION

Over 150 years after the adoption of responsible government, New South Wales remains unusual amongst Australian jurisdictions for the degree to which it does not codify in statute the immunities and powers – collectively the privileges – of the two Houses of its Parliament. The most important immunities – the immunities attaching to speeches and debate and to other proceedings – are today largely expressed by reference to Article 9 of the *Bill of Rights 1689*. The Houses also have the right of exclusive cognisance to regulate and control their own internal proceedings. The powers of the two Houses are largely, although not solely, founded on the common law concept of necessity – that the Houses have such powers as are reasonably necessary for their effective functioning.

These arrangements have on the whole served the Parliament and people of New South Wales well. In particular, the landmark *Egan* decisions of the late 1990s, which confirmed the power of the New South Wales Legislative Council to order the production of papers from the executive government, were founded on necessity. However, this paper examines the case for further limited codification of the statutory immunities that apply in New South Wales under Article 9 of the *Bill of Rights 1689*, together with codification or consolidation of certain other immunities. This follows recent controversial court decisions in New Zealand which prompted the New Zealand Parliament to respond with the *Parliamentary Privileges Act 2014*, drawing in turn on the successful Australian *Parliamentary Privileges Act 1987*. Such a step could be undertaken relatively easily, provided that care was taken to preserve all immunities currently in place. There is also a case for very limited legislative codification of the powers of the Houses in New South Wales in relation to the conduct of members and arguably former members, again provided that care was taken to preserve all existing powers under the common law. This case will be given extra force if foreshadowed reforms to strengthen the ethics regime for members of Parliament in New South Wales proceed.

PREVIOUS ATTEMPTS AT MORE COMPREHENSIVE PARLIAMENTARY PRIVILEGE LEGISLATION IN NEW SOUTH WALES

At the achievement of responsible government in 1855, the New South Wales *Constitution Act 1855*[1] did not include any express grant of privilege to the new Parliament; nor did its successor, the *Constitution Act 1902*, which remains in force today. Even now, the codification of privilege in New South Wales remains quite limited. Article 9 of the *Bill of Rights 1689* is in force in New South Wales by virtue of section 6 and schedule 2 of the *Imperial Acts Application Act 1969*. The *Parliamentary Evidence Act 1901*, which replaced a previous 1881 Act, enables the Houses and their committees to compel witnesses to attend and give evidence. Certain other statutes also bear on privilege.[2] However, there is no statute that attempts to codify more fully the privileges of the Parliament, for example by connecting them with those of the House of Commons in the Westminster Parliament, or by defining the power to punish contempts.

New South Wales is joined in this unusual status by Tasmania, at least in part. By contrast, other Australasian jurisdictions adopt the privileges of the House of Commons. Victoria adopts the privileges of the House of Commons as at 21 July 1855, South Australia as at 24 October 1856, New Zealand as at 1 January 1865, the Commonwealth and Queensland as at 1 January 1901 and Western Australia as at 1 January 1989. Other jurisdictions have also passed further privileges legislation, as notably the Commonwealth did with the *Parliamentary Privileges Act* in 1987, and Queensland did with the *Parliament of Queensland Act* in 2001. As will be discussed, New Zealand has also recently enacted significant privileges legislation.

It is not entirely clear why the *Constitution Act 1855* did not include an express grant of privilege to the new Parliament of New South Wales, or even a specific provision enabling the Parliament to define its privileges. One possible explanation may be that such a provision was simply not considered necessary. All that was thought necessary could be done via the standing orders or by relying on common law principles, in the realisation that if needed, a separate bill could be introduced to deal with the matter at any time.[3]

1 18 & 19 Vic, c 54, Sch 1, cited at www.foundingdocs.gov.au/item-sdid-78.html.

2 For example, Section 27 of the *Defamation Act 2005*, which replaced a previous 1974 Act, provides absolute privilege to the publication of records and proceedings of the Parliament of New South Wales, and section 6 and schedule 1 of the *Jury Act 1977* provide that members of the Parliament are ineligible to serve as jurors. Other relevant legislation includes the *Parliamentary Papers (Supplementary Provisions) Act 1975*, the *Parliamentary Precincts Act 1997* and provisions which explicitly preserve privilege such as section 122 of the *Independent Commission Against Corruption Act 1988*.

3 The omission of a specific privileges provision in the *Constitution Act 1855* in no way limited the power of the Parliament to codify its privileges in a separate Act under the general law making power in section 1 of the Act.

While privilege was not addressed at the advent of responsible government in New South Wales, there were six attempts to introduce more comprehensive privileges legislation in New South Wales between 1856 and 1912. All failed. The first bill, introduced in the New South Wales Legislative Assembly in the months following the establishment of the new Parliament in 1856, foundered following extensive public opposition, with the *Sydney Morning Herald* suggesting that contempt provisions in the bill would 'destroy the liberty of the press'.[4] Two further bills, each entitled the Parliamentary Powers and Privileges Bill, were introduced in the Assembly in 1878. The first was defeated at the second reading stage in the Council on 16 May 1878.[5] The second was the subject of ongoing negotiation between the two Houses, including a free conference, before ultimately being dropped.[6] Both bills foundered in the Legislative Council out of concern that they extended contempt powers to deal with contempts outside of Parliament. A fourth bill was introduced in 1901 by a private member in the Assembly[7] but subsequently lapsed on prorogation. Two further bills, both introduced in 1912 in the Assembly[8] also did not progress, again lapsing on prorogation.

However, while attempts at passing more comprehensive privileges legislation failed, in 1881 the Parliament did pass the *Parliamentary Evidence Act 1881*, which provided statutory power to the House and its committees to send for and examine persons.[9] The *Parliamentary Evidence Act 1881* was replaced in 1901 by the *Parliamentary Evidence Act 1901*, which is still in force today.

It is also notable that the *Bill of Rights 1689* formally became law in New South Wales on 1 January 1971 by virtue of section 6 and schedule 2 of the *Imperial Acts Application Act 1969*. Section 6 of the Act declares, among other things, that the *Bill of Rights*, so far as it was in force in England on 25 July 1828, was and remains in force in New South Wales on and from that day.

Proposals for enactment of more comprehensive privileges legislation have also arisen in more recent times. In 1985, a Joint Select Committee on Parliamentary Privilege recommended that 'the *Constitution Act 1902* be amended to place beyond doubt that the powers, privileges and immunities of the Houses of the New South Wales Parliament are those of the British House of Commons as at the establishment of responsible government in 1856.'[10] This recommendation has not been adopted.

4 *Sydney Morning Herald*, 2 September 1856, p 2.
5 *New South Wales Legislative Council Minutes*, 16 May 1878, p 100.
6 *New South Wales Legislative Assembly Votes and Proceedings*, 14 May 1979, p 511.
7 *New South Wales Legislative Assembly Votes and Proceedings*, 31 October 1901, p 290.
8 *New South Wales Legislative Assembly Votes and Proceedings*, 19 March 1912, pp 279–280; 14 November 1912, p 214.
9 The bill was based in part on the provisions of the second Parliamentary Powers and Privileges Bill of 1878.
10 New South Wales Joint Select Committee on Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, September 1985, p 21.

In 1997, the Leader of the Opposition in the Legislative Council, the Hon John Hannaford, prepared in consultation with Parliamentary Counsel a draft Parliamentary Powers, Privileges and Immunities Bill 1997, referred to in this paper as the Hannaford bill. Notice for the bill's introduction was given, but it never proceeded.[11]

The Privileges Committee of the Legislative Council on six occasions between 1993 and 2006 recommended the adoption of privileges legislation.[12] In 2006 it recommended the statutory codification of the privileges and immunities of both Houses in a similar form to the Commonwealth *Parliamentary Privileges Act 1987*. In November 2009, the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics also recommended the introduction of legislation similar to section 16 of the *Parliamentary Privileges Act 1987* to confirm the immunities in Article 9 of the *Bill of Rights 1689*.[13]

Finally, on 2 December 2010, the Speaker of the Legislative Assembly, the Hon Richard Torbay, tabled in that House a draft Parliamentary Privileges Bill 2010, referred to in this paper as the Torbay Bill.[14] It being the second last sitting day of the 54th Parliament, the draft bill was not progressed before prorogation.

For all these repeated attempts at enacting privileges legislation, New South Wales remains an outlier in the degree to which it does not codify its privileges in statute. The immunities of the two Houses of the New South Wales Parliament – notably the immunities attaching to speeches and debate and to other proceedings – are today largely expressed by reference to Article 9 of the *Bill of Rights 1689*. Using modern wording,[15] Article 9 declares:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

11 Notice of motion of the bill was given in the New South Wales Legislative Council on 28 November 1996.

12 New South Wales Legislative Council Privileges Committee, *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence*, 28 October 1993, Recommendation 5; *Report on Inquiry into sanctions where a minister fails to table documents*, Report No 1, 10 May 1996, Recommendation 3; *Report on Inquiry into Statements made by Mr Gallacher and Mr Hannaford*, Report No 11, 30 Nov 1999, Resolution 4; *Report on sections 13 and 13B of the Constitution Act 1902*, Report No 15, 1 December 2001, Recommendation 2; *Parliamentary privilege and seizure of documents by ICAC*, Report 25, 3 December 2003, Recommendation 3; *Review of Members' Code of Conduct and draft Constitution (Disclosures by Members) Amendment Regulation 2006*, Report 35, October 2006, Recommendation 9.

13 New South Wales Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Memorandum of Understanding – Execution of Search Warrants by the Independent Commission Against Corruption on Members' Offices*, November 2009, Recommendation 3.

14 *New South Wales Legislative Assembly Votes and Proceedings*, 2 December 2010, p 2562.

15 As originally enacted, Article 9 declares: 'That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.'

The Houses also have the right of exclusive cognisance, that is, the right of each of the two Houses of the New South Wales Parliament to regulate and control its own internal proceedings.[16]

The powers of the two Houses are largely, although not solely, founded on the common law concept of necessity – that the Houses have such powers as are reasonably necessary for their effective functioning.

A CASE FOR FURTHER PARTIAL CODIFICATION OF THE IMMUNITIES OF THE HOUSES OF THE NEW SOUTH WALES PARLIAMENT

There is no crisis of parliamentary privilege in New South Wales; the current arrangements, a reflection of the fragmented history of privilege in New South Wales, nevertheless remain entirely viable. However, recent case law concerning privilege in other jurisdictions, notably New Zealand, give pause for thought as to whether New South Wales should finally adopt privileges legislation to define in part the immunities of the Houses of the New South Wales Parliament under Article 9 of the *Bill of Rights 1689*, drawing on the model used in the Commonwealth *Parliamentary Privileges Act 1987*.

In 2013 and 2014, the New Zealand Parliament debated and passed the Parliamentary Privilege Bill. The *Parliamentary Privileges Act 2014* received assent on 7 August 2014, and came into force the next day.[17] As articulated in section 3 (Purpose of this Act), the main purpose of the Act was to 'reaffirm and clarify the nature, scope, and extent of the privileges, immunities, and powers exercisable by the House of Representatives, its committees, and its members', whilst 'avoid[ing] comprehensive codification of, parliamentary privilege', and whilst also 'ensur[ing] adequate protection' of "proceedings in Parliament" under Article 9. In clarifying the law of privilege in New Zealand, the bill also 'replace[d] with modern legislation the law formerly contained in the *Legislature Act 1908*, the *Legislature Amendment Act 1992*, and certain provisions of the *Defamation Act 1992*.'

The introduction and passage of the Parliamentary Privilege Bill was a direct response by the New Zealand Parliament to the decision of the New Zealand Supreme Court in *Attorney-General and Gow v Leigh*,[18] in which the Supreme Court found that statements made by an official (Mr Gow) to a Minister for the purposes of replying to questions for oral answer in the New Zealand Parliament were not themselves parliamentary proceedings, and as such, could be the subject of court proceedings as they were

16 See for example the statement of Justice McHugh in the High Court in *Egan v Willis* (1998) 195 CLR 424 at 478 concerning the right of the Legislative Council of New South Wales to control its own business.

17 *Parliamentary Privileges Act 2014*, section 2.

18 [2011] NZSC 106.

not protected by absolute privilege.[19] In effect, the statements made by Mr Gow to the Minister were protected by qualified privilege only under the law of defamation. Previously, it had been generally understood that the protection of absolute privilege under Article 9 extended not only to what a minister had said in the House, but also to the information supplied to a minister for the purposes of "proceedings in Parliament".

By any measure, the decision in *Leigh* was controversial. The decision moved the common law in New Zealand away from the reasonably settled principle, as articulated in *Prebble v Television New Zealand*,[20] that where there are two competing interests at play – the need to ensure the independence of parliament, and the right of an individual to access justice – the public interest test must be struck in favour of parliament, although the interests of justice cannot be ignored.[21]

In addition to the judgment in *Leigh*, the New Zealand Parliament and its Privileges Committee was also very concerned about the earlier matter of *Buchanan v Jennings*, dating back to 2004, in which it was ultimately held by the Privy Council that what a member said in the House could be used for the purposes of court proceedings where the member had "effectively repeated" what was said in the House outside Parliament.[22] In 2005, the New Zealand Privileges Committee recommended abolition of the doctrine of 'effective repetition' by legislation.[23]

In response to the decision in *Leigh*, and also to address the matter in *Buchanan v Jennings*, the New Zealand Parliament enacted in section 10 of the new *Parliamentary Privileges Act 2014* a definition of "proceedings in Parliament" based on that contained in section 16(2) of the Australian *Parliamentary Privileges Act 1987*. Section 10 defines "proceedings in Parliament" as meaning 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee' (emphasis added). In section 11, the New Zealand Parliament went on to articulate the meaning of 'prohibited impeaching or questioning', drawing directly on section 16(3) of the Australian Act. It is notable that in *Prebble v Television New Zealand Ltd*, Lord Browne-Wilkinson stated that section 16(3) of the *Parliamentary Privileges Act 1987*, 'contains … the true principle to be applied' as to the effect of article 9 and the admissibility of evidence.

It is particularly significant that the New Zealand Parliament chose to adopt a definition of "proceedings in Parliament" which includes words spoken or acts done which are 'incidental to' the transacting of the business of the House or of a committee. In its

19 For a more extensive summary of the court proceedings, see New Zealand Privileges Committee, 'Question of privilege concerning the defamation action *Attorney-General and Gow v Leigh*', June 2013, pp 8–10.

20 [1994] 3 NZLR 1 (PC).

21 [1994] 3 NZLR 1 (PC) at 337.

22 New Zealand Privileges Committee, 'Question of privilege concerning the defamation action *Attorney-General and Gow v Leigh*', June 2013, p 17.

23 New Zealand Privileges Committee, 'Question of privilege referred 21 July 1998 concerning Buchanan v Jennings, May 2005.

decision in *Leigh*, the New Zealand Supreme Court rejected the submissions of counsel for the Speaker, Mr Pike, that the proper test of whether a matter constituted part of the "proceedings in Parliament" was whether the occasion in question was "reasonably incidental" to the discharge of the business of the House – the so called 'reasonable incidentality' test. This 'test' drew directly on section 16(2) of the Australian Act, and the previous views articulated in *Prebble*.[24] Rather, the Supreme Court applied the seemingly narrower 'necessity test' – that the test of whether a matter constituted part of the "proceedings in Parliament" was whether it was strictly necessary for the proper and efficient functioning of the House of Representatives.[25] In doing so, the Supreme Court relied heavily on the recent decisions of the House of Lords in *Chaytor*[26] and the Supreme Court of Canada in *Vaid*.[27] The Court also rejected the conclusion reached in *Parliamentary Practice in New Zealand* that privilege in New Zealand is firmly rooted in statute, and that the scope of privilege is a question of law to be determined by the court by reference to the statute rather than on any ground of necessity.[28]

This approach adopted by the Supreme Court in *Leigh* subsequently came in for significant criticism by the New Zealand Privileges Committee. Citing the advice of Professor Philip Joseph, the Privileges Committee argued that the application of Article 9 is a matter of statutory interpretation, in this instance the meaning of the words "proceedings in Parliament", whereas necessity is more appropriately applied to the common law right of the New Zealand Parliament to control its own internal proceedings, referred to as exclusive cognisance. In jurisdictions overseas, notably the United Kingdom, the protection available under Article 9 is seemingly regarded as a subset of the broader concept of exclusive cognisance,[29] whereas at least in New Zealand, the Privileges Committee drew a sharp distinction between the two: 'freedom of speech

24 *Attorney-General and Gow v Leigh* [2011] NZSC 106 at paras 10–11.

25 This necessity test was first articulated in 1999 by the UK Parliament Joint Committee on Parliamentary Privilege when it spoke of rights and immunities 'strictly necessary' for Parliament's functioning in today's conditions. See UK Parliament Joint Committee on Parliamentary Privilege, *Report: Volume I – Report and Proceedings of the Committee*, Session 1998–99, para 4. In *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at para 4, the Supreme Court of Canada elevated this approach to a 'doctrine of necessity'. Most recently, in 2013, the UK Parliament Joint Committee on Parliamentary Privilege used the 'doctrine of necessity' to define the limits of the exclusive cognisance of parliament. See UK Parliament Joint Committee on Parliamentary Privilege, *Parliamentary Privilege: Report of Session 2013–14*, 18 June 2013, paras 20–28.

26 *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684. *Chaytor* concerned the prosecution of members of the House of Commons and House of Lords in the UK for submitting false expense claims.

27 *Canada (House of Commons) v Vaid* [2005] 1 SCR 667. *Vaid* concerned the dismissal of a chauffeur of the former Speaker of the Canadian House of Commons, and whether the dismissal was immune from external review by virtue of parliamentary privilege.

28 *Attorney-General and Gow v Leigh* [2011] NZSC 106 at para 12. See also McGee, *Parliamentary Practice in New Zealand*, 3rd edition, 2005, p 606.

29 See notably in recent times the decision in *R* v *Chaytor* [2010] UKSC 52 and the 2013 report of the UK Parliament Joint Committee on Parliamentary Privilege.

being concerned with protecting Parliament's core business, and exclusive cognisance with protecting actions that enable Parliament to discharge its core business'.[30]

Whichever view is taken, the matter has now been put beyond doubt in New Zealand by the *Parliamentary Privileges Act 2014* adopting the Australian approach to defining "proceedings in Parliament". Indeed, the New Zealand Parliament could scarcely have been more pointed in its rounding out of section 10 to ensure a broad reading of "proceedings in Parliament" based on statutory interpretation, without reference to any 'necessity test':

> (4) In determining under subsection (1) whether words are spoken or acts are done for purposes of or incidental to the transacting of the business of the House or of a committee, no necessity test is required or permitted to be used.
>
> (5) Necessity test includes, but is not limited to, a test based on or involving whether the words or acts are or may be (absolutely, or to any lesser degree or standard) necessary for transaction of the business.
>
> (6) …
>
> (7) This section applies despite any contrary law (including, without limitation, every enactment or other law in the decision in Attorney-General v Leigh [2011] NZSC 106, [2012] 2 NZLR 713 (SC)).

Without perhaps going to the extent that the New Zealand Parliament did above, there would be merit in the New South Wales Parliament also finally taking steps to partially codify the freedom of speech of its members under Article 9, based on the model used in the Commonwealth and now New Zealand. As previously indicated, there is no crisis of privilege in New South Wales and no imperative to act, as was the case in New Zealand (and indeed in Australia prior to the adoption of the *Parliamentary Privileges Act 1987*). However, there are strong arguments for a limited codification of the meaning of Article 9, based on the model used by the Commonwealth and New Zealand Parliaments.

First, limited codification of the meaning of Article 9 in New South Wales along the lines adopted in the Commonwealth and now New Zealand Acts would ensure an ongoing consistent interpretation of "proceedings in Parliament" in New South Wales, and would almost certainly head off any possibility of a narrower re-interpretation or chipping away of privilege by the courts in New South Wales in the future, such as occurred in *Buchanan v Jennings* and later *Leigh*. It is notable that the Australian *Parliamentary Privileges Act 1987* was itself enacted by the Commonwealth Parliament to reverse two judgments by Justice Hunt in the Supreme Court of New South Wales in 1985

30 New Zealand Privileges Committee, 'Question of privilege concerning the defamation action *Attorney-General and Gow v Leigh*', June 2013, pp 19–20.

and 1986, which interpreted and applied Article 9 in a manner unacceptable to the Commonwealth Parliament.[31]

Second, the Commonwealth Parliament's partial codification of its immunities has now stood for over 25 years, during which it has seemingly been well accepted, including as mentioned in *Prebble*, in Australia and elsewhere, and has served the Commonwealth Parliament well. It is also notable that Queensland and the two territories now adopt the same basic provisions to those in section 16. While New South Wales is currently an outlier in the extent to which it does not seek to define its privileges, it is interesting to note that both the Hannaford and Torbay privileges bills of 1997 and 2010 adopted a limited codification of the meaning of Article 9 based on section 16 of the Commonwealth Act. The adoption of the provisions of the Commonwealth Act has also been recommended by the privileges committees of both Houses in the past.[32]

Third, section 16 of the Commonwealth Act and in effect the 'reasonable incidentality' test is already used in New South Wales by both the Parliament and the courts as an appropriate guide as to the meaning of Article 9, even though it has not formally been adopted in legislation in New South Wales. The Parliament has routinely used the definition of "proceedings in Parliament" in section 16 in protocols with law enforcement agencies concerning the execution of search warrants on the offices of members of parliament. It has also been used in resolutions of the Houses. The courts have also been guided by it in cases in which matters of privilege have been raised. Of note, in *Opel Networks Pty Ltd*,[33] Justice Austin held that the preparation of briefs by departmental officials for a minister in Question Time is for the purposes of or incidental to the transacting of the business of the House, and that accordingly such documents are protected by privilege, quite contrary to the decision in *Leigh*.

Fourth, limited codification of the meaning of Article 9 in New South Wales could also be used to put beyond doubt aspects of the operation of Article 9. For example, members of the New South Wales Parliament are currently routinely warned of the implications of the decisions in *Buchanan v Jenning*s and the issue of effective repetition. To date, no Australian jurisdiction has adopted a legislative response to this issue, although the Torbay bill tried. The Senate Privileges Committee has suggested that at least at the federal level, the *Parliamentary Privileges Act 1987* would likely prevent a decision

31 It is acknowledged that the views of Justice Hunt have not been followed in subsequent New South Wales cases. See for example the decision in *Opel Networks Pty Ltd* cited later in this paper.

32 As noted earlier, between 1993 and 2009, the Privileges Committees of the two Houses between them recommended the adoption of privileges legislation seven times. However, it was only in the last two reports that the Committees specifically recommended adoption of the provision modelled on the Commonwealth Act. See New South Wales Legislative Council Privileges Committee, *Review of Members' Code of Conduct and draft Constitution (Disclosures by Members) Amendment Regulation 2006*, October 2006, Recommendation 9; New South Wales Legislative Assembly Parliamentary Privileges and Ethics Committee, *Report on a Memorandum of Understanding with the Independent Commission Against Corruption relating to the execution of search warrants on the Parliament House offices of member*s, November 2009, Recommendation 3.

33 *In the matter of OPEL Networks Pty Ltd (in liq)* [2010] NSWSC 142.

of the nature of *Buchanan v Jennings*.[34] Perhaps by extrapolation it may do so in New South Wales as well. It is notable, however, that for the avoidance of doubt, section 3 of the new New Zealand Act makes it clear that the Act is intended to 'abolish and prohibit' "effective repetition" claims of the type exemplified by the decision in *Buchanan v Jennings*. Equally, the historical exceptions doctrine, which permits the courts to establish what was said or done in Parliament as a matter of historical fact, but not to impeach or question the proceedings in Parliament, was established by the Privy Council in *Prebble*, but now usefully finds statutory expression, and importantly constraint,[35] in section 15 of the New Zealand *Parliamentary Privileges Act 2014*.

In advocating limited codification of the immunities of the Houses of the New South Wales Parliament along the Commonwealth lines, it is salient to note the recent warning of the United Kingdom Joint Committee on Parliamentary Privilege in its 2013 report that legislation to confirm the scope and meaning of parliamentary privilege is a 'last resort'. However, the Committee also recognised that legislation should not be ruled out where it is needed to 'resolve uncertainty' and to 'confirm the existence or extent of specific privileges'.[36] This was the reasoning adopted by the New Zealand Privileges Committee when it recommended a legislative response to *Leigh*:

> We do not wish to see a full codification of parliamentary privilege in legislation; we consider this properly remains with the Parliament. We do however wish to set out some general principles to ensure that our parliamentary democracy is safeguarded appropriately and to provide more clarity than the existing 1908 legislation affords.[37]

For similar reasons, limited codification of the meaning of Article 9 in New South Wales, provided that it carefully preserves all existing immunities under the common law, would usefully confirm an ongoing expansive interpretation of "proceedings in Parliament" and bring New South Wales into line with the Commonwealth, New Zealand, Queensland and the Territories at a time of increasing uncertainty internationally as to the precise application of Article 9.

Finally, legislation could also usefully put beyond doubt certain other immunities outside of Article 9 that are currently open to some conjecture in New South Wales. A very limited immunity of members and officers of Parliament from arrest and attendance before the courts is provided in section 14 of the Commonwealth *Parliamentary Privileges Act 1987*, where the scope of the immunity in New South Wales is unclear. Equally, the application of the general law to the Commonwealth Parliament is clarified in section 15 of the Commonwealth *Parliamentary Privileges Act 1987* where

34 Senate Privileges Committee, *Effective Repetition*, 134th Report, June 2008.

35 For further discussion, see D.McGee, 'The scope of parliamentary privilege', *The New Zealand Law Journal*, March 2004, pp 84–88.

36 UK Parliament Joint Committee on Parliamentary Privilege, *Parliamentary Privilege: Report of Session 2013–14*, 18 June 2013, paras 41, 46.

37 New Zealand Privileges Committee, 'Question of privilege concerning the defamation action *Attorney-General and Gow v Leigh*', June 2013, p 33.

in New South Wales there is uncertainty.[38] Should a privileges Act proceed in New South Wales, the protection of absolute privilege in the *Defamation Act 2005* for the publication of records of the proceedings in the Houses, together with the broadcasting of proceedings, could also be consolidated into the new Act.

A CASE FOR FURTHER PARTIAL CODIFICATION OF THE POWERS OF THE HOUSES OF THE NEW SOUTH WALES PARLIAMENT

There is also a case for further partial codification of the powers of the Houses of the New South Wales Parliament, at least in relation to the powers of the Houses to discipline their members and arguably former members.

The six privileges bills that failed in New South Wales between 1856 and 1912 all attempted to codify the powers of the Parliament of New South Wales, for example by connecting them with those of the House of Commons in the Westminster Parliament, or by legislating the power to punish contempts. Indeed, the reason why a number of the bills failed was precisely because of disagreement over the contempt provisions they contained. Ultimately, the only significant area in which the Parliament did legislate was the enactment in 1881 of a parliamentary evidence Act, subsequently repealed and replaced in 1901, to enable the Houses and their committees to compel witnesses to attend and give evidence.[39]

Given the lack of legislation in this area, the majority of the powers of the Houses of the New South Wales Parliament, including the power to control their own affairs, the power to deal with contempts, the power to discipline members, the power to conduct inquiries and the power to order the production of papers, continue to rely on the common law principle of necessity.[40] As Lord Denman CJ observed in *Stockdale and Hansard*:[41]

38 Unless explicitly stated otherwise, or unless there is a direct connection with "proceedings in Parliament", it is assumed the general law in force in the State applies to the Parliament of New South Wales.

39 It should be noted that the *Public Works Act 1912* also provides the Joint Standing Committee on Public Works with the power to compel witness to attend and give evidence, in similar terms to the *Parliamentary Evidence Act 1901*.

40 Necessity as a basis of privilege in colonial legislatures was established in *Kielley v Carson* (1842) 12 ER 225 in 1842, in which the Privy Council held that colonial legislatures deriving their authority from Imperial statutes had only such powers and immunities as were 'necessary for the existence of such a body, and the proper exercise of the functions which it is intended to execute'. This position was reiterated in later 19th century decisions: *Fenton v Hampton* (1858) 14 ER 727; *Doyle v Falconer* (1866) 16 ER 293; *Barton v Taylor* (1886) 11 App Cas 197; and *Fielding v Thomas* [1896] AC 600.

41 (1839) 112 ER 1112 .

> If the necessity can be made out, no more need be said: it is the foundation of every privilege of Parliament, and justifies all that it requires.[42]

Reliance on the common law principle of necessity has on the whole served the Parliament of New South Wales well. In particular, the *Egan*[43] decisions of the late 1990s, which confirmed the power of the New South Wales Legislative Council to order the production of papers from the executive government, were founded on necessity. Its great advantage is its flexibility: it changes with time and with the changing roles and operation of the Houses in New South Wales. It is not set at a particular date, for example by reference to the powers of the House of Commons at a particular instant, and nor is it constrained by statutory interpretation. As was observed by Justices Gaudron, Gummow and Hayne in the 1998 High Court decision of *Egan v Willis*:

> What is 'reasonably necessary' at any time for the 'proper exercise' of the functions of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.[44]

However, while necessity has the advantage of flexibility, its limitation (but not necessarily disadvantage) is that the powers of the two Houses that derive from it are variously described as 'protective' and 'self-defensive' only and not punitive,[45] although the boundary between them is often difficult to draw. In the absence of legislation, the common punitive powers of other parliaments, the powers to fine or imprison, are almost certainly beyond the reach of the Houses of the New South Wales Parliament, regardless of the manner of their use.

The question then arises whether the Houses of the New South Wales Parliament should have such punitive powers to punish contempts, or at the very least to discipline their members. In 1985, the Joint Select Committee on Parliamentary Privilege in New South Wales recommended that the Houses be given a statutory power to fine (and seemingly only refrained from recommending the provision of other punitive powers on the apparent belief that the Houses already possessed them).[46]

The basic argument for why any parliament should have punitive powers to deal with contempts was encapsulated in the report of the 1984 Commonwealth Parliament

42 (1839) 112 ER 1112 at 1169.

43 See the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650, the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424 and the decision of the New South Wales Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563.

44 (1998) 195 CLR 424 at 454.

45 In *Willis and Christie v Perry* (1912) 13 CLR 592, the High Court decided that the Speaker of the New South Wales Legislative Assembly had no power to cause a member who had been disorderly in the chamber, and had left it in a disorderly manner, to be arrested outside the chamber and brought back into it. The 'only purpose' of such action, according to the High Court, was to punish the member concerned.

46 New South Wales Joint Select Committee on Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, September 1985, pp 125–126.

Joint Select Committee on Parliamentary Privilege, in many ways the forerunner to the Commonwealth *Parliamentary Privileges Act 1987*:

> Many of the essential safeguards or conditions for the proper operation of the Houses and their committees are provided for in various ways. … But there must, at the end of the day, be a means of enforcing the bedrock safeguards or conditions essential to Parliament's operation. …
>
> The ultimate sanction possessed by Parliament is its penal jurisdiction – the power of the Houses to examine and to punish any breach of their privileges or other contempt.[47]

As previously discussed, the Parliament of New South Wales is singular for not giving its Houses any punitive contempt powers. By comparison, the Houses of the Westminster Parliament have a broad punitive power deriving from the *lex et consuetudo Parliamenti* – the law and custom of Parliament. All the other state parliaments in Australia acted soon after responsible government to acquire contempt powers, either through direct enactment or by reference to those of the House of Commons. The Queensland Parliament has articulated more fully its contempt power in the *Parliament of Queensland Act 2001*. At the Commonwealth level, the Houses have power to impose a fine or imprisonment on any person found guilty of contempt of parliament under section 7 of the *Parliamentary Privileges Act 1987*, although section 8 abolished the power to expel a member. The same arrangements are now replicated in New Zealand under Part 4 of the recently enacted New Zealand *Parliamentary Privileges Act 2014*.

Those that doubt whether punitive powers are appropriate in New South Wales need only look at the *Parliamentary Evidence Act 1901*, which (in strikingly emphatic terms) gives the Houses and their committees the power to compel the attendance of witnesses, other than members, and to obligate answers to 'lawful questions' under oath, at the risk of one month in gaol. Both the 1901 Act and its 1881 predecessor were enacted precisely because committees of the Parliament at the time were encountering considerable difficulty in relation to the calling of witnesses and taking of evidence. While the provisions of the *Parliamentary Evidence Act 1901* have been used sparingly over the years, nevertheless the words of the 1984 Commonwealth joint select committee ring true: the Act has at times been essential in enabling committees of the Parliament to operate effectively.

Once again, the Commonwealth *Parliamentary Privileges Act 1987* would be an appropriate template for the adoption of contempt powers in New South Wales: it sets out a broad indicative definition of contempt, together with specific penal powers. While this approach to contempt powers has been criticized and ultimately rejected in the

47 Commonwealth Joint Select Committee on Parliamentary Privilege, Final Report, October 1984, p 79.

United Kingdom,[48] it was the approach adopted in the Torbay bill of 2010, and to a lesser degree, the Hannaford bill of 1997.[49]

For all these arguments, however, it is hard to see that there is currently a compelling case for the Houses of the New South Wales Parliament to legislate to adopt additional punitive contempt powers for use against non-members. Importantly, contempt powers are generally not necessary to protect the immunities of the Parliament; they are expected to be protected by the courts. Rather they exist to enable the Houses to effectively carry out their functions and to deal with challenges to their authority. In modern times, serious challenges to the operations of the Houses are uncommon outside of the conduct of committee proceedings (which are covered at least in part in New South Wales by the *Parliamentary Evidence Act 1901)*. Moreover, legislating punitive contempt powers against non-members at this time would raise questions as to the circumstances (ideally few) in which the power would be invoked, and whether the penal jurisdiction of the Parliament should be transferred to the courts.

There is, however, a stronger argument that the Parliament of New South Wales should legislate to grant its Houses additional powers, including punitive powers, for the internal discipline of their own members, and also arguably former members.

In New South Wales, the Independent Commission Against Corruption (ICAC) has power to find that a member of the New South Wales Parliament has engaged in 'corrupt conduct', including a substantial breach of the *Code of Conduct for Members*, and to report that finding to the relevant House.[50] However, it is for the individual Houses to discipline members for misconduct or conduct unworthy of the House.

In circumstances where a House becomes aware of misconduct by one of its members, for example on receipt of a report of the ICAC, the House currently has available to it at common law 'protective' and 'self-defensive' disciplinary measures only. They include the power to seek an apology from the member concerned, or to reprimand the member, and in instances of very serious misconduct, there is authority also that

48 UK Parliament Joint Committee on Parliamentary Privilege, *Parliamentary Privilege: Report of Session 2013–14*, 18 June 2013, pp 22–23.

49 It is noted that section 7A of the New South Wales *Constitution Act 1902*, inserted in 1930, provides, amongst other things, that a bill to alter the powers of the Legislative Council, including potentially to define the privileges of the Council, shall not be presented to the Governor for assent unless first passed by both Houses and approved at a referendum by a majority of the electors. On one view, since the insertion of section 7A, any attempt to introduce a parliamentary privileges act in New South Wales that alters the powers of the Council would require the endorsement of the people of New South Wales at a referendum. The more likely view, however, is that section 7A refers specifically to the powers of the Council vis-à-vis the Legislative Assembly, rather than the powers of the Council (and Assembly) in relation to privilege, and that section 7A is only designed to protect the existence and powers of the Council as a constituent part of the Legislature, rather than to prevent any future codification of the powers of the Parliament. In support, see G.Griffith and D.Clune, *'Arena v Nader* and the Waiver of Parliamentary Privilege' in G.Winterton (ed), *State Constitutional Landmark*s, The Federation Press, 2006, pp 351–352.

50 The Houses may also conduct their own investigations.

the Houses have the power to expel a member where it is necessary for the defence of the institution, provided it is not a cloak for punishment.[51] On the same basis, it is also possible that the courts would judge the suspension of a member for serious misconduct as a defensive measure and therefore within power, although unconditional suspension, for an indefinite time would likely be beyond power.[52] However, other punitive measures, such as suspension of a member for an unrestricted period of time, and the imposition of financial penalties such as a fine or the loss of pay, are presumably beyond power.

Arguably the Houses should have available such powers to deal with their members, on the basis that they must be able to safeguard their operations and integrity. Punitive powers against their members are held by all other parliaments in Australia and New Zealand, with the limited exception of Tasmania, although in some jurisdictions the power of expulsion has been removed.[53] Equally, the Houses should arguably be able to take action (generally through a fine) against former members who are otherwise beyond the reach of the Houses for bringing the House into disrepute. The Parliament of Queensland has recently fined former members Mr Gordon Nutall and Mr Scott Driscoll for contempt and misleading the House.

The argument for codification in this area is given further force if the Parliament of New South Wales adopts recent proposals concerning the ethics regime for members of the Parliament.

In October 2013, the New South Wales Independent Commission Against Corruption (ICAC) published a report that included three specific recommendations targeted at improving the accountability and scrutiny of members of the Parliament in New South Wales.[54] The recommendations followed a series of scandals in New South Wales in relation to the conduct of members past and present.[55] Amongst those recommendations was a recommendation that the New South Wales Parliament establish a 'parliamentary investigator position', with reference made by the ICAC in its report to the Parliamentary Commissioner for Standards model adopted by the United Kingdom Parliament. Amongst other things, the Commissioner would be in a position to investigate allegations against a member of a less serious nature than those generally investigated by the ICAC. A commissioner would also be able to investigate matters where issues of privilege arose, where the ICAC cannot act.

51 See the authority of *Barton v Taylor* (1886) 11 AC 197 at 204–205; *Harnett v Crick* [1908] AC 470; *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 396.

52 *Barton v Taylor* (1886) 11 AC 197 at 204–205.

53 For the rationale for removing the power of expulsion, see the discussion in Commonwealth Joint Select Committee on Parliamentary Privilege, Final Report, October 1984, pp 121 – 127.

54 Independent Commission Against Corruption, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, October 2013.

55 Of note, see the Independent Commission Against Corruption's investigation reports on Operation Jasper, entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, July 2013, and Operation Acacia, entitled *Investigation into the conduct of Ian Macdonald, John Maitland and others*, August 2013.

The matter was subsequently considered by the Privileges Committees of both Houses, both of which made recommendations in support of either an 'Ethics Commissioner' or 'Commissioner for Standards', with the commissioner to have power to receive and review complaints concerning possible breaches by members of the 'Code of Conduct for Members' or the interest disclosure regime, and to report findings in certain circumstances to the respective Houses (or committees of the Houses). It would then be open to the Houses to impose sanctions against the member concerned.[56]

If the commissioner for standards model is introduced in New South Wales, a sensible accompaniment would be privileges legislation giving the Houses of the New South Wales Parliament the full suite of measures that are available in other parliaments in Australia and the New Zealand Parliament to discipline members and former members who undermine their operations and bring the institution into disrepute. Such an approach would have the added benefit of providing an appropriate mechanism for the Houses to deal in full with potential misconduct by members where evidence of the conduct in question is protected by privilege.

If such an approach were to be adopted, once again care would need to be taken to ensure that existing powers of the Houses in New South Wales under the common law remained untouched. The opportunity could also be taken to consolidate and modernise the existing punitive provisions of the *Parliamentary Evidence Act 1901* into the new Act.[57]

THE MEANS BY WHICH A PARLIAMENTARY PRIVILEGES ACT MIGHT BE DEVELOPED

Should the Parliament of New South Wales proceed down the path of limited codification of its privileges in a parliamentary privileges Act, the means by which a bill might be developed and implemented would be of great import.

The Commonwealth *Parliamentary Privileges Act 1987* was unprecedented in being introduced by the President of the Senate.[58] Arguably, it would be appropriate for

56 See New South Wales Legislative Council Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, June 2014; New South Wales Legislative Assembly Parliamentary Privileges and Ethics Committee, *Inquiry into matters arising from the ICAC report entitled "Reducing the opportunities and incentives for corruption in the State's management of coal resources"*, July 2014.

57 For example, the Act currently provides that a witness who refuses to answer a lawful question 'may be forthwith committed for such offence into the custody of the usher of the black rod or sergeant-at-arms, and, if the House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker'. This provision has never been used, and it is unclear how it would operate in modern times.

58 See *Australian Senate Hansard*, 7 October 1986, p 892. In his second reading speech to the Senate, the President indicated that he was introducing the bill in response to the requests of Senators, and that Senators had indicated that 'it would be appropriate, as it is a parliamentary matter, for the President to introduce such a Bill.'

the President and Speaker of the New South Wales Parliament to jointly sponsor a privileges bill in New South Wales, rather than the bill being introduced by the Government of the day. To ensure cross-party support, the bill could be developed by the Presiding Officers in consultation with a cross-party working group with members drawn from both Houses, along the lines adopted recently in addressing other cross-party issues.[59] The Torbay and Hannaford bills, together with the Commonwealth *Parliamentary Privileges Act 1987* and New Zealand *Parliamentary Privileges Act 2014*, would be appropriate starting points for such a group. It would also be appropriate before the introduction of a privileges bill for an exposure draft of the bill to be tabled by the Presiding Officers in both Houses and referred to the respective privileges committees of the two Houses for inquiry and report to enable all members the opportunity to comment on the bill.

CONCLUSION

Parliamentary privilege has its origins in centuries of struggle by the House of Commons to establish its privileges and to assert its authority over the conduct of its own affairs, free from undue interference from the Crown or the courts. It is the sum of a range of peculiar immunities, rights and powers, some derived from the law and practice of the House of Commons, some from the common law, and some from statute, which despite their longevity, often remain difficult to define fully. This difficulty is complicated by the fact that privilege continues to evolve, seemingly ever more rapidly, to match the needs of parliaments over time.

A prime example of the need for privilege to evolve to match the need of the day is Article 9 of the *Bill of Rights 1689*. Article 9 articulates the final success of the House of Commons in establishing its independence from the Crown, and in modern times has come to be relied upon by the courts as a statutory articulation of the immunities of Westminster parliaments everywhere. Indeed it is fundamental to the existence of Westminster parliaments. However, in many ways, the vagueness of the wording of Article 9 does not match the needs of modern Parliaments, including the Parliament of New South Wales. The *Australian Parliamentary Privileges Act 1987* has led the way in giving meaning to the words of Article 9, an approach recently strongly endorsed by the New Zealand Parliament following controversial decisions in *Buchanan v Jennings* and *Attorney-General and Gow v Leigh*. There are very good arguments, based on consistency, clarity, and indeed safety, for the New South Wales Parliament to adopt the same approach, and to fall into line with other Australian jurisdictions and New Zealand in giving broad and consistent statutory meaning to Article 9. Importantly, the immunity attaching to freedom of debate and other ‘proceedings in Parliament’ in New South Wales is now firmly rooted in statute, namely Article 9, and as such, it should be better defined in statute, without reference to the common law principle of

59 For example, the cross-party marriage equality working group that worked on the Same Sex Marriage Bill 2013.

necessity. In New South Wales, necessity is a basis for the powers of the Houses of the Parliament, not their immunities. The opportunity should also be taken to clarify the meaning of other immunities of the New South Wales Parliament.

The powers of Westminster parliaments exist to enable them to effectively carry out their functions and to deal with challenges to their authority. In New South Wales, those powers are not expressly founded on the powers of the Westminster Parliament, as is the case in many other Australian states, nor on statute, but on the common law principle of necessity. This is despite numerous attempts and recommendations to legislate in the field over more than 150 years. For this failure, the Houses of the New South Wales Parliament can probably be grateful. While it has been argued that the common law test of necessity is not appropriate in interpreting Article 9, in defining the powers of the Houses in New South Wales it has the great advantage that it changes and evolves to suit the circumstances of the time, as demonstrated by the landmark *Egan* decisions of the late 1990s. This is unlike the circumstances of those jurisdictions that base their privileges on those of the House of Commons at a particular date. As such, necessity should remain the basis of the powers of the Houses in New South Wales. There is, however, a very strong argument that the Parliament of New South Wales should legislate to give its Houses additional punitive powers for the disciplining of members and former members, especially if the Parliament adopts recent proposals concerning the ethics regime for members of the Parliament. A case for broader contempt powers generally could also be made, although it is not necessarily compelling at the current time.

Other Australasian parliaments have been more successful than the New South Wales Parliament in legislating in the field of privilege. Admittedly, some have acted only in response to provocation from the courts. Nevertheless, this article has made a case for the Parliament of New South Wales to be more proactive in legislating to protect its privileges in the future, starting with the uncertainty at the edges of Article 9 and the power of the Houses to discipline their members and former members.

25 Years of Civil Society Engagement and Participation in the Work of Australian Capital Territory Legislative Assembly Committees

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ABSTRACT

Globally, 2015 is an important year for democracy as it marks a number of historical anniversaries that serve as key prompts for all parliaments to contemplate the significance of their relationships with the people.

2015 also marks a number of additional milestones with regard to the relative importance of the Australian Capital Territory (ACT) Legislative Assembly's relationship with the people—the year preceding (2014) saw the celebration of 25 years of self-government in the ACT and the year following (2016) will mark the first time the people of Canberra will go to the polls to elect 25 members (previously 17) to its Legislative Assembly. It is timely, therefore, to assess and reflect on the Assembly's relationship with the people of Canberra.

This paper uses methodological inquiry to examine civil society participation in the work of Assembly committees over the first 25 years of self-government. The assessment also serves to establish an important benchmark for the next 25 years, as it provides an indicator by which the maturity of the Assembly with regard to inclusiveness can be assessed. While it is not possible to predict the degree of inclusiveness over this time period a new stage of political imperatives, priorities, and awareness will shape participation priorities for an enlarged Assembly, its committees and from 2016 onwards its 25 members.

INTRODUCTION

The legislature is in essence the buckle between people and the executive. In terms of scholarly literature, the focus has tended to be on the relationship between the legislature and the executive and not on the relationship between the legislature and the people, but both are crucial to the legislature establishing and maintaining the trust of electors. A legislature, however it is selected, gives assent on behalf of the people and, in a

democracy, rests on the confidence of the people in order to fulfil its tasks effectively, indeed it rests on popular legitimacy to have an enduring existence.[1]

Lord Norton—Professor of Government, University of Hull

The above quote from Norton (2014), demonstrates that legislatures matter because they are the crucial link between the people and those who govern them.[2]

In terms of scholarly attention, the relationship between the legislature and the executive—and within that, the capacity of the legislature to say no to the executive—has taken precedence over the relationship of the legislature to the people (Norton 2014, p.1; 2012, p.4).[3] Yet, importantly, in the absence of a strong relationship with the people, the question arises that, irrespective of the robustness of the relationship a legislature may have with the executive, without there being at least an equally strong relationship with the people—is the institution legitimate?

As to the importance of the relationship with the people, Norton adds:

> Legislatures can and do fulfil significant functions in relation to the people, functions which underpin the maintenance of consent within the system. Hearing from and speaking to the people is an important task of a legislature in maintaining political stability. Legislatures may serve an important, if not crucial, expressive function, acting as a safety valve or as a conduit for the views of the people to the government. Legislatures may serve to mobilise or enhance popular support for a measure of public policy through their contact with the people.[4]

Norton has also argued, that the importance of connecting the legislature with the people is growing, not diminishing, in importance, especially as a countervailing force in the contemporary climate of diminished trust in politicians.

Legislatures can, as he explains act as:

> …a fundamental means of enabling people to feel connected, however tenuously, to the decision-making process and of ensuring that their views are heard and that people know that, through members of the legislature, their views have been expressed and are on the record and heard by decision makers.[5]

1 Norton, Philip. 2014. Memorandum to the House of Commons International Development Committee—Inquiry into Parliamentary Strengthening.

2 Norton, Philip. 2011. 'Effective capacity building: The capacity to do what?', *International Conference: Effective capacity building programmes for parliamentarians*, Bern (Switzerland), 19–20 October.

3 Norton, Philip. 2014. Memorandum to the House of Commons International Development Committee—Inquiry into Parliamentary Strengthening; Norton, Philip. 2012. Parliaments in the 21st Century: the representative challenge, Address to the Italian Chamber of Deputies, 13 November, Lectio magistralis, Italy.

4 Norton, Philip. 2011. 'Effective capacity building: The capacity to do what?', *International Conference: Effective capacity building programmes for parliamentarians*, Bern (Switzerland), 19–20 October, p. 3.

5 Norton, Philip. 2011. 'Effective capacity building: The capacity to do what?', *International Conference: Effective capacity building programmes for parliamentarians*, Bern (Switzerland), 19–20 October 2011, p. 3.

As Norton explains, the relationship between people and their parliament is always significant, and it takes on added significance in 2015 as it marks a number of historical anniversaries that serve as key prompts for all parliaments to reflect on, and to contemplate in a meaningful way the nature of that relationship and its importance as an institution that exists to represent the wishes of the people.

2015 is the 800th anniversary of King John's acceptance of the Magna Carta (1215)—the document that symbolises a cornerstone of democracy: the rule of law. The Magna Carta (or the Great Charter) formalised the concept that the Monarch needed their subjects' assent to impose taxes to raise money for specific purposes. Edward I, in summoning parliament in 1295, stated 'What touches all should be approved by all'. The concept of parliament (the commons or conference) could be said to have grown out of the Great Charter.[6]

2015 is also the 750th anniversary of the Simon de Montfort (Earl of Leicester) Parliament (20 January 1265). It is often referred to as the "Representative Parliament", as it was the first time elected representatives from every county and major town in England were invited to parliament on behalf of their local communities.[7]

The "Representative Parliament" met in Westminster Abbey and established the precedent of representation—the idea of including the wider community in decisions that effected them rather than continuing to leave them to the elite (Knights and Barons). Whilst parliaments had met before, they were elite gatherings that primarily discussed taxation (Henry III who de Montfort defeated was well known for summoning parliament to fund his wars). de Montfort's parliament was thus different because of its representation and its concern with the wider business of the realm, not just taxation. Consequently, de Monfort is often referred to as the founder of the House of Commons. Throughout the United Kingdom (UK), 20 January, is celebrated as Democracy Day.[8]

A Foreign and Commonwealth official giving evidence to the UK House of Commons Select Committee on International Development's recent inquiry into parliamentary strengthening was of the view that these anniversaries are important in providing an opportunity to 'reaffirm' the significance of 'parliaments in the contemporary world'.[9]

6 Bryant, Chris. 2014. *Parliament—The Biography (Volume 1: Ancestral Voices).* Doubleday: London.
7 Bryant, Chris. 2014. *Parliament—The Biography (Volume 1: Ancestral Voices).* Doubleday, London; BBC Radio 4. 2015. Democracy Day Special, *Today in Parliament*, 20 January.
8 Bryant, Chris. 2014. *Parliament—The Biography (Volume 1: Ancestral Voices).* Doubleday: London; BBC Radio 4. 2015. Democracy Day Special, *Today in Parliament*, 20 January.
9 Foreign and Commonwealth witness commenting on the importance of the 800th anniversary of the Magna Carta and the 750th anniversary of the Simon de Montfort Parliament—UK House of Commons. 2015. International Development Select Committee, *Report on Parliamentary Strengthening,* January, p. 70.

Locally, for the ACT Legislative Assembly, 2015 marks a number of additional milestones with regard to the relative importance of the Assembly's relationship with the people. The year preceding (2014) saw the celebration of 25 years of self-government in the ACT (May 2014). The year following (2016) will mark the first time Canberrans will go to the polls (on 15 October 2016) to elect 25 members to the Legislative Assembly (MLAs). Since its establishment in 1989, the Assembly has had 17 MLAs, but changes to *the Australian Capital Territory (Self-Government) Act 1988* (the Self-Government Act) in 2013, means that the present or eighth Assembly will be the last to have that number.

By way of background, the passing of the Self-Government Act by the Commonwealth Parliament in 1988 granted self-government to the ACT. At that time the ACT had a population of approximately 275,000 and by 2013 this had increased to 375,000.[10]

The Assembly is a unicameral parliament and its terms have transitioned from three to four year fixed terms. The first sitting of the Assembly was held on 11 May 1989 and standing committees were established on 23 May of the same year (standing committees are appointed by Assembly resolution and governed by standing orders).[11]

The history of the ACT Legislative Assembly across a number of representative parameters is set out in the following table.

10 Report by the Expert Reference Group. 2013. *Review into the size of the ACT Legislative Assembly.* ACT Government: Canberra.

11 Report by the Expert Reference Group. 2013. *Review into the size of the ACT Legislative Assembly.* ACT Government: Canberra.

Table 1: History of the ACT Legislative Assembly across a number of representative parameters

Assembly	Term[i]	No of MLAs	General[i] election	First sitting	Last sitting	Standing committees appointed	No. of standing committees[iii]	No. of select committees
1st	1989–1991	17	04.03.1989	11.05.1989	17.12.1991	23.05.1989	5	12
2nd	1992–1994	17	15.02.1992	27.03.1992	08.12.1994	27.03.1992	7	8
3rd	1995–1997	17	18.02.1995	09.03.1995	11.12.1997	09.03.1995	5	8
4th	1998–2001	17	21.02.1998	19.03.1998	30.08.2001	28.04.1998	5	11
5th	2001–2004	17	20.10.2001	12.11.2001	26.08.2004	11.12.2001	6	10
6th	2004–2008	17	16.10.2004	04.11.2004	28.08.2008	7.12.2004	5	6
7th	2008–2012	17	18.10.2008	05.11.2008	24.08.2012	09.12.2008	6	10
8th	2012–2016	17	20.10.2012	06.11.2012	?	27.11.2012	5	5[iv]
9th	2016–2020	25(ii)	15.10.2016	?	?	?	?	?

(i) The *Australian Capital Territory (Self-Government) Act 1988* does not place any limit on the length of the term of the Assembly, and without any reservation gives the power to determine it to a simple majority of the Assembly. The term was increased in 2004 from three to four years. Election dates are fixed by the *Electoral Act 1992*, with elections now held in October every four years (until 1997, elections were held in February—with the exception of the first).

(ii) In March 2013, the Federal parliament amended the *Australian Capital Territory (Self-Government) Act 1988* to give the Assembly the power to determine its own size by enactment passed by at least a two-third majority of members. On 5 August 2014, the ACT Legislative Assembly voted to increase its size to 25 members from the 2016 election.

(iii) excludes House and Chamber committees

(iv) as at May 2015

RESEARCH CONTEXT

Given the changes referred to above, it is timely to reflect on the Assembly's relationship with the people of Canberra over its first 25 years of self-government.

In light of the 25th anniversary, the purpose of this paper is twofold: (i) to signal the importance of the Assembly's relationship with the Canberra community; and (ii) to assess the extent to which the Canberra community has participated in the work of Assembly committees over the first 25 years. In doing so, it can provide a means by which the maturity of the Assembly can be assessed with regard to inclusiveness.

Chaney (2014) describes the maturity of an institution as the materialising of a 'discourse of inclusiveness'.[12] Inclusiveness in the context of parliament as an institution, he explains, can be measured by the extent of civil society participation in its work. Such an assessment also serves as a benchmark for the analysis of inclusiveness of future parliamentary terms—in particular, in the case of the Assembly, after 25 years and as it transitions from 17 to 25 members.

Inclusiveness is important as it signals the extent to which diversity of views, input and expertise are welcomed and encouraged as part of the policy making process as well as the extent to which legitimate mechanisms are in place to facilitate and capture such views. Equally important is reciprocity in this exchange—in that, the people need to be willing to engage and share their views. Hirschman (1970) describes this as having a 'voice' in policymaking.[13]

The contribution that diversity of views makes to good government and decision making was illustrated when President Abraham Lincoln appointed his cabinet on the basis of diversity and not because candidates subscribed to his views. Because of this approach, Lincoln's cabinet included his three biggest rivals. President Barack Obama followed this tradition by not only appointing some of his rivals but also ensuring that his cabinet reflected the country's diversity—including Latino and Asian Americans in addition to white males and balanced gender representation.[14]

12 Chaney, Paul. 2014. 'Exploring the Pathologies of One-Party Dominance on Third Sector Public Policy Engagement in Liberal Democracies: Evidence from Meso-Government in the UK', *International Society for Third-Sector Research*, 19 August; Chaney, Paul. 2014. Civil society views of engagement with the National Assembly for Wales (Panel 2: Political Science and the National Assembly for Wales), The National Assembly for Wales: Studying the Welsh Legislature Seminar, 17 October, Pierhead, Cardiff Bay, Wales.

13 Hirschman, Albert. 1970. *Exit, Voice and Loyalty: Response to Decline in Firms, Organizations, and States.* Cambridge, MA: Harvard University Press.

14 Goodwin, Doris Kearns. 2005. *Team of Rivals: The Political Genius of Abraham Lincoln.* Simon and Schuster: New York; Barnes, J.A. (2009) Special report: Decision makers 2009—'Obama's Team: The Face of Diversity', *National Journal*, 20 June (on-line).

In a parliamentary context, measuring inclusiveness is a useful yardstick for determining the extent to which the political opportunity structures have transitioned from traditional to pluralist policy making structures. The former can best be described as the "State talking or consulting with itself" while the latter encompasses what Tilley (1978) describes as 'strategic bridging' opportunities that encourage alliance building between the various policy actors in civil society and parliamentarians.[15]

Pluralist policy making structures matter because they provide important bridging mechanisms to link civil society with the decision makers and are thus important because:

> …exogenous civil society interests perform a pivotal role through critical engagement in policy-making as part of the wider process of holding government to account.[16]

Parliaments provide many bridging opportunities to foster strategic alliance building between civil society and the decision makers, however, the most important of these are parliamentary committees. By virtue of their role, parliamentary committees are significant in their contribution because unlike the Committee of the Whole, (the Chamber), committees bring the Parliament to the people. They perform tasks that the House itself cannot do. They provide time to consider matters in detail (removed from the adversarial glare of the Chamber), offer a forum for members to hear and consider diverse views on matters under inquiry, admit to uncertainty, weigh up opinion and evidence and, in some cases, modify their views on the basis of evidence received.

Committees are able to carry out their important information seeking role by virtue of public participation and thus emphasise the important relationship of parliament to the people.

It is arguable that the importance of public participation in committees is heightened in a unicameral parliament, such as the ACT Legislative Assembly. The literature advances that in single-chamber parliaments, which has no upper house to act as a house of review, the work of committees with regard to strengthening parliament in relation to the executive takes on a more prominent role. Equally important, in terms of the extent to which committees are able to effectively assist in this regard, is the level of participation from the public in the work of committees.[17]

15 Tilley, Charles. 1978. *From mobilization to revolution.* Reading, MA: Addison-Welsey.

16 Chaney, Paul. 2014 'Exploring the Pathologies of One-Party Dominance on Third Sector Public Policy Engagement in Liberal Democracies: Evidence from Meso-Government in the UK', *International Society for Third-Sector Research*, 19 August.

17 UCL Constitution Unit. 1998. *Checks and Balances in Single Chamber Parliaments: a Comparative Study,* The Constitution Unit—School of Public Policy: London, February; Norton, Philip. 2013. *Parliament in British Politics* (2nd edn.). Palgrave Macmillan: London.

Furthermore, in the case of the ACT, governing in the Territory is also unique as it has what is referred to as a city-state model, or two tiers of government, where two sets of responsibilities—state and council—are inextricably linked. Halligan and Wettenhall (2002) have commented on the significance of this arrangement in terms of democracy for the ACT:

> The ACT city-state model fuses two sets of responsibilities which are elsewhere in Australia divided between a state or territory government tier and a local government tier. Thus a broader range of functions is vested in the ACT government than in any other Australian sub-national government.
> …
> In comparative terms, therefore, members of the ACT Legislative Assembly carry a heavy load and much responsibility, and this must inevitably impact on the way they represent their electors.
> …
> The presence of a tier of local government councils in other Australian jurisdictions means that citizens in those jurisdictions have recourse to another group of elected representatives when they want to involve governmental processes…[18]

The fusing of two sets of responsibilities, as they relate to government, also suggest that civil participation in such jurisdictions takes on more significance, simply on the basis of the wider coverage of responsibilities coupled with limited avenues for citizens to make representations.

METHODOLOGY

The methodology, in part, adopts some aspects of inquiry used by Chaney (2014) to assess the maturation of the National Assembly for Wales.[19]

The parameters for inquiry for this article looked at civil society participation in Assembly committees over the first 25 years—trends and other interesting aspects of this participation.

Before continuing further, it is important to define the two terms civil and civic participation as they are central to the issues raised throughout this article. Civil participants were defined broadly as all stakeholders other than those associated

18 Submission by Professors Halligan and Wettenhall to the ACT Legislative Assembly Standing Committee on Legal Affairs (5th Assembly) inquiry into the appropriateness of the size of the ACT Legislative Assembly, 12 April 2002.

19 Chaney, Paul. 2014. 'Exploring the Pathologies of One-Party Dominance on Third Sector Public Policy Engagement in Liberal Democracies: Evidence from Meso-Government in the UK', *International Society for Third-Sector Research*, 19 August; Chaney, Paul. 2014. Civil society views of engagement with the National Assembly for Wales (Panel 2: Political Science and the National Assembly for Wales), The National Assembly for Wales: Studying the Welsh Legislature Seminar, 17 October, Pierhead, Cardiff Bay, Wales.

with government. Civic participants were defined as all stakeholders directly with direct links to government. [20]

The methodological parameters were:

- The 25-year timeframe which spans the first through to the seventh Assembly and part of the eighth Assembly—from the establishment of the standing committees of the first Assembly (23 May 1989) up to 23 May 2014. Committee inquiries concluded during this timeframe were included in the data sets.
- Civil society participation in the committee system was assessed by calculating the percentage of submissions and witnesses to committee inquiries drawn from civil society.
- Gender of witnesses was also assessed to determine gender representation with regard to participation. Gender representation is an important measure in relation to inclusiveness as participation by both men and women is considered to be a fundamental requirement of good governance.[21]
- Due to limitations of reporting—there were occasions where insufficient information was provided to determine exact numbers of witnesses. On these occasions, data was captured and categorised under civic and civil entities.
- Also, due to limitations of reporting—there were occasions where insufficient information was provided to determine gender representation of witnesses. On these occasions, data was captured and categorised under civic and civil witnesses only.
- Only standing committees supported by the committee support office were included in the assessment. House and chamber committees were not considered.
- Primary and supplementary submissions were each counted as a single submission. Joint submissions from multiple organisations and/or individuals were each counted as single submissions. Multiple appearances by the same witnesses were counted as per each appearance.
- Witnesses included participants in public hearings, briefings, field and site visits.

20 Kioe Sheng, Y. (Undated) What is Good Governance?, UNESCAP United Nations Economic and Social Commission for Asia and the Pacific.

21 Kioe Sheng, Y. (Undated) What is Good Governance?, UNESCAP United Nations Economic and Social Commission for Asia and the Pacific.

RESULTS

Participation in Assembly committee inquiries

Civil society participation in the committee system was assessed by calculating the percentage of submissions and witnesses to committee inquiries drawn from civil society. This was compared and contrasted with levels of civic participation. Data for these assessments is shown in Table 2.

Table 2: Participation in Assembly committee inquiries—witnesses and submissions

	Number of Submissions		Number of Civil Witnesses*			Number of Civic Witnesses*			Number of Entity Witnesses**	
Assembly	**Civil**	**Civic**	**Total***	**Male**	**Female**	**Total***	**Male**	**Female**	**Civil**	**Civic**
1st	906	114	421	261	115	306	156	44	11	49
2nd	1049	164	567	392	136	645	461	160	35	57
3rd	751	142	457	277	173	426	305	115	37	88
4th	1966	172	904	590	314	447	330	109	138	191
5th	1027	89	512	281	189	742	496	246	18	37
6th	506	96	474	270	204	1424	951	473	14	113
7th	814	126	505	299	206	1920	1254	666	0	14
8th***	74	13	34	16	18	695	438	257	0	0
Total	**7093**	**916**	**3874**	**2386**	**1355**	**6605**	**4391**	**2070**	**253**	**549**

* Total numbers of civil and civic witnesses include witnesses whose gender was not specified.

** Due to limitations of reporting—there were occasions where insufficient information was provided to determine exact numbers of witnesses. On these occasions, data was captured and categorised under civic and civil entities.

*** Up to 23 May 2014

Table 2 illustrates some interesting trends regarding participation in the work of Assembly committees over the 25 years in question. With regard to:

- written submissions—in aggregate, the data shows submissions from civil society participants (7093) clearly outstripping those received from civic participants (916) to committee inquiries. This trend is also replicated across aggregate numbers for each assembly;
- witnesses—in aggregate, the data reveals that numbers of civic witnesses, as compared with civil witnesses, have increased over the later Assemblies—in particular, from the 6th Assembly onwards; and
- gender representation of witnesses—in aggregate, the ratio of representation as a percentage for civil witnesses was about 36% females as compared to 64% males and for civic witnesses—approximately 32% females as compared to 68% males.

To investigate this data, and its trends—data relating to submission numbers, participation in estimates and annual report inquiries, and source of referrals was extracted. These data sets, together with related information, are detailed below.

Submission numbers

When comparing aggregate totals across the first 25 years of the Assembly, submissions from civil society participants (7093) clearly outstrip those received from civic participants (916). In considering each Assembly, in aggregate, committees of the 4th Assembly received the greatest number of submissions—1966 (civil) and 172 (civic). This was followed closely by the 2nd Assembly with aggregate totals of 1049 (civil) and 164 (civic) submissions.

The greatest number of submissions received by a specific committee inquiry (to date) also occurred in the 4th Assembly. The Standing Committee on Planning and Urban Services as part of its inquiry into proposals for the Gungahlin Drive Extension received 910 submissions of which 907 were from civil participants.

In terms of originating jurisdiction for submissions to a committee inquiry, the 1st Assembly's Standing Committee on Social Policy inquiry into water fluoridation in the ACT received 143 civil submissions. Whilst the bulk of submissions were from Canberra, submissions were also received from national jurisdictions (NSW, Victoria and Queensland) and international jurisdictions (United States of America, New Zealand, Canada, South Africa, and the Netherlands).

A list of the top 15 Assembly committee inquiries in terms of numbers of submissions received is detailed in Table 3. The inquiry topics to which submissions were received illustrate the state and council responsibilities that arise in the two tiers of government model in place in the ACT. The number of submissions received is also indicative of the level of interest in the matter under inquiry.

Table 3: Top 15 Assembly committee inquiries in terms of numbers of submissions received[22]

A No.	Committee	Inquiry	Source of inquiry	Submissions	
				Civil	Civic
4th	Standing Committee on Planning and Urban Services	Inquiry into proposals for the Gungahlin Drive Extension	Assembly	907	3
2nd	Select Committee on Euthanasia	Euthanasia	Assembly	239	2
5th	Standing Committee on Legal Affairs	The operation of the *Dangerous Goods Act 1975* with particular reference to fireworks	Assembly	229	1
1st	Standing Committee on Social Policy	Inquiry into water fluoridation in the ACT	Assembly	143	3
5th	Standing Committee on Planning and Environment	Variation to the Territory Plan No. 200-Garden City Variation-Residential Land Use Policies, Modifications to Residential Codes, and Master Plan Procedures	DV* (statutory)	127	Nil
1st	Select Committee on the Establishment of a Casino	Establishment of a Casino	Assembly	97	4
3rd	Standing Committee on Social Policy	Social Policy Issues Raised by Community Groups April 1995	Self-referred	89	Nil
7th	Standing Committee on Planning and Territory and Municipal Services	Draft Variation to The Territory Plan No. 307: Griffith—Change of Zoning	DV (statutory)	87	Nil
1st	Standing Committee on Social Policy	Inquiry into Behavioural Disturbance Among Young People	Self-referred	86	5

22 More recently, in late 2014, the Standing Committee on Public Accounts in the 8th Assembly conducted a self-referred inquiry into the proposed Appropriation (Loose-fill Asbestos Insulation Eradication) Bill 2014. It received over 80 submissions, all of which were civil submissions. Due to the significant level of public interest and limited timeframe for inquiry, the Committee resolved to receive submissions after it had reported, with a final cut-off date approximately one week after reporting. Although this inquiry is slightly outside the 25 year time frame, it ranks number 11 in the all-time list in terms of numbers of submissions received by an Assembly committee inquiry.

A No.	Committee	Inquiry	Source of inquiry	Submissions	
				Civil	Civic
1st	Standing Committee on Conservation, Heritage and Environment	Inquiry into Commercial and Domestic Waste Management	Assembly	83	6
2nd	Standing Committee on Planning, Development and Infrastructure	Inquiry into Possible Changes to Planning Legislation in the ACT	Self-referred	77	2
2nd	Standing Committee on Planning, Development and Infrastructure	DV—Watson Sections 61 – 64, 72, 74, 76, 79, 80, and 83 (North Watson)	DV (statutory)	77	Nil
7th	Standing Committee on Education, Training and Youth Affairs	School closures and reform of the ACT education system	Self-referred	76	Nil
3rd	Standing Committee on Planning and Environment	The Adequacy of Processes Relating to Identifying and Managing Contaminated Sites in the ACT	Self-referred	73	2
3rd	Standing Committee on Public Accounts	Voluntary Parent Contribution Scheme in the ACT School System	Self-referred	71	12

* Draft variation (DV) pursuant to *Land (Planning and Environment) Act 1991*; and *Planning and Development Act 2007.*

Budget estimates and annual report inquiries

Inquiries by committees into budget estimates and annual reports, when taken together, complete the important role that parliament has in the cycle of public financial accountability—*ex-ante* and *ex- post* scrutiny of the budget estimates and budget outcomes.

Oversight of the budget estimates and annual reports of government agencies and authorities across assemblies has been carried out in different ways. Coupled with these variations has been accompanying trends of civil and civic participation in these inquiries.

In considering participation in estimates related inquiries—in aggregate, the data at Table 4 shows that numbers of civic witnesses, as compared with civil witnesses, have significantly increased over the later Assemblies—in particular, from the 5th Assembly onwards with 446, 516 and 914 civic witnesses appearing respectively across the 5th, 6th and 7th assemblies, as compared to 43, 129 and 94 civil witnesses. The 6th Assembly also had 105 civic entities as witnesses, in addition to the 516 individual civic witnesses.

With regard to estimates (and supplementary estimates)—in the first five assemblies, oversight of the main appropriation and supplementary appropriations was carried out

using: (i) select committees; (ii) the referral of budget estimates along portfolio lines to respective standing committees; and (iii) the referral of supplementary appropriations to either a select committee or the public accounts committee.

From the 6th Assembly onwards, the practice has been to refer the main appropriation to a select committee and supplementary appropriations to the public accounts committee.

In terms of participation—it was not until the 4th Assembly that civil society was provided with avenues to participate in estimates' inquiries. This was in response to a recommendation of an estimates committee from that assembly.[23] The 4th Assembly Select Committee on Estimates 1989–99 was the first to invite civil society participation as part of the estimates process. Prior to this, only civic participants contributed to such inquiries. These trends are reflected in Table 4.

Uniquely, on a number of occasions, select committees (during the 2nd, 3rd and 4th assemblies) have been established to not only examine: (i) expenditure proposals set out in the relevant appropriation bill and any revenue estimates as proposed by government; but also (ii) annual and financial reports for the respective financial year. The establishment of a select committee in this way effectively captures the *ex-ante* and *ex-post* scrutiny of budget estimates and outcomes.

Table 4: Participation in estimates and supplementary estimates inquiries—witnesses and submissions

	Number of Submissions		Number of Civil Witnesses			Number of Civic Witnesses			Number of Entity Witnesses	
Assembly	**Civil**	**Civic**	**Total**	**Male**	**Female**	**Total***	**Male**	**Female**	**Civil**	**Civic**
1st	0	0	0	0	0	0	0	0	0	48
2nd	0	0	0	0	0	281	210	71	0	3
3rd	0	0	0	0	0	121	88	33	0	34
4th	106	2	58	34	24	41	33	6	59	47
5th	17	0	43	24	19	446	320	126	0	0
6th	9	0	129	55	74	516	363	153	0	105
7th	1	0	94	51	43	914	585	329	0	0
8th**	0	0	13	6	7	256	157	99	0	0
Total	**133**	**2**	**337**	**170**	**167**	**2575**	**1756**	**817**	**59**	**237**

* Total number of civic witnesses include witnesses whose gender was not specified

** Up to 23 May 2014

23 4th Assembly, Select Committee on Estimates 1998–99.

Over the first 25 years, participation in annual report inquiries was dominated by civic participants. During the 4th and 5th assemblies, committees invited civil society participation with mixed results. Each committee of the 5th Assembly, at a point in time during that assembly, ceased seeking/inviting public input due to lack of responsiveness and interest. Notwithstanding advertising in local print media, the call for written submissions by each committee yielded minimal interest and as a result each committee, at different times, decided to cease calling for written submissions. From the 6th Assembly onwards, the practice of seeking public input to these inquiries ceased and has remained the practice ever since. It may be worth reconsidering this matter and to seek out other ways of encouraging greater participation by members of civil society so as to ensure the 'buckle', referred to by Norton, does not loosen. Trends are reflected in Table 5.

Table 5: Participation in annual reports inquiries—witnesses and submissions

	Number of Submissions		Number of Civil Witnesses			Number of Civic Witnesses			Number of Entity Witnesses	
Assembly	**Civil**	**Civic**	**Total**	**Male**	**Female**	**Total***	**Male**	**Female**	**Civil**	**Civic**
1st	0	0	0	0	0	0	0	0	0	0
2nd	0	0	0	0	0	50	38	12	0	1
3rd	0	0	0	0	0	11	8	3	0	34
4th	0	0	11	7	4	16	8	4	0	51
5th	4	0	7	5	2	104	69	35	0	28
6th	0	0	0	0	0	685	448	237	0	0
7th	0	0	0	0	0	723	485	238	0	0
8th**	0	0	0	0	0	405	253	152	0	0
Total	**4**	**0**	**18**	**12**	**6**	**1994**	**1309**	**681**	**0**	**114**

* Total number of civic witnesses include witnesses whose gender was not specified

** Up to 23 May 2014

Source of inquiry

Source of inquiry for Assembly committees can come from four main sources: (i) a recurring requirement arising from resolutions of appointment or the practices of the Assembly—for example, to review Auditor-Generals reports; (ii) legislation—for example, the consideration of planning variations pursuant to planning legislation; (iii) a reference from the Assembly; and (iv) self-referral by the standing committee, that is initiation of inquiries that relate to their areas of responsibility.

Initially, the power to self-refer was sourced from an Assembly resolution appointing standing committees (7 December 2004). In March 2008, the Assembly amended standing order 216 to explicitly give committees the power to self-refer. Notwithstanding, prior to 2004, assembly committees self-referred or initiated their own inquiries—that is, within their area of competence.

The power to self-refer or initiate matters is an important power for committees and has particular significance with respect to civil society participation.[24] It can allow committees to be responsive to matters of public concern. For example, in the 4th Assembly, the Standing Committee on Planning and Urban Services self-referred three inquiries on the basis of representations from local residents. These were inquiries into:

- a proposed development at South Bruce Section 21 Blocks 1, 3 and 4 and traffic arrangements on Haydon Drive—inquiry self-referred on the basis of representation of residents of South Bruce;
- Mawson/Athllon Drive Land Use—this inquiry followed representation from local residents. Importantly, to supplement the Committee's inquiry, the Assembly resolved on 6 December 2000 that the Minister for Urban Services not proceed with the proposed sale and release of the Mawson/Athllon Drive corridor until the Committee had reviewed the appropriateness of the land use design and the Government had presented its response to the Committee report; and
- Section Master Planning for Turner, Sections 46, 47, 48 and 62—this inquiry followed representation from local residents.

A general summary of the number of Assembly committee referrals by source is detailed in Table 5. The highest number of self-referred and assembly referrals, to date, have occurred in the 4th Assembly. This correlates with levels of participation—as sourced from Table 2—in the work of the committees of the 4th Assembly. In aggregate, 4th Assembly committees received the greatest number of submissions—1966 (civil) and 172 (civic), the highest number of civil witness participants—904 (590 males and 314 females)—and the highest number of civil entity participants at 138.

24 UCL Constitution Unit. (1998) *Checks and Balances in Single Chamber Parliaments: a Comparative Study*, The Constitution Unit—School of Public Policy: London, February.

Table 6: Table 5: Number of Assembly committee referrals by source

Assembly	Self-referred	Assembly referred**	Other***	Total
1st	7	30	2	39
2nd	18	24	42	84
3rd	23	23	42	88
4th	34	69	42	145
5th	21	35	31	87
6th	15	33	37	85
7th	12	57	24	93
8th*	1	15	1	17
Total	**131**	**286**	**221**	**638**

* Figures for the 8th Assembly are inquiries reported on up until the end of May 2014. 6 inquiries have been self-referred in the 8th Assembly up until the end of May 2015.

** Excludes referrals relating to draft variations (DVs) to the Territory Plan and Auditor-General's reports.

*** Includes referrals relating to DVs to the Territory Plan and Auditor-General's reports.

A study of the first 25 years of the Assembly is not complete without acknowledging a number of firsts with regard to sources of inquiry. These include:

- The first Assembly referred inquiry (25 May 1989)—was to the Standing Committee on Social Policy asking it to inquire into the needs of the ageing.
- Two equal first select committees were established (25 May 1989)—these were the Select Committee on the Occupational Health and Safety Bill 1989 and the Select Committee on the Establishment of a Casino.
- The first draft variation (DV) referred to the Standing Committee on Planning, Development and Infrastructure after the passing of the Territory planning laws—*Land (Planning and Environment) Act 1991* occurred on 22 October 1991 (1st Assembly). The DV related to Forrest—Section 12, Block 1 (Canberra Bowling Club).
- The first Auditor-General's report presented to the Assembly and referred to the Public Accounts Committee was the Auditor-General's Report No. 1 of 1991. It reported on the first six months of operation of the Government Audit Office for the ACT—for the period July–December 1990 (14 February 1991, 1st Assembly).

OTHER OBSERVATIONS

In addition to the quantitative assessments of civil and civic participation in committee inquiries as discussed above, the data mining also revealed trends and interesting aspects of participation that have contributed positively to the Assembly's relationship with the people. Some of these are discussed below.

Participation by prominent citizens in the work of committees has included:

- Sylvia Curley OAM and Gus Petersilka were participants in the work of committees in the first and second assemblies. Sylvia Curley is considered one of Canberra's most outstanding citizens and made a significant contribution to nursing and the conservation and heritage of Canberra.[25]

  Augustin "Gus" Petersilka was the proprietor of Gus' café in the heart of Civic where he championed outdoor eating and fought the bureaucratic constraints of the day to be the first eating establishment in Canberra to serve his customers at tables and chairs on the footpath. [26]
- Sir David Smith (former official secretary to the Governor General) and Sir Lennox Hewitt OBE [prominent retired senior Australian public servant who served the Commonwealth in various capacities for over 40 years (1939–80) and also served the governments of New South Wales and Western Australia] were participants in an inquiry examining defamation laws.[27]
- The former Assistant Federal Treasurer, Arthur Sinodinos AO, appeared as a witness (1994) on behalf of the Kingston Community Action Group (which also made a submission) as part of an inquiry into planning laws.[28]
- The Managing Director of Westfield Holdings—David Lowy made a submission and appeared as a witness as part of an inquiry into the tenancy of commercial premises.[29]

There has also been active participation by prominent community representatives in the work of committees prior to their election as MLAs or as federal Members—Kate Carnell on behalf of the Pharmacy Guild (1st Assembly—Select Committee on Tenancy of Commercial premises); Caroline Le Couteur on behalf of the Conservation Council (3rd Assembly); Kate Lundy on behalf of the Trades and Labour Council (3rd Assembly); Dr Chris Bourke as an individual (3rd Assembly) and on behalf of the ACT and Region Chamber of Commerce and Industry (4th Assembly); Dave Rugendyke on behalf of the AFP (3rd Assembly); Meredith Hunter on behalf of the Youth Coalition (4th Assembly

25 2nd Assembly, Standing Committee on Environment, Heritage and Conservation—Inquiry into the Cultural and Heritage Significance of the Tuggeranong Homestead and its Site.

26 1st Assembly, Select Committee—Inquiry into Police Offences (Amendment) Bill 1989; 2nd Assembly, Standing Committee on Planning, Development and Infrastructure—Inquiry into the Territory Plan—

27 4th Assembly, Standing Committee on Justice and Community Safety—Inquiry into the Defamation Bill 1999.

28 2nd Assembly, Standing Committee on Planning, Development and Infrastructure—Inquiry into possible changes to planning legislation in the ACT.

29 1st Assembly, Select Committee on Tenancy of Commercial premises.

onwards); Yvette Berry on behalf of the Australian Liquor and Hospitality Workers Union (4th Assembly); and Mary Porter on behalf of Volunteering ACT (4th Assembly). Of these, Mary Porter AM, Dr Chris Bourke and Yvette Berry are current MLAs. Participation of this nature is worthy of note as it signals that these representatives valued the formal channels available to submit their views.

Move from place to place

The powers of committees fall broadly into two categories—authorisations and inquiry powers. The ability to conduct hearings and move from place to place falls under the authorisation power.

In a small jurisdiction the necessity to hold public hearings at locations, other than the Assembly itself, is not as vital as in other jurisdictions. Nonetheless, its value is still important in terms of encouraging or facilitating civil society participation and is in keeping with the concept that committees can bring parliament to the people.[30]

The only committee to hold local public hearings outside of the Assembly building has been the Standing Committee on Planning, Development and Infrastructure in the 2nd Assembly. The hearings were in connection with its inquiries into:

a. The draft Territory Plan, in addition to holding two hearings at the Assembly, a public hearing was also held in Belconnen. In its report, as to the importance of holding hearings in other locations, the Committee commented:

   The first public hearing was held on Tuesday 6 April 1993 in Belconnen. This was the first time that a committee of the ACT Legislative Assembly had formally taken evidence outside the Assembly building in Civic, and demonstrated the wish of the Committee to facilitate the appearance of witnesses, especially on local issues – at the Belconnen hearings, the Committee heard from a number of organisations concerned about developments in the Belconnen area.[31]

b. A draft variation to the Territory Plan [DV – Richardson Section 450 Block 1 (Tuggeranong Homestead)]. The Committee held public hearings at Lake Tuggeranong College as part of its inquiry.

The only committees to hold public hearings interstate were in the 6th Assembly. These were the:

- 6th Assembly Standing Committee on Legal Affairs as part of its inquiry into the Court Procedures (Protection of Public Participation) Amendment Bill 2005 held a public hearing in Melbourne, Victoria.
- 6th Assembly Standing Committee on Public Accounts as part of its further inquiry into Auditor-General's report No. 8 of 2004: *Waiting lists for elective surgery and medical treatment* held a public hearing in Sydney, NSW.

30 Norton, Philip. 2013. *Parliament in British Politics* (2nd edn.). Palgrave Macmillan: London.

31 2nd Assembly, Standing Committee on Planning, Development and Infrastructure, Report on draft variation to the Territory Plan, p. 3, May 1993.

Several committees over the last 25 years have also utilised community forums, field and site visits, locally, nationally and internationally to seek further information concerning subject matter as it related to inquiries before these committees. These forms of information gathering are supplementary ways committees can engage with civil society in addition to the formal channels of calls for written submissions and the public hearings.

Petitions

The right to petition parliament to highlight issues and directly influence the work of parliament dates back to the 13th century in Britain. A petition is a request by a group of citizens that asks its parliament to take action to solve a specific problem. It is the oldest and most direct way that citizens can draw attention to a matter and ask parliament to assist them.[32]

Over the last 25 years, the Assembly has received many petitions and also implemented a system for electronic lodgement of petitions. However, to date, there has been only one occasion where a petition has been referred to an Assembly committee. This occurred in the 5th Assembly—on 21 October 2003, the Assembly referred a petition presented to it concerning the building of a supermarket next to the Belconnen Markets to the Standing Committee on Planning and the Environment for inquiry and report. As to why this has been the only time a petition has been referred, may be a combination of committees not keeping watching briefs on lodged petitions coupled with the power to self-refer not requiring an Assembly referral.

Joint inquiries

The concept of a joint inquiry—that provides for committees to meet jointly where the subject matter being dealt with crosses different committee areas—is a powerful way of utilising the expertise that various committees can bring to an inquiry together with harnessing the respective relationships each committee may have with potential stakeholders as a means of encouraging participation.

There has been one occasion to date in the life of the Assembly where a joint inquiry has been held. During the 1st Assembly, on 21 February 1991, a resolution was passed that, amongst other things, specified that draft planning and land use legislation and related legislation and regulations, be referred to the Standing Committee on Conservation, Heritage and the Environment and the Standing Committee on Planning, Development and Infrastructure for joint consideration and report. The resolution specified further that the committees shall meet, deliberate and report jointly and not individually, and only on the matters relating to draft planning and land use legislation; before proceeding to business, the members to elect a Chair and a Deputy Chair; and that the motion ceases to have effect on the presentation of the joint report or by 18 April 1991, whichever was sooner. This joint inquiry was significant

32 Norton, Philip. 2013. *Parliament in British Politics* (2nd edn.). Palgrave Macmillan: London.

for civil participation in that it examined the founding planning and land use legislative framework for the ACT post self-government. The Assembly's establishment of a joint committee to inquire into the framework signalled its importance to the community, which can be a means of encouraging participation.

DISCUSSION/CONCLUSION

The foregoing data and analysis show various trends with regard to civil society participation in the work of Assembly committees over the first 25 years since self-government. These include:

- Written submissions—in aggregate, the data shows submissions from civil society participants (7093) clearly outstripping those received from civic participants (916) to committee inquiries. This trend is also replicated across aggregate numbers for each assembly.
- In considering each assembly, in aggregate, committees of the 4th Assembly received the greatest number of submissions—1966 (civil) and 172 (civic). This was followed closely by the 2nd Assembly with aggregate totals of 1049 (civil) and 164 (civic) submissions.
- The highest numbers of self-referred and assembly referrals, to date, have occurred in the 4th Assembly. This correlates with levels of participation—as sourced from Table 2—in the work of the committees of the 4th Assembly and referred to above. In aggregate, 4th Assembly committees recorded the highest number of civil witness participants—904 (590 males and 314 females), and the highest number of civil entity participants (138).
- Witnesses—in aggregate, the data shows that numbers of civic witnesses, as compared with civil witnesses, have increased over the later Assemblies—in particular, from the 6th Assembly onwards.
- Gender representation of witnesses—in aggregate, the ratio of representation as a percentage of witnesses was more balanced for civil witnesses (36% females to 64% males) as compared to civic witnesses (32% females to 68% males). Whilst the results are comparable between civil and civic witnesses with inclusiveness as it relates to gender representation, civil witnesses fair slightly better when compared with civic witnesses. Balanced representation in this regard is an important contributor to inclusiveness and is considered a core requirement of good governance.
- In considering participation in estimates related inquiries—in aggregate, the data at Table 4 shows that numbers of civic witnesses, as compared with civil witnesses, have significantly increased over the later assemblies—in particular, from the 5th Assembly onwards with 446, 516 and 914 civic witnesses appearing respectively across the 5th, 6th and 7th assemblies, as compared with 43, 129 and 94 civil witnesses. The 6th assembly also had 105 civic entities as witnesses, in addition to the 516 individual civic witnesses.

To investigate the aforementioned data, and its trends—data relating to submission numbers, participation in estimates and annual report inquiries, and source of referrals was extracted.

The significant trend arising from the data is the increase in participation by civic witnesses. In aggregate, the data shows that numbers of civic witnesses, as compared with civil witnesses, have increased over the later Assemblies—in particular, from the 6th Assembly onwards.

A possible explanation for this may be changes regarding the appearance by ministers (as witnesses) over the 25 years. Appearances by ministers (as witnesses) were not common-place during the first through to the third assemblies and in the main for the fourth Assembly. The only exception to this was for estimates committees. As the Select Committee on Estimates 1992–93 explained:

> One feature that distinguishes the Estimates Committee from other Committees of the Assembly is that the responsible Minister, or the Speaker where appropriate, is always present when the Estimates Committee is taking evidence. This is to ensure that a broad range of questions can be responded to by the Minister or Speaker and officials, including those relating to policy.

The first non-estimates inquiry process where a minister appeared as a witness occurred in the second Assembly. This was in connection to the Standing Committee on Public Accounts inquiry reviewing petrol supply arrangements. The Attorney General at the time and his Senior Private Secretary appeared as witnesses on two occasions (15 and 17 August 1994). The appearance of Ministers as witnesses, at times other than estimates inquiries, is important, in that it has the potential to shift an inquiry focus from implementation of policies to defending their merits. Where it becomes a recurring practice, it has implications for the relationship a parliament has to the people.

With the exception of estimates and annual report inquiries—and as noted, ministers did not appear as witnesses (with senior officials appearing only) from the first to the third assemblies inclusive. There were some changes to this in the fourth Assembly, with the then Minister for Education appearing as a witness for all inquiries of the Standing Committee on Education, Community Services and Recreation.

The appearance of ministers as witnesses was thus fragmented in the 4th Assembly and increased during the 5th Assembly. Ministers appearing as witnesses for all inquiries became standard from the 6th Assembly onwards—although on a few occasions, no minister appeared as a witness.

This trend, should it continue for the next 25 years, has some interesting implications for participation and one which has possible consequences for inclusiveness as it relates to strategic bridging and voice for civil society participants. In practical terms, it risks a shift towards traditional policy making structures—i.e., the “State talking or consulting with itself”—which would be counterproductive.

It is evident from the analysis that the 'discourse of inclusiveness' has materialised over the first 25 years in the work of Assembly committees. However, as noted from the 6th Assembly onwards, the rise in numbers of civic witnesses (as compared with civil) has the potential to weaken the status of the 'discourse of inclusiveness' should this level of participation continue on such a trajectory.

Whilst slightly outside the 25 years[33]—on 3 December 2014, the current Standing Committee on Public Accounts reported on a self-referred inquiry into an appropriation bill underpinning a one billion dollar loan to the Territory (over a ten year period) to fund the Loose-fill Asbestos Insulation Eradication Scheme. The extent of public engagement in this inquiry suggests that civil participation in the work of committees remains strong after 25 years. With an inquiry timeframe of only close to two weeks, the Committee received over 80 submissions from civil society participants and heard from 25 civil society participants at public hearings.

After presentation of its report, a civil society participant (submitter and witness) conveyed the following to the Committee:

> I have not yet completed reading the Reports, but did watch the presentation of the report this morning.
>
> This is just one example of what makes me proud to be a Canberra citizen.
>
> Your Committee has done an extraordinary job under great pressure while showing great respect and understanding to the families and individuals affected by the Mr Fluffy debacle.
>
> As I said in my evidence, there are no winners and no easy choices for anyone, but at least the voices were heard.
>
> Regards and thank you…[34]

As to what the next 25 years holds for civil society participation in Assembly committees—only time will tell. However, the comments from the submitter and witness above, emphasise the significance of the relationship of parliament to the people and importantly the integral role the legislature has as 'the buckle' between the people and the executive. It also shows the importance of ensuring the existence of the linking 'buckle'.

A salient message for all legislatures is thus to give more attention to fostering the linkages they have with citizens. Van der Meer (2010) has termed this the 'care relationship' and suggests that it is possibly more important in contributing to trust

33 Whist outside the 25 years, this inquiry is important as it signals a point in time after the first 25 years and looking to the next 25 years – because of its timing – it is relevant to the central theme of this paper.

34 Submitter and witness. (2014) ACT Legislative Assembly Standing Committee on Public Accounts, Inquiry into the proposed Loose-fill Asbestos Insulation Eradication Bill 2014, 4 December.

in parliament than accountability.[35] Norton (2010) imparts that such a relationship is critical to the legitimacy of legislatures in the contemporary world on the basis that:

> Legislatures are the means through which the people can be heard. The voices of the people need to be channelled through the legislature and support for measures of public policy, which may be necessary but unpopular, mobilised through the legislature. Popular trust will not be achieved purely through what happens within a legislature, but rather as a consequence of the connections it forges, and is seen to forge, with the people. It is a daunting challenge, but it is one that can put legislatures where they belong, at the heart of a representative democracy.[36]

For the ACT Legislative Assembly, a new stage of political imperatives, priorities, and awareness will shape participation priorities for an enlarged Assembly, its committees and its 25 MLAs from 2016.

35 Van der Meer, Tom. 2010. 'In What We Trust? A Multi-Level Study into Trust in Parliament as an Evaluation of State Characteristics', *International Review of Administrative Sciences,* 76 (3), pp. 530–531.

36 Norton, Philip. 2012. Parliaments in the 21st Century: the representative challenge, Address to the Italian Chamber of Deputies, 13 November, Lectio magistralis, Italy, p. 15.

Papers
from the ASPG 2014 National Conference

The High Court on Election Funding – Legitimate Ends and the Validity of Reforms

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INTRODUCTION

In 1992 the High Court identified for the first time an implied freedom of political communication. It derived this implication from ss 7 and 24 of the Constitution, which require that the Houses of the Commonwealth Parliament be directly chosen by the people and s 128 which provides that constitutional amendments cannot be made without the approval of the people voting in a referendum. The Court concluded that in order for the people to exercise their voting responsibilities under the Constitution, they must be capable of making a free and informed vote. This meant that there must be free political communication which aids electors in forming their voting intentions.[2]

Any law that burdens this implied freedom of political communication will be held to be constitutionally invalid, unless the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Commonwealth Constitution. This is known as the *Lange* test.[3]

In 1992, in the *Australian Capital Television* case, the High Court struck down the validity of laws that banned all political advertising on electronic media and permitted free political broadcasts by political parties.[4] The ostensible purpose of the law was to reduce the cost of election campaigns and thereby reduce the risk or perception of corruption or undue influence that arises from parties raising large amounts through political donations.[5] While the Court accepted that anti-corruption purposes

1 This conference paper, delivered at the 2014 Australasian Study of Parliament Group conference in Sydney, draws in part upon: Anne Twomey, 'Unions NSW v New South Wales: Political Donations and the Implied Freedom of Political Communication' (2014) 16 UNDALR 178.

2 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

3 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–8, as altered by *Coleman v Powers* (2004) 220 CLR 1, [92]–[96] (McHugh J), [196] (Gummow and Hayne JJ), [211] (Kirby J).

4 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

5 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 130–1 (Mason CJ).

would amount to a legitimate end,[6] a majority did not accept that the law itself was reasonably appropriate and adapted to serve this end. In particular, two concerns stood out. First, it banned advertising on the electronic media by third parties, such as environmentalists, charities, business groups and others who wished to make political advertisements and influence voters in relation to the election.[7] Secondly, the arrangements for the allocation of free-time for political broadcasts favoured the incumbents, because they were based upon votes received at the previous election.[8] The impact upon the implied freedom of political communication was disproportionate to the legitimate end and the laws were held to be invalid.

THE CASE OF *UNIONS NSW V NEW SOUTH WALES*

The High Court did not address the issue of campaign funding again until the 2013 case of *Unions NSW v New South Wales*.[9] By then, the High Court's jurisprudence on the implied freedom of political communication was far more extensive, and the laws governing campaign funding in New South Wales had undergone fundamental changes. It is necessary, to make sense of the case and the issues arising from it, to briefly sketch the various changes made to campaign funding laws in NSW.

First, in 2009, bans were imposed by the Rees Labor Government upon property developers, prohibiting them from making political donations.[10] Then in 2010, more comprehensive reforms were introduced by the Keneally Labor Government.[11] Caps were imposed upon political donations of $5000 for parties and $2000 for candidates and third-party campaigners. Caps were also imposed upon electoral communication expenditure by parties, candidates and third-parties. The cap for a major party running candidates in all electorates was approximately $9.3 million and for smaller parties that run candidates in Legislative Council elections but no more than 10 candidates in the Legislative Assembly, the cap was $1,050,000. The same cap of $1,050,000 applied to third-party campaigners. In addition, the legislation significantly increased public funding for elections, with parties being reimbursed for 75% or more of their electoral communication expenditure under the expenditure cap. Parties also received generous funding for administrative purposes.

Despite the imposition of caps on donations, the ban on donations by property developers was not lifted in 2010. Instead, it was extended to include donations by

6 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 130 and 144 (Mason CJ); 155–6 (Brennan J); 189 (Dawson J); 238 (McHugh J).
7 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 145 (Mason CJ); 173 (Deane and Toohey JJ); 220 (Gaudron J).
8 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 131–2 (Mason CJ); 172 (Deane and Toohey JJ); and 239 (McHugh J).
9 *Unions NSW v New South Wales* (2013) 88 ALJR 227.
10 *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act* 2009 (NSW).
11 *Election Funding and Disclosures Amendment Act* 2010 (NSW).

tobacco, liquor and gambling entities. Together, they are now classified as 'prohibited donors'.[12] This classification also extends to close associates, including directors and officers of corporations engaged in these businesses, their spouses, related bodies corporate, shareholders with at least 20% voting power in such corporations and their spouses and the beneficiary of any trust engaged in these businesses.[13]

In 2012, legislation enacted under the O'Farrell Coalition Government banned all political donations, other than those from persons on the electoral roll.[14] This meant that donations from corporations, unions, partnerships, clubs and associations were all prohibited, along with donations by persons such as non-citizens who were not on the electoral roll. The legislation also aggregated the expenditure caps of political parties and affiliated organisations, in a way that only affected the Labor Party and its affiliated unions. The unions challenged these 2012 amendments in the High Court in *Unions NSW v New South Wales.*

The unions did not challenge the caps on donations or on expenditure. They accepted that these aspects of the election funding legislation were enacted for legitimate anti-corruption purposes.[15] They argued, however, that the ban on *all* donations by corporations, unions and others, was not for any anti-corruption purpose and was therefore invalid. Before getting to this point, however, they had a number of hurdles to leap.

Whether the law burdened the implied freedom of political communication

One of them was the question of whether the law banning these political donations actually burdened the implied freedom of political communication. The law was not directed to the content of political communications or the manner in which they were made. It did not ban anyone from making political communications or expressing their political views. So how did it burden the implied freedom?

Two possible arguments arose. The first, which has been accepted by the United States Supreme Court,[16] is that the making of a political donation is itself a form of political communication – i.e. that the donor supports the policies of the party or candidate that receives the donation and that it supports their election. There are, however, some difficulties with this argument. For a start, many people and corporations donate to opposing political parties.[17] Their message is not so much one of support as one of

12 *Election Funding, Expenditure and Disclosures Act* 1981 (NSW), s 96GAA.
13 *Election Funding, Expenditure and Disclosures Act* 1981 (NSW), s 96GB.
14 *Election Funding, Expenditure and Disclosures Amendment Act* 2012 (NSW).
15 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [9] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
16 *Buckley v Valeo* 424 US 1 (1976) 21.
17 Note the 1995–8 study which showed that of the top 10 donors, all but one donated to both the Coalition and the ALP: I Ramsay, G Stapledon and J Vernon, 'Political Donations by Australian Companies', (2001) 29 *Federal Law Review* 179, 203–4.

self-interest, with the donor seeking to be in favour with whoever wins government.[18] Secondly, if the making of a political donation is a form of political communication, then it communicates nothing if it remains secret. This suggests that donations as a form of political communication would only be protected if publicly disclosed. At the Commonwealth level, donations under $12,800 need not be disclosed, suggesting that they have no role as part of political communication and would therefore not be constitutionally protected.

The High Court avoided addressing this issue. Instead, it opted for the second argument which was that a law that has the effect of reducing expenditure on political communications, by reducing the number of sources from which donations can be raised, is a law that burdens the implied freedom of political communication.[19] The assumptions behind this conclusion do not necessarily stack up. First, it is assumed that a reduction in the sources of donors will result in a reduction in funds that could be spent upon political communications. This is not necessarily the case. It must be remembered that parties are reimbursed for 75% or more of their electoral communication expenditure. Their expenditure is also capped. The existence of fixed term Parliaments in NSW means that parties have four years to raise the amount needed to fund the difference between the publicly funded amount and the expenditure cap. For a major party that runs candidates in all electorates, that amounts to around $2.3 million that needs to be raised over a four year period to fund electoral communications expenditure. That's around 115 donations of $5000 annually, or just over one such donation per electorate annually. It does not seem to be a great burden, especially when there are 4.6 million voters on the roll in NSW and one can even draw upon donations from voters across the whole country, giving a pool of 15 million potential donors.

When faced with a similar argument, the US Supreme Court dismissed it, observing that political parties and candidates would simply have to raise funds from a wider field of people and could still raise large amounts if they had sufficiently broad support.[20]

The second assumption is that more money for expenditure on political communication necessarily amounts to more political communication and a more informed electorate. Yet if a party has more money to spend on political advertising, it tends to be spent on the repetition of the same advertisements, rather than greater diversity of political views or more information on policy differences. As Brennan J observed in the *Australian Capital Television* case, television advertisements tend to trivialise political issues and are directed to emotions rather than the intellect.[21] There is also a counter

18 See: I Ramsay, G Stapledon and J Vernon, 'Political Donations by Australian Companies', (2001) 29 *Federal Law Review* 179, 181; J Fisher, 'Why Do Companies Make Donations to Political Parties?' (1994) 42 *Political Studies* 690; and G Gallop, 'From Government in Business to Business in Government' (1997) 83 *Canberra Bulletin of Public Affairs* 81.

19 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); and [120] (Keane J).

20 *Buckley v Valeo* 424 US 1 (1976) 22.

21 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 160 (Brennan J).

argument that if a law were to reduce the domination of the airwaves by major parties, there would be more opportunity for diverse political communication from other voices that are normally drowned out during election periods. Hence a law that had the effect of reducing the amount of political advertising by political parties might have the effect of increasing the quality, diversity and free-flow of political communication. The point is that we do not know whether this is the case, and neither did the High Court in reaching its conclusions about the effect of a law banning certain types of political donations.

Thirdly, there are many other laws, such as tax laws, that more directly reduce the amount of money that a party can draw upon to fund electoral communications expenditure. It would be very surprising, however, if laws such as that imposing the goods and services tax were regarded as burdening the implied freedom of political communication.

Whether the law was reasonably appropriate and adapted to serve a legitimate end

Having accepted that a law banning corporate and union donations burdened the implied freedom of political communication, the High Court in *Unions NSW* then considered the second part of the *Lange* test. Is the law reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the constitutionally prescribed system of responsible and representative government? In this case the Court held that the law was not made for a 'legitimate end'. Indeed, it rather coyly claimed that 'the purpose of its wide, but incomplete, prohibition is inexplicable'.[22] The critical problem was that the caps on donations had removed the corrupting influence of large donations. A political donation of $5000 by a corporation was worth exactly the same as the $5000 of a union and the $5000 of an individual on the electoral roll. None would buy any more influence than the other. The Government could not explain to the Court why a $5000 donation by a union or a corporation was more likely to give rise to corruption and undue influence than a donation in the same amount by a voter.

The Government had argued that only voters have an interest in the choice of a government and therefore they should be the only ones allowed to donate. This argument was rejected by the Court which pointed out that there are 'many in the community who are not electors but who are governed and are affected by decisions of government'.[23] Their Honours considered that these non-voters 'have a legitimate interest in governmental action' and may seek to influence elections either directly or indirectly through the support of a party or candidate, through donations or otherwise.[24] This includes corporations, unions, other entities and non-citizens.[25]

22 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [59] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
23 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
24 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [144] (Keane J).
25 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [56] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

As for the aggregation provisions, the Court found it much easier to hold that they burdened the implied freedom of political communication, as they directly limited expenditure on political communication.[26] While an argument might have been able to be run that they supported the legitimate end of a 'level playing field', this was thwarted by the fact that the provisions were skewed so that they only applied to the Labor Party and its affiliated unions. They did not aggregate the expenditure of other parties and their closely associated organisations. Hence, such an argument was doomed to fail. Nor could the Government argue that they were intended to achieve an anti-corruption purpose. The best it could contend was that the aggregation provision was intended to prevent avoidance of the caps.[27] But this argument was based upon an assumption that the Labor Party and its affiliated unions were effectively the one body with the same interests, which the Court rejected.[28] Their Honours noted that even though unions may have similar interests to the Labor Party, this does not mean that they are effectively the same body or that their objectives are necessarily the same.[29] Unions are as much entitled to participate in political communication as any other body or person (although there is no personal *right* to do so).

A COMPLETE BAN ON ALL DONATIONS

Various politicians have suggested that as an antidote for the current corruption scandals in the Independent Commission Against Corruption ('ICAC'), there should be full public funding of elections and all political donations should be banned. There are numerous problems with this proposition.

First, even if political donations were banned, those who seek corrupt influence over Members of Parliament would simply do so by other means – such as personal gifts, expensive holidays, funding of 'fact-finding' trips, jobs for the Member's children or offers of future employment for the Member after leaving Parliament. If prohibited donors are currently prepared to break the law by making political donations in cash or through employees or other organisations, there would appear to be no reason why they would not also break laws banning all donations. Hence, it would be very difficult to contend that such a measure would prevent corruption. At most it would make corruption more difficult to identify.

26 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [61] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also Keane J at [163].

27 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [62] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

28 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [62]-[63] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

29 *Unions NSW v New South Wales* (2013) 88 ALJR 227, (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [165] (Keane J).

Secondly, it sends out two appalling messages:

1. that our politicians and political parties are so corrupt they cannot help themselves from breaching donation laws and must therefore be shielded from all such temptation; and
2. that instead of punishing people for criminal acts, we should reward them.

It is rather like paying a child not to shop-lift or giving car thieves luxury cars so that they are not tempted to steal the cars of others. But it is worse than that. This is because Members of Parliament are entrusted to make the laws. If they, of all people, are unable to be trusted to obey the laws that they make, then that is a massive breach of trust that will seriously undermine our democratic system.

Thirdly, full public funding of political parties and candidates would impose a serious burden on taxpayers. Taxpayers spent over $20 million reimbursing parties and candidates for expenditure in relation to the 2011 election.[30] This covered around 75% of electoral communication expenditure by those parties and candidates that received over 4% of first preference votes. It did not cover the other parties or candidates, or anything falling outside electoral communications expenditure. Taxpayers also fund parties to the tune of approximately $9 million per year from the Administrative Fund.[31] If all donations were to be banned and all the costs of all political parties and all candidates were to be picked up by tax-payers, this would significantly increase this very large existing impost on taxpayers, swallowing up many millions of additional dollars which could be better spent on services to the community.

Fourthly, if all the expenses of parties and candidates were paid by the public, then there would most likely be a surge in the number of parties and candidates that have little to no public support. Any person with an opinion could run for Parliament at public expense. This would not only be expensive for taxpayers, but has the potential to result in massive ballot papers, voter confusion and high levels of informal voting.

Fifthly, from a practical point of view, it would be extremely difficult to design any system of full public funding that fairly and equitably distributed funding amongst parties and candidates. I am unaware of any other democratic country in the world that has done so.

Sixthly, such a scheme is likely to have unwanted consequences. For example, all the corporate and union money that previously was paid in donations to parties and candidates would most likely instead be paid to third-party campaigns or be used directly for third-party campaign expenditure. While third-party campaigners would presumably still be subject to expenditure caps, this would not prevent the proliferation

30 $15,076,709 was paid to 7 parties and $4,938,363 was paid to 326 candidates: Election Funding Authority, *Annual Report 2011–2012,* p 7: https://www.efa.nsw.gov.au/__data/assets/pdf_file/0020/128720/EFA_AR2011-12_RS_FINAL_JAN_2013.pdf.

31 In the 2011–12 financial year $9,581,460 was paid to 7 parties and 1 independent from the Administrative Fund and in the 2012–13 financial year $8,026,423 was paid to 7 parties and 3 Independents from the Administrative Fund: Election Funding Authority, *Annual Report 2011–2012,* p 32; and *Annual Report 2012–13,* p 8.

of third-party campaigners, who could run campaigns in concert, taking the political agenda away from parties and candidates and dominating the airwaves, as they do in the United States.

Finally, such a scheme is likely to be constitutionally invalid. It would certainly impose a burden on the implied freedom of political communication, even if public funding was paid up to the level of expenditure caps. This is because the expenditure cap would presumably have to be extended to cover *all* expenditure on communications by political parties, not just that which occurs during the currently regulated 6-month period before elections. The question then would be whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the constitutionally prescribed system of representative and responsible government. As in the *Unions NSW* case, it would be extremely difficult to argue that a maximum donation of $5000 to a party is any more likely to give rise to corruption or undue influence than a complete ban on donations.

The High Court, in *Unions NSW,* noted that the ban in that case stopped short of a complete ban on donations. Their Honours observed in relation to a complete ban that 'if challenged, it would be necessary for the defendant to defend a prohibition of all donations as a proportionate response to the fact that there have been or may be some instances of corruption, regardless of source'.[32] If the problem, as seen in the ICAC, is that people have been breaching the existing laws, then it is difficult to see why they would be any less likely to breach a complete ban on donations. If the aim is to prevent corrupt breaches of the law, then there are more appropriate and adapted ways of achieving this, such as increasing penalties and providing the means for more rigorous enforcement of the law.

BANS ON POLITICAL DONATIONS BY PARTICULAR TYPES OF DONORS

The other interesting question is whether the existing bans on donations from prohibited donors are constitutionally valid. A challenge to these laws is currently being brought by a Newcastle property developer, Mr Jeff McCloy.[33]

The first question is whether the law burdens the implied freedom. While the High Court held in *Unions NSW* that much broader bans on donations by any corporations, unions, entities and persons, other than those on the electoral roll, burdened the implied freedom by reducing the potential sources of expenditure on political communications, an argument might be made that the much more limited ban on donations from prohibited donors would not have any significant effect upon the capacity of parties

32 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [59] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also Keane J at [127] re the irrelevancy of s 96D being a 'step towards the comprehensive prohibition on all political donations'.

33 Writ of summons, No S211 of 2014, *McCloy v NSW and ICAC,* 28 July 2014.

and candidates to fund their political communications. If this argument succeeded, it would raise the more vexed and so far unresolved question of whether the making of the donation is itself a form of political communication which is burdened by the law.

If the second stage of the *Lange* test is reached, then the same question arises as to why a $5000 donation by a property developer is any more likely to corrupt than a donation from anyone else. However, when it comes to perceptions of corruption and undue influence, the history of scandals concerning donations from property developers and others who have strong financial interests in the decisions of government may be relevant. The High Court noted in *Unions NSW* that prohibited donors may have 'interests of a kind which requires them to be the subject of an express prohibition'.[34] It also observed that the 'history which may explain or support the targeting of the "prohibited donors" in Div 4A was not addressed in detail in argument', as it was not necessary to do so.[35] Both these statements recognise a possibility that such a history could be relied upon to justify these bans. If compelling evidence could be brought to show that donations made by persons or entities falling within these particular categories are more likely to give rise to corruption or the perception of corruption and undue influence, and that the caps on donations do not remove that risk, then such provisions might survive if regarded as reasonably appropriate and adapted to serve that legitimate end.

CONCLUSION

The regulation of campaign finance laws is fraught with both constitutional and practical difficulty. This is not, however, an excuse for doing nothing. Reforms that are carefully considered and clearly aimed at legitimate ends such as preventing or reducing the risk or perception of corruption, will be valid. The real difficulty lies in ensuring that laws are made for these purposes alone and are not manipulated to the advantage either of particular political parties, or to the benefit of parties generally over the ability of third-parties to have their say in political debate. Laws of these kinds have been struck down twice by the High Court. That ought to be a clear warning about how such laws should be framed in the future.

34 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [57] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
35 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [58] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

Parliaments without Parties

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ABSTRACT

We are told that an efficient and effective parliament needs functioning political parties. They are necessary to ensure stable government majorities and to provide a link between voters and legislators. Without parties, chaos and instability would ensue as governments would rise and fall on the whim of individual legislators. However, this assumption has largely gone untested, primarily because parliaments in almost all western democracies are entirely dominated by parties.

The aim of this paper is to expand the study of parliament and to examine what happens when parties are not dominant in parliament, to the extent that they are entirely absent or in a minority. The cases for inclusion are the primary democratic parliaments where this occurs, almost all of which are at the regional level. These include: the Tasmanian Legislative Council in Australia, the Nebraskan state assembly in the United States (US), the Legislative Assemblies of the Northwest Territories and Nunavut in Canada, the legislatures in the British dependencies of the Isle of Man, Channel Islands and the Falkland Islands. Also included are the national parliaments of several Pacific island states where there are no functioning political parties.

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INTRODUCTION

> If there were no parties – in other words, if every member of parliament was an independent with no institutionalised links with other members – the result would be something close to chaos (Gallagher, Laver and Mair 2005: 308).
>
> Parties are inevitable. No free large country has been without them. No one has shown how representative government could be worked without them (Bryce 1921: 119).

The academic literature on parties is rife with assertions that they are a necessary feature of political life in a modern liberal democracy. To this extent, Schattschneider (1977: 1) claimed democracy is 'unthinkable' without them and Aldrich (1995: 3) that it is 'unworkable'. However, most of these claims are unsubstantiated since they have not examined the cases where political life exists without parties. If political parties were necessary for democracy to function then we would imagine that in their absence political life would be 'nasty, brutish, and short', to borrow a famous Hobbesian line. These claims need not go untested. There are a number of cases where parties do not thrive, or are even non-existent. The purpose of this paper is to examine these cases, to understand why and how they manage without parties. This is primarily an exploratory study, a precursor to a more in-depth study of life without parties in these regimes. Nevertheless, it is an insight into the rationale for parties, because an appreciation of political life without them can reveal a lot about why they are present in most other democracies.

The structure of this paper is as follows. It first outlines why parties are apparently needed in democracy, before moving on to examine the cases where they are not needed. Three reasons for their absence are discussed: size, political culture and colonial background.

WHY DO WE NEED PARTIES?

A paper on the necessity or otherwise of parties needs a discussion of what constitutes a political party and this is not as straightforward as might seem. We all know a party when we see one but what is its defining characteristics? In many regions, such as South Pacific island states, parties are evolving. They can be in the process of formation, evolving over a number of years as an alliance and organisation. So when does such an alliance of independents become a party? It can be very difficult to pinpoint a precise moment. The classic characteristics of a party are that it uses a party name, it recruits and selects candidates who stand under this party name, it has a party leader, it adopts a manifesto or political program, and if elected to government its members attempt to implement this program and they act in a unified manner (often under the control of a party whip). There is not the space within the confines of this paper to assess the nature of party evolution and organisation further, so for now the empirical evidence concerning the degree and lack of party organisation in the cases under study has been taken from the secondary literature.

The function of parties

The modern party as we know it has been around for only one hundred years or so, mainly because parties were historically much reviled, as it was believed that they distorted the link between government and the people. Indeed, the term party originates from the Latin verb *partire,* which means to divide, and it was for these very reasons that parties were despised: they were seen to promote sectional interests

to the detriment of the nation's welfare (Ignazi 1996: 279). This stemmed from their factional tendencies, sentiment that was echoed by many political philosophers, including Madison in *The Federalist* (Number 10). As Belloni and Beller note, 'party spirit was viewed as the antithesis of public spirit' (1978: 4). In such a climate, the 'private' member of parliament – an independent – was lauded (Beales 1967: 3), because being independent was more than just a label – it was heralded as the highest state of being for any true democrat; it implied that a politician could make a decision based on his own personal judgement, free of pressure from any external influence, such as parties or interest groups. Keith et al. (1992: 5–7) list a variety of references pointing to the esteem in which independents were held until the twentieth century; for one, they were seen as altruistic individuals who put the welfare of the state before that of the party. As a result, independents were the dominant type of politician in all democracies until the emergence of the modern political party in the nineteenth century, when individual actors realised that they could achieve more politically by working in unison. Once it was accepted that parties were not detrimental to society, they took a stranglehold upon political power in all western democracies. With the emergence of the complexities associated with modern government, it became an accepted premise that parliamentary democracy could not survive without parties.

So what roles do parties fulfil? Any standard politics textbook lists a number of these, but the main ones include: the aggregation of interests, the structuring of preferences, the provision of a 'brand name' to make the voting decision easier for voters, the provision of a linkage between the ruling and the ruled, and the recruitment and socialisation of the political elite (Gallagher, Laver and Mair 2005: 308). In addition, parties help prevent the instability that can result from cyclical majority rule (Aldrich 1995: 39–41; Brennan and Lomasky 1993: 81–86), and overcome the problem of collective action that could result in low voter participation by mobilising the electorate (Aldrich 1995: 24). Further, Dalton follows the approach of Easton that sees political support as a multi-level dimension, that is, political support for one level affects support for another. Because parties are so intertwined with democracy, a loss in support for the former may have disastrous consequences for the latter, as it may result in 'eventual revolution, civil war, or loss of democracy' (Dalton 1999: 59 quoted in Holmberg 2003: 289–290).

There is almost a consensus then that parties are needed for a parliamentary democracy to function and survive. But as is detailed below there are a number of cases where parties are absent, but democracy has thrived. Why is this the case? What does this say about the stated assumptions concerning the necessity of parties? Are these outliers that should be ignored or should the normative role of parties be questioned?

DATA

The cases for analysis in this paper are parliaments where parties are absent or in the minority. These include: the Tasmanian Legislative Council in Australia, the Nebraskan state assembly in the US, the Legislative Assemblies of the Northwest Territories and Nunavut in Canada, the legislatures in the British dependencies of the Isle of Man, Channel Islands and the British Overseas Territory of the Falkland Islands. Also included are the national parliaments of six Pacific island states where there are no functioning political parties. In the next section below a snapshot is provided for each of these cases.

Data for this study stems from fieldwork carried out in Nebraska in August 2012, Tasmania in March 2010 and April 2011, and several Pacific islands in November 2011 and April 2012 (including Fiji, Samoa and Tonga). Interviews were conducted with leading politicians and experts (academics, journalists and government officials, such as electoral commissioners) in each of these jurisdictions, as well as ambassadors of non-party regimes in the Pacific region. For those regions not visited, correspondence took place with experts and politicians. Secondary literature was also an importance source for this study.

CASES

The Tasmanian Legislative Council (upper house) is one of the few parliamentary chambers in the world that has never been controlled by political parties. In many ways, the Council is perhaps the closest existing resemblance to a nineteenth-century 'gentlemen's club'-style parliament, one that functioned as a house of review before the emergence of modern political parties. Although independents have always been in the majority, the Tasmanian case is slightly different to the others in this study in that parties have almost always been present, particularly the Labor Party. While there is a historical tradition of second chambers being less partisan, parties grew to monopolise representation in most directly elected upper houses. This never occurred in Tasmania. Of the 159 members elected to the fifteen-strong Legislative Council between 1909 and 2015, 132 have been independents. One reason given for the failure of parties to replicate their success from the lower house level (where independents have won just thirty-two of 1,000 seats over the same time period, indicating that their predominance in the Legislative Council cannot purely be a Tasmanian factor) is due to the institutional structures of the upper house – there has never been a general election for the Legislative Council, simply annual staggered elections for the single-seat constituencies (Sharman 2013: 328).

Nebraska offers a slightly different context. It is a non-partisan unicameral state legislature (the only one of its type in the US) (Berens 2004). Almost all senators are members of either the Republican or Democrat parties; these affiliations are widely known and the parties endorse candidates during the election campaigns. However,

once elected, senators remain true to their non-partisan stance and there is no caucus in the assembly, despite external pressure from the parties. Members are free to vote on each and every bill as they wish, and they tend to coalesce around certain social and geographical interests. Although there are some informal coalitions, new majorities are formed for each bill.

The three British dependencies (Isle of Man, Jersey and Guernsey in the Channel Islands) and one of the British Overseas Territories (Falkland Islands)[1] have assemblies dominated by independents. Historically, parties have primarily been absent from the politics of these regions and have only recently emerged. In the Isle of Man independents have always controlled the lower chamber, the House of Keys, and parties have only recently made a breakthrough with the Liberal Vannin Party winning 3 seats (out of 24) in 2011. In Guernsey there are no political parties in the States (the lower chamber), while in Jersey the first registered political party (Reform Jersey) only formed in 2014, electing three of twenty-nine deputies at that year's election (all of whom were sitting independents). Parties are absent in the Legislative Council of the Falkland Islands, a unicameral assembly that replaced the Legislative Assembly under a new constitution in 2009.

Both Nunavut and the Northwest Territories in Canada are consensus democracies, so in the absence of partisan conflict, parties are not needed. The Legislative Assembly of the NW Territories is almost 150 years old, whereas that in Nunavut was created little more than ten years ago, following the separation of Nunavut from the NW Territories. A nonpartisan model has been the tradition of politics in these regions, apart from a short period of party rule at the turn of the twentieth century (White 1991, 2006).

In the Pacific, size and cultural heritage appear to be the main factors inhibiting the emergence of political parties in the six states of Nauru, Tuvalu, Kiribati, the Marshall Islands, Micronesia and Palau. In each of these states independents are the sole form of representation. Attempts have been made to form alliances and parties in some of these islands but they have never succeeded; primarily because it is claimed they do not need political parties. For example, Veenendaal (2013: 8) described political life in Palau as one of 'attitudinal homogeneity, personalized politics…lack of ideologies and particularistic relations between politicians and citizens'. In such an environment, there is little need for clans or political leaders to form parties.

WHY NOT PARTIES?

It is not just in these jurisdictions that parties are absent. They are also not a feature of political life in regions such as various emirates in the Middle East. The difference is that these are non-democracies where parties are not needed to perform functions such as recruit elites for elections or to provide a linkage between rulers and the ruled.

1 Pitcairn Island is the only other BOT with no parties but this is because of an extremely small population (56).

The regimes examined in this paper need these functions to be performed but it is not done by parties. This section analyses why parties are absent in the chosen cases.

Size

There a number of hypotheses as to how politics functions without parties in these jurisdictions. The first relates to size. Generally speaking, small jurisdictions are less likely to need political parties than large jurisdictions. Given a conducive political culture (discussed in the next section), size can matter in three ways: the size of the population, the territory and the parliament. In a jurisdiction with either a small population or territory, the levels of personal interaction are higher than in larger communities and there is usually a greater premium placed on face-to-face contact (Anckar 2000). Such a culture, combined with a small-sized society, reduces the necessity of parties, which are not needed as heuristic cues or to mobilize voters. This in part explains the absence of parties in the pre-nineteenth century, when the limited suffrage meant that candidates had little need for party organisation to mobilize support. Instead it was assumed that the strength of a candidate's name was enough of a voting cue (Cox 1987). Small societies are also likely to be more homogeneous (Dahl and Tufte 1973), with fewer social divisions, further reducing the need for political parties (Anckar and Anckar 2000). However, the influence of homogeneity is disputed by Veenendaal (2013), who cites examples of small homogenous states with parties (e.g. the Seychelles) and small heterogeneous states without parties (e.g. Tuvalu, the Marshall Islands). In general, however, size seems to matter. One study of thirty-one small island states found that eight of them lack political parties (Anckar 2000).

The third means by which size can affect the absence of parties relates to parliament. In general, the smaller the assembly the fewer the pay-offs arising from the formation of a party. In small arenas it might be easier and more beneficial for members to form temporary coalitions; this would allow them to reap both the benefits of collective action in parliament and non-partisanship in the electoral arena. Sharman (2013) cites the size of the Tasmanian Legislative Council (fifteen members) as a potential factor as to why it has never been controlled by political parties.

To further explore the relevance of size Table 1 below details the size of population and territory of all the cases in this paper, as well as the size of their parliaments. Tasmania and Nebraska have by far the largest populations in the sample, which is perhaps a reason why parties are present in these jurisdictions and dominant at jurisdictional levels outside of the focus of this study. Kiribati, Micronesia and the Marshall Islands all have larger populations than the remaining cases, but these are dispersed across a large number of islands. In general, outside of Tasmania and Nebraska, the population of all these regions is rather small. Population does not necessarily correlate with territorial size, as the two outliers are the very large Canadian territories. However, much of the geography in these regions is inhospitable (and most likely inhabitable), and so territorial size here is not a key factor. Another factor considered in the literature that relates to geography is the state of dispersion of the islands within the various

archipelagos (Anckar 2000). The higher the level of dispersion, the more difficult it should be to form national institutions across these islands. However, Veenendaal (2013) claims the evidence does not support this hypothesis, because the likes of the Solomon Islands, the Seychelles, Vanuatu and Fiji for a time all had many political parties.

Assembly size seems to be an important factor. The smaller the chamber the easier it is to form ad hoc coalitions and so the less the necessity to form parties. Certainly all the cases examined here are small chambers, and size seems a necessary, but not sufficient, factor. There are other small parliaments that have parties so there must be other factors explaining their absence in these states.

Table 7: Size of parliaments and regions

Jurisdiction	Parliament	Population	Territory (sq. km)
Tasmania	15	513,400	68,401
Nebraska	49	1,865,000	200,520
Isle of Man	24	84,497	572
Guernsey	45	65345	78
Jersey	29	97,857	118
Falkland Islands	11	2,932	12,200
Palau	16	19,000	458
Nauru	19	9,434	25
Kiribati	46	103,248	810
Tuvalu	15	10,698	21
Marshall Islands	33	69,747	180
Micronesia	14	106,104	702
NW Territories	19	43,537	1,346,106
Nunavut	22	31,906	1,877,787

Source: CIA World Factbook.

Political culture

The second factor contributing to an absence of parties is political culture. In many of these regions there is a culture that is anathema to the development of parties. All the world's sovereign democracies without parties are in the Pacific region: Palau, Kiribati, Marshall Islands, Micronesia, Nauru and Tuvalu. The factors common to these cases appear to be cultural restraints and geographical dispersion, not necessarily diminutive size (Anckar 2000: 242). One contributory cultural feature in the Pacific islands is a

strong tradition of 'personalism' and 'localism', where politics tends to revolve around the clan leaders and the importance of patron-client relationships lessens the need for parties (Veenendaal, 2013). Personalism implies that electoral behaviour is motivated by personal knowledge of, and interaction with, candidates; localism suggests that it is affinity to the local community and how the candidate deals with its primary issues that matter. In such a culture, party label is less of an asset than an environment where national issues and policies are to the fore and where parties are seen as the only viable organs of political representation. In addition, the prevalence of personalism and localism result in the development of patron-client networks and particularism whereby politicians are seen as patrons who deal on a personal basis with voters, their clients. Parties would only get in the way of this relationship, which is why patrons tend to be against the development of parties. While a regime without political parties might seem more democratic due to the direct nature of the link between ruler and ruled, this is not necessarily the case. As Veenendaal (2013) argues, patrons may well be anathema to the emergence of political parties, who are viewed as the agents of democracy. The emergence of parties is seen as a challenge to their personal rule and will lessen their power. So parties might be absent because of some anti-democratic tendencies.

Of course the situation is far different in the non-Pacific regimes, most of which are part of longer established democracies. These regions, such as Nebraska or Tasmania are part of, or connected to, larger jurisdictions where parties are at a much later stage of development and are an accepted feature of the political landscape, just not at the level examined in this paper. Thus, parties are dominant in Canada but they are absent in the Legislative Assemblies of Nunavut and the Northwestern Territories because these are consensus democracies, unlike the Yukon, the third Canadian territory. The non-partisan nature of these assemblies, as well as the Nebraskan assembly, shows that institutional structures are a key factor. Parliaments may be designed in such a way to be non-partisan, whether it is for practical or cultural reasons. It may also be that the institutional structures unintentionally result in parties not gaining a dominant foothold, such as in Tasmania. There, the use of staggered elections, which attract little attention, and limits on campaign expenditure have acted to lessen the disadvantages which independents usually face at elections. It is also the case that all these jurisdictions use candidate-centred electoral systems, from preferential voting in Tasmania and Nauru to single-member and multi-member plurality in most of the other jurisdictions. While it can be argued that candidate-oriented systems are conducive to the election of independents (Weeks 2014), it is more likely that their presence and persistence is a consequence of non-partisan politics, rather than a cause.

Colonial background

A final factor to consider is that almost all these cases are English-speaking democracies, with most of them having a British colonial background. The exceptions to the latter are the Pacific states of Palau, Micronesia and the Marshalls, where the US (itself a former British colony of course) was the colonial power. The relevance of this is that the few countries in which independents are still elected at the national

level are primarily English-speaking democracies, such as Ireland, Canada, Australia, the US and India (Weeks 2015). In these regimes, independents are in part a product of a candidate-centred political culture, itself facilitated by the institutional factor of conducive candidate-centred electoral systems. In the cases treated in this study the influence of British political culture on the presence of non-party politics cannot therefore be ruled out at this preliminary stage. Indeed, it is the British colonial background that explains the prevalence of single-member and multi-member plurality voting systems. The exact nature of the relationship between colonial background and non-partisanship has yet to be established and will be the subject of a future study, but it seems more than a coincidence that non-party politics is far more prevalent in English-speaking democracies.

Of course, all this assumes that an absence of parties implies these regimes are lacking something, particularly in terms of the previously discussed functions of parties. But this is a dangerous assumption to make; if the likes of the Nebraskan assembly, the Tasmanian Legislative Council, or the Nunavut Legislative Assembly felt it was failing in some manner, surely it would have looked to the experience of its neighbours (or indeed to the federal/confederal experience in their own countries), where parties are omnipotent, and followed their path. Instead, it may be the case that these functions are being fulfilled, just not by political parties. In the absence of parties there may be informal alliances or personal networks between politicians that cater for the recruitment and socialisation of elites. So organisation may well exist, just not in the form of party. It may form around leaders, localities or issues. For example, in many of the Pacific islands and elsewhere (e.g. Nebraska) it is possible to identify members of the government and of the opposition as in the case of the islands, where alliances are based on family or friendships (Veenendaal 2013). In other words, the absence of parties does not imply an unstructured and unstable political outcome.

It has also been assumed that life would be easier for politicians, and perhaps voters, if they formed parties. Certainly, this is the assumption of the party-centric literature. But it may be that the independent path is chosen because it is far more convenient to be an independent than form a party; that is, it is a rational outcome. This is the argument of Aldrich (1995), whose analysis of the origin of political parties in the US identifies their formation as a rational outcome. If it had been rational for individual political entrepreneurs to remain independent rather than form a party, the Republican or Democratic parties (or their precursors) would never have come into existence. Indeed, this was a factor cited by several politicians and experts in Tonga (source: personal communications with author, April 2012), where loose alliances that may well be the precursors to parties are slowly emerging. Parties as we know them in the western sense will form when they are needed. It could be that the contemporary situation in the Pacific is simply a different stage of party development, akin to nineteenth century politics in western democracies. Perhaps the current alliances and movements will morph into the equivalent of cadre parties, which were decentralized, dominated by elites and had little to no grass-roots organization. What this all means is that we might need to approach party systems and their absence from a different perspective.

Certainly compared to western regimes the regions under analysis in this study are quite different. But when compared to different periods of development they may not appear so unique and this might help us understand their functioning in the absence of the equivalent of modern, western political parties.

CONCLUSION

The 'Era of Good Feelings' was a time in American history when party politics entered decline. It primarily coincided with the Monroe presidency (1817–1825) and marked the demise of the Federalist Party. Buoyed by exuberant nationalism after the War of 1812 and a subsequent economic boom, partisan animosity seemed to abate. In this paper a range of cases where party politics is not present have been discussed, but none of them needed an era of good feelings to generate their presence. Parties have been absent in these parliamentary chambers for a lot longer than the era of good feelings, which lasted barely more than a presidential term.

Two hundred years ago political parties were not seen as necessary as they are today, despite the low esteem in which they are held. Despite this poor level of esteem it is still generally believed that parties are needed for modern, complex democracies to function. Thus when independents win seats in parliament and even hold the balance of power, such as in Australia, Canada and Ireland in recent times, there tends to be a lot of outcry over their influence. Claims abound that instability and inefficiency result from a presence of, and reliance on, independents (Sherrill 1998; Wright and Schaffner 2002), with surprisingly little empirical testing of these claims. Given the low regard with which parties are held it is even more surprising that there has not been more clamour for a party-free political environment, or certainly an environment where parties are not omnipotent. This is primarily because most buy into the logic of the necessity of parties. However, as has been shown, albeit very briefly, in this paper, there are functioning and effective political systems where parties are not omnipotent, and in some cases are absent. More research is required to understand this phenomenon, which is of normative importance, given the prevailing assumptions concerning the necessity of parties.

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Cultural Adaptation of the Westminster Model: Some Examples from Fiji and Samoa

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INTRODUCTION

The Westminster system has been a very successful model of responsible government having demonstrated its relevance around the globe in a wide variety of cultural settings – national and provincial. Cultural adaptability is arguably a critical part of the explanation for the institutional success of the Westminster model. A capacity for localising is scarcely the only reason, of course. The enormous extent of the British Empire, its policy of indirect rule and its less troubled disengagement with colonisation were important elements contributing to a widespread acceptance of the Westminster model as the winds of change blew through the Empire creating a need for democratic legislatures. Nevertheless, a political seed planted in foreign soil does not flourish if it cannot adjust to its new environment and is not nourished locally. And, in some circumstances, the process of adaptation has been itself a significant challenge.

Of the 14 Island states that are members of the Pacific Islands Forum,[1] the Commonwealth Parliamentary Association counts 11 national parliaments (Cook Islands, Fiji, Kiribati, Nauru, Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu) and one provincial parliament (Bougainville) amongst its members as Westminster-related legislatures. Of these 11, all but Nauru and Kiribati, which have added a layer of presidentialism, are recognisably traditional Westminster in their parliamentary form. Yet, even those closest to the original model have made some accommodation to adapt to their new environment either formally or through the informal continuation of customary political practices that influence the style of parliamentary representation. Although liberal electoral systems, based on full adult franchise with one vote and one value, are a norm for most of these countries, customary cultural influences are also rarely absent.[2]

1 The Pacific Islands Forum (nee South Pacific Forum) is a political association of the 16 heads of government from 14 independent and self-governing Pacific Island regional states, Australia and New Zealand.

2 For a detailed examination of the tensions between liberal democracy and Pacific Island traditional elites, see: Stephanie Lawson, *Tradition Versus Democracy in the South Pacific: Fiji, Tonga and Western Samoa* (Cambridge: Cambridge University Press, 1996).

Samoa celebrates its non-liberal traditional system of democracy and has worked consistently over decades to preserve *fa'a Samoa* (Samoan custom) as a central element in its political processes. The inclusion of non-liberal elements has not so much changed the form of the Samoan parliamentary system as its practice and representational style. Similarly, until the December 2006 military coup, Fiji had also sought to incorporate non-liberal traditional elements in its parliamentary system. Indeed, the intent and effect of the three coups from May 1987 prior to the December 2006 coup was to strengthen the role of traditional forms and practices in national politics including the parliament. The post-2006 coup roadmap engineered by Fiji's Prime Minister Voreqe Bainimarama for the return to democracy has attempted to reverse this trend. His strategy involved removing ethnicity in voting and dismantling customary influences in the Parliament. Thus, he has sought to entrench more liberal elements in the political process, both electoral and parliamentary, albeit in the case of the latter with a strong corporatist (party political) accent.

This article reviews how the process of institutional transfer of the Westminster model has been, and is being, influenced by the tensions between the traditional processes and the liberal expectations in two of Australia's Pacific Island neighbours. There is a great deal of "apples and oranges" in comparing these countries, of course. Yet, the preservation of traditional political forms has been a continuing influence in both countries that produced some useful commonalties at times. And, more recently, these are providing some striking contrasts particularly with regard to the value of traditional political practices and national unity. This review deals only with some very recent organisational developments in the two countries. As far as possible, it is focused principally on institutional issues rather than on the contentious politics and motives behind institutional adaptation.[3]

SOME HISTORICAL CONTEXT – SAMOA

The maintenance of *fa'a Samoa,* or Samoan custom, was a critical consideration in drafting the 1960 Constitution and in the 1961 plebiscite, which endorsed independence in 1962 under this constitution.[4] Nevertheless, the same constitution established a Westminster style parliament outside any traditional experience but which had been gradually introduced and extended during the colonial period under the New Zealand administration of Western Samoa.[5] The constitution blended the indigenous and the exotic politically to accommodate the aspirations of the Samoans

3 In the interest of disclosure on this point, elements of this paper are based on the author's direct experience as a consultant with the National Council for Building a Better Fiji and author of the Candidates' Manual for Fiji's 2014 national election. The author also served as the UNDP consultant for the 2011 Legislative Needs Assessment for the Legislative Assembly of Samoa

4 For the background on Samoan independence see: James W. Davidson *Samoa mo Samoa* (Melbourne: Oxford University Press, 1967).

5 Western Samoa became a League of Nations' mandate under New Zealand following its seizure from Germany early in World War I and remained under New Zealand administration until its independence in 1962. Western Samoa changed its name formally to Samoa in 1997.

for a democracy that recognised the validity of *fa'a Samoa*. This was evident at the highest level of governance as demonstrated in the Westminster model's dual executive relationship between the Parliament and the Government. Article 42 of the Constitution of Samoa defines the Parliament as composed of two institutions – the Head of State (*Le Ao o le Malo*) and the Legislative Assembly (*Fono Aoao Faitulafono*). [6] The Head of State was expected to lend traditional gravitas to the elected Parliament as it was to be held jointly by the two highest customary titles in the land.

The Legislative Assembly as established in 1962 was a unicameral legislature with 49 members elected from two electoral rolls serving three distinct constituencies. The vast majority of voters were enrolled on a register for candidates with chiefly titles (*matai)*. Non-*matai* could not vote or stand for Parliament except in one case. The *matai* register served two types of constituencies – 35 single member and six dual-member electorates. The two-member constituencies were those electorates that had a population base sufficient to justify two representatives but could not be divided into single member electorates for historically based cultural reasons. The second electoral roll, the Individual Voters' Roll (IVR), provided a register for those voters whose ethnicity or other circumstance put them outside the *matai* system. Indeed, to qualify for IVR, the voter had to disavow any claims to lands or titles under the *matai* system. Both the Individual Voters' Roll constituencies were single member districts.

There is some dispute as to whether Samoa is a constitutional monarchy or a republic. The Head of State is addressed as His Highness and every Head of State since independence has been a *Tama a aiga* (one of the four paramount chiefly titles that, conventionally, have been treated as "royal"). However, the republican argument holds that the Constitution does not require that the Head of State be a "royal" thus classing Samoa as a republic. The Government of Samoa itself has settled the issue in favour of being a republic from 2007 by referring to His Highness as a "ceremonial President". Appointment to the office is by the Legislative Assembly (Art 19) for a term of five years. Unquestionably the powers of the Head of State are limited even by the general standards of Westminster constitutional monarchies, as the office appears to have few discretionary powers save those of summoning, proroguing and dissolving the Legislative Assembly and assenting or refusing assent to parliamentary bills to make them law and even these are heavily circumscribed. Section 26(2) of the Constitution has been taken to mean the that a bill will be deemed passed if the Head of State has not assented to a bill within seven days.

The location and physical style of the Parliament building were also imbued with traditional political significance. The Legislative Assembly is located on the politically historic and sacred *Tiafau* area of the Mulinu'u peninsula on the western side of the capital city, Apia. The parliamentary precincts include an open field (*malae*) that serves as a sort of natural plaza for public events including ceremonies and demonstrations. This *Malae o Tiafau* has customary significance as the meeting ground of the nation.

6 *Constitution of the Independent State of Western Samoa* 1960 http://www.paclii.org/ws/legis/consol_act2008/cotisos1960438/

The independence parliament met in a small traditional meeting house (*fale fono*) that stood on a corner of the *Malae o Tiafau*. In 1970, the Legislative Assembly moved into a modern building architecturally designed to resemble a *fale fono* on the other side of the *malae*. The original building was dismantled recently to improve the use of the *Malae o Tiafau* but the ceremonially significant posts were preserved for some later commemorative purpose.

SOME HISTORICAL CONTEXT – FIJI

Western political adaptation to Fiji culturally began very early. The British Government applied significant aspects of indirect rule to Fiji after Ratu Seru Cakobau ceded the country to Queen Victoria in 1874. Traditional elites served in administrative posts using largely traditional mechanisms to maintain British authority in the colony. The process was a two-way street as the traditional political authorities used the indirect rule system to strengthen and entrench their political power and their control of land within indigenous society. Thus the colonial experience for Fiji found both foreign administrators and indigenous chiefs benefiting from the process of cultural adaptation.[7]

Arguably, the colonial system fossilised perceived political status through both the recognition of titles and lands in a way that prevented further changes. The rising indigenous elites, especially those close to the colonial administration, benefited significantly. Their claims to pre-eminence were recognised while other elites lost out as their historic claims were snubbed by colonial authorities. Even less happy were late-comers from South Asia brought to Fiji to work as indentured labour in the colony's plantations. Unlike the European plantation owners or the indigenous Fijians, these had almost no access to land or to positions of influence with the system of indirect rule. Not only did this store up fuel for future social disharmony as the ethnic balance within Fiji shifted, it imposed political constraints on just how to end colonial rule in Fiji.

The issue of traditional political authority in Samoa at independence was essentially between Samoans and the international community.[8] However, for Fiji this was very much an internal issue since, from the late 1940s, the formerly indentured labourers, their children and grandchildren enjoyed a demographic majority over the indigenous Fijians. Communal tensions were raised by the prospect of independence with the result that independence came later to Fiji than would have been expected. The Indo-Fijian leadership favoured a liberal one vote-one value approach while the Fijian leadership wanted traditional political values and power structures recognised and retained in some measure. A compromise was reached in the late 1960s when there

7 For a very useful introduction to these cultural interactions, see: Peter France, *The Charter of the Land: Custom and Colonization in Fiji* (Melbourne: Oxford University Press, 1969).

8 Indeed, the Samoans as a nation appeared to resent the United Nations' enforced universal suffrage. This was said to be a factor in the decision against UN membership for nearly a decade. R.A. Herr, "A Minor Ornament: The Diplomatic Decisions of Western Samoa at Independence", *Australian Outlook*, vol 29 (December 1975), pp. 300–314.

was a change in the Indo-Fijian leadership.[9] Some compromises on the inclusion of some traditional Fijian political elements as well as on a voting system were reached. The partially communal and partially liberal accommodations went some way politically to redressing the demographic imbalance.

Fiji's 1970 independence Constitution gave constitutional status to customary political processes when it recognised the Great Council of Chiefs (*GCC* or *Bose Levu Vakaturaga*). This body had served an advisory role to the Governor shortly after Cession. In the decade or so before independence, the GCC had added indigenous institutional leaders to its number who did not hold chiefly titles. The GCC became virtually a third chamber to the formally bicameral parliament through its power to appoint more than a third of the Senate and its influence on indigenous Fijian (now i*Taukei*) policy including the sensitive area of communally owned land. The 1970 Constitution also entrenched an ethnically based electoral system that reinforced the communal compromise in the 52 member House of Representatives. Three communities divided reserved seats that were not entirely proportional in terms of ethnic numbers. The majority Indo-Fijian community shared an equal number of seats with the indigenous Fijians (22 seats each) with the remaining 8 preserved for "General Electors" (Europeans, Chinese, Pacific Islanders etc.). The Senate also showed the ethnic compromise. The Prime Minister nominated 7 Senators, the Leader of the Opposition nominated 6, the GCC 8 and the island of Rotuma one.

The military coups of 1987 brought about a number of changes to further enhance *iTaukei* influence in Government through the incorporation of traditional mechanisms and processes. An attempt was made to constitutionally preserve the presidency and the prime ministership for an i*Taukei* leader and a permanent majority for *iTaukei* in the House of Representatives in a failed 1990 Constitution.[10] This was replaced in 1997 by one that promoted the powers of the GCC while removing the *iTaukei*-preserved majority in parliament and *iTaukei* ownership of the office of the Prime Minister. Nonetheless, under the 1997 Constitution the GCC retained the authority to appoint the President and 14 of the 32 Senators. The 1997 Constitution also further entrenched *iTaukei* ownership of the majority of land held through communal titles.[11]

9 For some background on these constitutional developments see: Lawson, *Tradition Versus Democracy in the South Pacific,* chapter 2.

10 An interesting contemporary commentary with some qualified support of the 1990 Constitution by Education Minister, Meraia Taufa Vakatale, can be found at: www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs/programs-policy/a-multicultural-australia/programs-and-publications/1995-global-cultural-diversity-conference-proceedings-sydney/political-aspects-of-diversity/constitutional-change-and-political

11 A useful constitutional comparison can be found in: Jill Cottrell and Yash Ghai, *The Role Of Constitution-Building Processes In Democratization*: *Case Study Fiji*, International IDEA, 2004

POST-INDEPENDENCE ADAPTATION – SAMOA

For nearly two decades after independence, Samoan politics revolved around traditional networks and political alliances. The many Samoan leaders had spoken against the creation of political parties in the pre-independence debates on the constitution. And, there was no mention in any form of political parties during the deliberations of the constitutional convention.[12] Pressure on *fa'a Samoa*, however, built during the 1970s. The extended families, *aiga,* using the traditional system split titles and revived old titles to secure some electoral advantage. It became clear that this process, if it continued, would undermine the chiefly system politically and *fa'a Samoa* generally. Perhaps ironically, retention and protection of the customary political roles of the *matai* became core motivations for the establishment Samoa's first party – the Human Rights Protection Party (HRPP) – in 1979. The name suggested a liberal orientation but, in fact the "human rights" were cultural; the right to retain Samoan values.

The HRPP pushed (for?) a referendum in 1990 to provide for universal suffrage, nonetheless. Its position on the referendum did not acknowledge defeat in the face of advancing liberalism. Rather it was a strategic retreat to a more defensible position. Relaxing the limitation on *matai* franchise was motivated in large part to save the *matai* system from the pressure to fully liberalise parliamentary representation. The referendum successfully extended the franchise to all adult Samoans but it maintained *matai* restrictions on the eligibility to stand for Parliament. A decade later, however, a Government commission enquiry into the electoral system found the pressures for electoral liberalism continued as it concluded:

> ... the sooner the people accept that the Westminster parliamentary system is alien to the *fa'asamoa*, and that we should not try and assimilate the f*a'asamoa* to this system, the sooner we shall achieve a transparent and smoother running electoral process.[13]

The HRPP offset the liberalisation of the national franchise significantly with the passage of the *Village Fono Act* 1990. This act legislated to protect the "custom and usage" of the village assembly (*fono*). In effect, it protected the *matai* system at the village level at the same time as universal suffrage was modifying this nationally. *Village Fono Act* confirmed or granted powers to each *fono* to exercise its traditional rule within the village under the authority of the state. The effects of this Act are such a concession of political authority to the village level of governance that one diplomat privately described Samoa as "a confederacy of 360 republics".

The HRPP moved again on electoral reform in 2010 to eliminate all non-*matai* representation at the national level through a constitutional amendment. Non-*matai* had been eligible for election to the Legislative Assembly from the Individual Voters'

12 Asofou So'o, "Reconciling liberal democracy and custom and tradition in Samoa's electoral system", *South Pacific Futures*, ANU Development Studies Network, Bulletin No. 60, December 2002, p. 43.
13 Quoted in So'o, "Reconciling liberal democracy and custom and tradition in Samoa's electoral system", p. 44.

Roll. Under the 2010 amendment these two seats were restricted to matai candidates. There is wide spread speculation that the IVR will be abandoned in the near future and that the restriction to only *matai* candidates is a prelude to eliminating these two constituencies altogether. Given universal suffrage and the restriction to matai candidates, there appears to be little useful purpose for the IVR distinction.

Nevertheless, even with these developments to strengthen customary influences in the Samoan political processes, there may be some liberalising trends within *fa'a Samoa*. Estimates vary as to the number of recognised *matai* from more than 18,000 to around 25,000. The 2011 Samoa Bureau of Statistics reported 16,787 *matai* living in Samoa with 1,766 women holding more than one in every ten titles.[14] It has been suggested that the number of titles being conferred on women is increasing as women become better educated, more self-confident of their own status in society and as the Samoan community as grown more accepting of gender equality.

A non-liberalising influence unrelated to *fa'a Samoa* has been the strengthening of the role of party over the parliament. For the past decade, HRPP Governments have strengthened bans on "party-hopping" inspired, in part, by similar legislation in New Zealand. This culminated in two bills that were introduced into the Legislative Assembly in late 2009 – one to amend the Constitution and the other to amend the 1963 *Electoral Act*. Critics of these initiatives saw some irony in that the HRPP had been an enterprising beneficiary of defections from other parties in the past. Moreover, while accepting that modern Westminster systems tend to favour strong parties, critics held that a corporatist party political approach poses threats to the parliament. *Inter alia*, it weakens the liberal freedom of conscience of the MP and can even undermine the privileges of parliament by giving outside bodies (political parties) control over the actions of an MP on the floor of the parliament. Further, the office of the Speaker has been compromised unnecessarily by making the Speaker a part of the enforcement process. The Speaker has the statutory authority to initiate action to expel a Member thus embroiling the Speaker in enforcing party discipline.

Although scarcely a cultural adaptation, the Westminster model's preference for a majority on the floor of the parliament has been embraced rather enthusiastically by recent HRPP Governments. Despite having had landslide results in the last two national elections, every parliamentary member of the HRPP that is not a Minister or Presiding Officer has been made an Associate Minister with special resources that go with the position. Essentially, the concept of a Government backbench has been negated by this tactic even though the anti-party-hopping provisions do not require such measures to ensure party cohesion.

14 "Final Population and Housing Census 2011", Government of Samoa, Samoa Bureau of Statistics, July 2011.

THE CONTEMPORARY ADAPTATION – FIJI POST 2006 COUP

Parliamentary developments since the December 2006 military coup in Fiji have followed an almost polar opposite direction to the last few decades in Samoa. Indeed, much of the defence of the coup by its supporters has been that it has served a democratic purpose – removing the discriminatory influences of the customary power structures from Fijian politics. In this, the post 2006 developments have not only repudiated the traditional elements included in the 1970 independence constitution but also the measures taken following the 1987 coups which strengthened these customary influences.

Prime Minister Bainimarama declared his September 2014 Fijian election as the culmination of a revolution to deliver Fiji's "first genuine democracy".[15] He portrayed the post 2006 coup Government of Fiji as a watershed between "old" politics and "new", non-racial, more liberally based politics. Certainly, a principal underlying tension throughout the electoral campaign was the Government's belief that its main opponent, the Social Democratic Liberal Party (SODELPA), belied the "liberal" in its name. Rather, SODELPA was mobilising the "old" customary political networks of *iTaukei* power in its attempt to defeat it and to overturn the liberalised order the Bainimarama Government had pursued under the 2008 *Peoples Charter for Peace Progress and Change* and expressed through a new Constitution.[16]

The 2013 Constitution along with some earlier decrees with significant constitutional effects have sought to remove both ethnic and customary influences from the Parliament and, indeed, from the politics of Fiji. A unicameral Parliament elected in September 2014 is composed of 50 elected Members and a non-elected Speaker who serve four-year terms. There is no Senate and the GCC was formally abolished in 2012. The Constitution establishes a strongly liberal electoral system by opting for the open list system of proportional representation. These liberal values are expressed directly through Sec 53(1) stating "each voter has one vote, with each vote being of equal value…" Ethnic and racial discrimination is proscribed by its Bill of Rights and underscored by provisions in both party and electoral decrees. For example, the Political Party (Registration, Conduct, Funding and Disclosures) Decree of 2013 requires any association attempting to register as a political party to demonstrate its bona fides as non-discriminatory and not to "advocate hatred that constitutes ethnic or religious incitement or vilification of others or any other communal antagonism".

The one area where the Constitution could not avoid recognising traditional custom and practice was in the area of land ownership. Although a source of political contention as to its value, Sec 29(1) of the Constitution provides: "The ownership of all *iTaukei* land shall remain with the customary owners of that land and *iTaukei* land shall not

15 Rear Admiral J. V. Bainimarama, Speech at the 69th Session of the United Nations General Assembly, 27 September 2014. Accessed at: http://www.un.org/en/ga/69/meetings/gadebate/pdf/FJ_en.pdf

16 The 2013 Constitution of the Republic of Fiji can be accessed at: http://www.fiji.gov.fj/getattachment/8e981ca2-1757-4e27-88e0-f87e3b3b844e/Click-here-to-download-the-Fiji-Constitution.aspx

be permanently alienated, whether by sale, grant, transfer or exchange, except to the State … ". This contentious area also illustrated another noteworthy Bainimarama Government reform. Indeed, cutting through the Gordian knot of finding a common name for all citizens has been proudly proclaimed as one of its most significant reform achievements. Although naturally controversial, the Bainimarama Government promulgated a decree in 2011 to call all citizens "Fijian". The word "*iTaukei*" (owner of the land) is used now officially to describe both the indigenous people and the language of Fiji.

The 2013 Constitution preserves the Westminster model of responsible Government by providing that only a Member of Parliament can be appointed a Minister with the possible exception of the Attorney General. The Attorney General may be appointed from outside the Parliament if the Prime Minister deems there is no suitable person available from amongst the elected Members. A non-elected Attorney General would sit in the Parliament but would not be eligible to vote. Once the Parliament elects the Prime Minister, the PM appoints the ministers to serve as a Cabinet, which doubles also as the executive council. There is no role for the President in the appointment process save administering the oath of office. Consequently, ministers are subordinates of the PM, not equals. Indeed, the Constitution makes ministers accountable individually to Parliament but not individually responsible. The Parliament does not have the power under the Constitution to remove an individual minister by a want of confidence motion. The Speaker is appointed from outside the membership of the Parliament, to limit the partisan influence of internal election. Nevertheless, the individual must be qualified to have stood stand as a candidate for the Parliament. Significantly, the Leader of the Opposition is made an office in the Parliament by the Constitution rather than leaving this to standing orders.

As is the case in Samoa, a strong party corporatist approach is evident in the operation of the Fijian Parliament. The extent and nature of this constitutionally entrenched party discipline serves to undermine some of the liberal aspects of the electoral system. Arguably, party discipline can override constituency influence in Parliament even to the point of breaching the privileges for most Westminster parliaments. Following constituency interests at the expense of party directions can be a career ending decision. A Member may be expelled from the Parliament if the MP:

> votes or abstains from voting in Parliament contrary to any direction issued by the political party . . . without obtaining the prior permission of the political party [Sec 63 (1)(h)]

Other provisions of this section take party control of a Member even further as the seat can be lost if the MP resigns from the party or is expelled from the party. Thus the membership of the Parliament can be determined outside the electoral process by unelected party officials if these officials impose party discipline over MPs. However, it is uncertain how to interpret the qualification that expulsion from the party should "not relate to any action taken by the member in his or her capacity as a member of a committee of Parliament." Presumably the parliamentary leadership can expel a

Member for an action within the Parliament but the party machinery is restricted to organisational matters outside the Parliament.

Individual ministerial responsibility appears to be another area where the Constitution supports a party corporatist approach over individual obligation and accountability. The Constitution provides that "Cabinet members are accountable individually and collectively to Parliament, for the exercise of their powers and the performance of their functions" [Sec 91(1)]. However, while accountability might be individual, Sec 95(3) suggests that responsibility may not be. Ministers continue in office unless removed by the Prime Minister, ceasing to be a Member of Parliament, or by resigning. While in the event, perhaps, not much different in practice from other Westminster parliaments, the absence of a specific reference to the role of the parliament seems an unusual oversight. On the other hand, a successful motion of no confidence in the Prime Minister deems every other Minister to have resigned. As is the case in Papua New Guinea, any motion against a PM must be constructive; e.g. propose the name of an alternative.

Chapter 8 of the Constitution requires the enactment by statute of a "code of conduct" for all public officers established under the Constitution. Members of Parliament are so listed. The Constitution also established an independent authority, the Accountability and Transparency Commission, which is to oversee compliance with this code of conduct once enacted. The Commission will have the power to investigate breaches of the code. Even more, however, the Commission will have the power to enforce this code "through criminal and disciplinary proceedings, and provide for the removal from office of those officers who are found to be in breach of the code of conduct". Again, it appears that an outside body unelected agency will have control over MPs that, in this case, would be more normally the responsibility of Members through a privileges committee.

SOME CONCLUDING THOUGHTS

This comparison of parliamentary apples and oranges is not intended to make any deep argument about the strength of customary practices in the Pacific Islands or the flexibility of the Westminster model in accommodating cultural adaptation. The two countries involved in this evaluation are indeed apples and oranges in terms of their comparability. Samoa has a high degree of social homogeneity with substantial internal support for the retention of customary political norms. Stability within Samoa is grounded in a well-established sense of national identity. This has been buttressed by the opportunity for significant flows of emigration, which has provided an outlet of several generations standing for those who find the village structure confining. Thus, the search for a majority in Parliament has not been especially contentious in principle or in practice.

On the other hand, the liberal electoral underpinnings of Westminster democracy have proved more problematic but, perhaps, more for outsiders than for Samoans or at

least those Samoans living in Samoa. The retention of *fa'a Samoa* has been repeatedly supported within Samoa with only incremental changes over time. In practice, mutual adaptation between Westminster and *fa'a Samoa* has proved to be fairly benign and only moderately contentious thus far. In light of the electoral review's finding in 2001 that there is a fundamental disjuncture between *fa'a Samoa* and the liberal elements of the electoral system, however, the future will always be uncertain. Particularly important in this regard will be the potential influence of Samoans living abroad. The Samoan diaspora's loss of a franchise in Samoan elections has been long regarded as a limiting factor on liberal change within Samoa.

Clearly Fiji's circumstances have been substantially different. Deep ethnic divisions have been a tragically critical influence on Fiji's adoption and adaptation of the Westminster model. The implicit philosophical preference of the Westminster model for stable Government based on majority control of the floor of the Parliament challenged the model's relevance for Fiji from before independence. Indigenous customary political forms had been a central part of the administration of colonial Fiji but *iTaukei* were not in a majority as independence approached. Treating the Indo-Fijian majority as a minority in the post-independence Parliament produced constant political tension and strife in the decades after 1970. It would be impossible to treat the past half-century of parliamentary development in Fiji without acknowledging that the struggle to implement the Westminster model had played a grim role in this fractured and fractious political narrative. Whether a liberal electoral system would have set the post-independence Parliament of Fiji on a different path cannot be known. Nor, for the moment, can it be known if the Bainimarama Government's attempt to reduce the former accommodations to *iTaukei* political processes in favour of more liberal arrangements will succeed in binding the nation's wounds.

The September 2014 election has successfully produced a new Fijian Parliament, which is an important first step. Nevertheless, there are some elements in the 2013 Constitution that appear likely to challenge the Westminster expectation of the supremacy of parliament. The unexpectedly high level of dependence on political parties as mechanisms for accountability may undermine aspects of the liberal voting system as well some of the traditional privileges of parliament. The entrenchment of the Constitution requiring three quarters of the Parliament and three quarters vote in a subsequent referendum is such that few believe it can be amended. Arguably, too much was detailed in the Constitution that might have been left to statutory implementation. Given this inflexibility, it seems likely that adaptation and reform will be a continuing source of political contention in Fiji. While a role for customary political structures and norms will be an issue in some *iTaukei* quarters notwithstanding the 2014 election result, one can only hope that Fiji will find a way to accept that debate without the racial rancour of the past.

Parliamentary Speech and the Location of Decision-making

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> Parliament is perceived as a particular theatre of action by its participants. So, parliamentary debates have become rehearsed theatre, where adversarial protagonists line up against one another and perform to bolster their own party support (and that of the leadership) and shore up their own political credibility.[1]
>
> … democratic legitimacy rests on authentic deliberation… deliberation induces individuals to think through their interests and reflect upon their preferences, becoming amenable to changing the latter in light of persuasion from other participants… to the extent effective deliberation occurs, political outcomes will secure broader support, respond more effectively to the reflectively held interests of participants, and generally prove more rational.[2]
>
> Uhr and Wanna have described State Parliaments as "unoccupied museums occasionally opened for the passing of bills, where members of the executive, with its extensive entourage, camp uncomfortably like modern day Bedouins for the duration of sittings…" The main weakness of Uhr and Wanna's description is that it fails to take account of the revival of the Legislative Council… where the passage of government legislation has become a consultative process.[3]

INTRODUCTION

Which of these three very different views of parliamentary debate and proceedings is most accurate? Is the idea of Parliament as a deliberative forum simply a quaint hang over from a bygone era, or does it have an ongoing relevance? What are the purposes of parliamentary speech and what are the locations of real decision-making power in a modern Parliament? Are parliamentary rules of debate and conventions, which

1 R A W Rhodes, John Wanna & Patrick Weller, *Comparing Westminster*, Oxford University Press, 2009, 169.
2 John Dryzek & Valerie Braithwaite, "On the Prospects for Democratic Deliberation: Values Analysis Applied to Australian Politics", *Political Psychology*, 21(2), 2000, pp 241–242.
3 David Clune & Gareth Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856–2003*, Federation Press, 2006, p 687.

assume the existence of a deliberative body now obsolete, or is there still merit in the process of decision making envisaged in those rules and conventions? What is the impact of the deliberative process evident in much parliamentary committee work on parliamentary debate and consideration of legislation? Should more of the work of consideration of legislation occur in parliamentary committees?

These are some of the questions, which are examined in this paper, through a preliminary analysis of the role of parliamentary debate in the New South Wales Legislative Council. Three particular debates are examined: two involving the consideration of government legislation (one from 1996 and one from 2011), together with a very unusual debate in which members had a "free vote" in 2011. These debates are examined from within the framework provided by the recently popularised political theories of "deliberative democracy." Some observations about recent Legislative Council committee work are also included before a number of reflections and four conclusions or recommendations are proposed.

THEORETICAL FRAMEWORK: DELIBERATIVE DEMOCRACY

Since the 1990s a key direction in political theory has been the emphasis upon "deliberative democracy" and associated terms "discursive democracy" and "communicative democracy." These theories emphasise the importance of political communication "involving the giving of good reasons and reflection upon the points advanced by others."[4] Whilst ideas of this nature can be traced back to Aristotle and political philosophers such as Edmund Burke and John Stuart Mill, it was the declarations by leading European philosopher Jurgen Habermans in 1996 and Anglo-American political philosopher John Rawls in 1997 that they were "deliberative democrats" which led to the popularity of the term and theories.[5] Deliberative democracy is grounded in the idea that individuals' positions are not determined by political power but rather that they can reflect upon their own preferences, values and judgments in light of political dialogue with others. Theorists refer to "talk centric" as opposed to "vote centric" democracy, and to the need for majority views to be legitimated "by their power to generate consent through the force of open argument and sustained public justification, as distinct from the tyranny of numbers."[6] Some deliberative theorists have only limited interest in parliamentary institutions, being more interested in public discourse,[7] or new forms of "deliberative collaborative governance" such as citizens' juries and other approaches which might transform or act outside of existing structures of government.[8]

4 John Dryzek & Patrick Dunleavy, *Theories of the Democratic State*, Palgrave Macmillan, 2009, p 215.
5 Ibid, p 216; John Uhr, *Deliberative Democracy in Australia*, Cambridge University Press, 1998, p 4.
6 Uhr, *Deliberative Democracy in Australia*, p 10.
7 Dryzek & Braithwaite, "On the Prospects for Democratic Deliberation."
8 See for example Margaret Gollagher & Janette Hartz-Karp, "Deliberative Collaborative Governance, at http://www.newdemocracy.com.au/library/research-papers/item/131-deliberative-collaborative-governance, accessed at 4.26 pm, 15/9/2014.

In 2004 four political scientists (three European and one American) published the first major study of parliamentary discourse from the perspective of deliberative democracy.[9] They point out that the emergence of this deliberative theory in the 1990s may have been related to efforts around that time to identify the conditions for democratic stability in culturally fragmented political systems, including post-conflict societies and new states.[10] They quote from proponents of deliberative democracy who argue that "democratic legitimacy rests on authentic deliberation", while also noting that psychological research points out that many people lack the cognitive ability to engage in the sort of active listening required in deliberation.[11] 5,500 speeches from 52 debates in chambers in four different legislatures (the Swiss Council of States, the German Bundestag, the US Senate and the UK House of Commons) are assessed against a "Discourse Quality Index." The range of chambers and debates enables the testing of expectations that institutional features would affect the quality of discourse. Key conclusions include:

- "institutional design [including the role of consensus institutions, veto players, second chambers, or non-public deliberation] matters for the quality of political discourse"[12]
- "institutional design may have the greatest payoff in terms of forging a respectful discourse"[13]
- "The differences that we observe between institutional settings are … not categorical, but rather subtle shifts along a continuum… Such changes may be barely noticeable to casual observers, but to political actors operating in a particular setting, such changes send clear signals. That is, departures from normal discourse, even where they are subtle, can indicate a great deal about other actors' willingness to work out a mutually agreeable solution. Seasoned politicians pick up on those signals; they represent windows of opportunity that should not be wasted."[14]
- "given the strong influence of initial majority preferences, it is clear that discourse quality cannot play much of a role in shaping substantive outcomes. This is a sobering thought for deliberative theory… it seems that power politics – the politics of majority preferences – seems to dominate substantive outcomes. Discourse seems to be impotent at changing this, except in rare circumstances."[15]

John Uhr, in his 1998 book *Deliberative Democracy in Australia*, suggests that one of the attractions of deliberation is its capacity to be used as a concept or theme that ties together all the threads of political theory relevant to parliamentary government.

9 Jurg Steiner, Andre Bachtiger, Markus Sporndli & Marco R Steenbergen, *Deliberative Politics in Action: Analyzing Parliamentary Discourse*, Cambridge University Press, Cambridge, 2004.

10 Steiner et al, *Deliberative Politics in Action*, pp 9–15, 135, 166–168. The establishment and operations of an intentionally structured "post-conflict Parliament" was discussed by Andrew Miriki & Robert Tapi, *Promoting unity in Bougainville – the House of Representatives working with leaders,* paper delivered at the 44th Presiding Officers and Clerks Conference, Canberra, July 2013.

11 Steiner et al, *Deliberative Politics in Action*, p 17.

12 Steiner et al, *Deliberative Politics in Action*, p 135.

13 Ibid., p 136.

14 Ibid., p 137.

15 Ibid., p 158.

However, he cautions against unworldly versions of deliberative theory that place undue weight upon shared rationality or consensus: "Deliberative processes are not recipes for consensus and rational harmony… politics is concerned with the clash of alternative views… majorities must eventually win."[16] Rather, for Uhr the value of deliberation is that it requires governments to meet "a basic test of public accountability by openly debating and defending their proposals" as well as providing "equality of opportunity so that all representatives can contribute to public debate and to the collective determination of legislative proposals."[17]

The language of deliberation has been picked up in the unofficial history of the Parliament of New South Wales. David Clune and Gareth Griffith adopt a theoretical framework for assessing Parliament's performance against two models of the constitution: an "executive" model which focuses on stable government and the efficient passage of legislation; and a "liberal" model in which parliamentary power is used to scrutinise and review both legislation and executive government. The authors comment that: "These liberal criteria are associated with the idea of parliament as a deliberative forum, talking over the issues of the day, considering the appropriateness of legislation, judging the expediency of government policy and inquiring into administrative actions."[18]

THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES

The New South Wales Legislative Council has undergone fundamental change since becoming directly elected by a system of proportional representation in 1978. No Government has had majority control of the Council since 1988. During the 49th Parliament, from 1988 – 1991, two Australian Democrats, the Hon Liz Kirkby and the Hon Richard Jones, together with Reverend the Hon Fred Nile and his colleague the Hon Marie Bignold MLC, effectively held the balance of power and the Greiner Government was faced with a strong and unpredictable Legislative Council. During the 50th Parliament, from 1991 – 1995, the real parliamentary action was in the "hung" Legislative Assembly, as the Greiner and Fahey Governments could generally muster a majority in the Legislative Council through the support of Reverend the Hon Fred Nile and his new colleague, the Hon Elaine Nile.[19]

51ST PARLIAMENT: 1995–1999 – INTENSE SCRUTINY OF LEGISLATION

The periodic election held in 1995 elected five new cross-bench members, bringing the total to seven: the two Australian Democrats; Reverend the Hon Fred Nile and the Hon Elaine Nile; the first Greens member, the Hon Ian Cohen; the first Shooters

16 Uhr, *Deliberative Democracy in Australia*, pp 93–94.
17 Ibid.
18 Clune & Griffith, *Decision and Deliberation*, p 15.
19 Ibid., pp 567, 609–611.

Party member, the Hon John Tingle; and the Hon Alan Corbett, representing a party known as "A Better Future for Our Children." (In 1999 the total number of cross bench members would rise to 13, matching the number of Opposition members.)[20] In order to win any division the Carr Government required the votes of four out of the seven cross bench members. During the 51st Parliament, from 1995 to 1999, there were a total of 571 divisions, with 382 won by the Government and 189 lost.[21] This Parliament was a crucial time for the Legislative Council, involving both "confident achievement" of the outworking of strong bicameralism but also "uncertainty and questioning" of the very credibility of the chamber.[22] It was during this Parliament that the Leader of the Government, the Hon Michael Egan, was suspended for failing to produce state papers in response to orders for their production, precipitating the crucial series of *Egan* cases, in which the High Court of Australia upheld the powers of the House to require the production of such documents,[23] and the NSW Court of Appeal confirmed that claims of privilege did not constitute valid grounds for refusal.[24] It was also during the 51st parliament that the second stage in the development of the Council's committee system took place, with the establishment of five General Purpose Standing Committees (GPSCs) reflecting the composition of the House and focussing on holding the executive government to account.

The 51st Parliament, from 1995 – 1999, represented in many ways a high point (at least in the modern era) in the intensity of the scrutiny of legislation in the Legislative Council. There were 291 divisions in committee-of-the-whole (where legislation that has passed its second reading is then considered in detail, including proposed amendments) during this period, with the Government winning 221 and losing 70 of those votes.[25] Cross bench members, particularly those who were the single members from their respective parties, during this period have described the situation in which they found themselves when determining how to vote on questions before the House, particularly in relation to legislation. They have also described the persuasive efforts of the great orators in the Legislative Council at that time. The sole Greens member during this period, the Hon Ian Cohen MLC, reflected on this experience in his valedictory speech some years later:

> While my first four years in this place involved a steep learning curve, it presented a time of great opportunity to leave my mark on the statute book of New South Wales and make my contribution as the single Greens member. That was a very exciting time, in large part because we have a fine balance in this House. There were many

20 For a detailed discussion on the changing number of cross bench members in the Legislative Council, the impact on electoral reforms and implications see Lynn Lovelock, "The Declining Membership of the NSW Legislative Council Cross Bench and its Implications for Responsible Government," *Australasian Parliamentary Review*, Autumn 2009, 24(21), pp 82–95.

21 Clune & Griffith, *Decision and Deliberation*, p 632.

22 Ibid., pp 628–9.

23 *Egan v Willis* (1998) 195 CLR 424.

24 *Egan v Chadwick* (1999) 46 NSWLR 563.

25 Clune & Griffith, *Decision and Deliberation*, p 632.

> Independents and small party groups… Another wonderful learning experience for me was to sit in awe and trepidation—because I had to make a decision at some stage—as I listened to the debates between Jeff Shaw and John Hannaford, as the Attorney General and shadow Attorney General. I must say, my general tendency was towards my good friend Jeff, but John Hannaford was so skilled. He was an orator in the House. So often while he was speaking in the House he just glared at me. I thought: Oh my God, this is a very difficult situation.[26]

The sole representative of the Shooters Party during this period, the Hon John Tingle, also reflected on the context in which cross bench members found themselves at that time. In fact during his own valedictory speech Mr Tingle reflected that he found himself in a similar situation in regards to the legislation to which he was then speaking, not being sure how he would vote on that legislation in view of the contributions others had made in debate.[27] There are numerous examples from the 1995 – 1999 period of the Hon John Tingle, who had a reputation for making concise speeches, speaking towards the end of a debate and before indicating which way he would vote on the particular matter, noting that he had "listened to the debate with great interest… been impressed with the remarks" of particular members and finally determined his position "after very careful consideration."[28]

Industrial Relations Bill 1996: persuasive parliamentary speech, reflection and decisions on the floor of the House

The deliberative nature of Legislative Council proceedings at their best is illustrated by the proceedings on one government bill in particular, the Industrial Relations Bill 1996. This bill was considered in committee-of-the-whole for 35 hours and 53 minutes, over seven days. A total of 147 amendments were considered, with 62 of these (including 53 Opposition amendments) agreed to.[29]

A detailed review of the parliamentary debate on the Industrial Relations Bill 1996 against something like the "Discourse Quality Index" used by Steiner et al is beyond the scope of this paper. However, even a cursory reading of the debate in committee-of-the-whole reveals numerous examples of active debates over particular amendments, including multiple contributions by members addressing and responding to questions and concerns raised by one another, in an effort to persuade one another (or at least the key cross bench members whose vote varied from one

26 *NSWPD* (LC), 2/12/2010, p 28849, per the Hon Ian Cohen.

27 *NSWPD* (LC), 2/5/2006, p 22318, per the Hon John Tingle.

28 See for example his statement on an Opposition amendment to the Industrial Relations Bill 1996 dealing with the vexed issue of union preference in employment at *NSWPD* (LC), 22/5/1996, p 1295.

29 An earlier Industrial Relations Bill 1995 had been the subject of over nine hours debate on the second reading but had lapsed upon prorogation of the parliament. A previous Industrial Relations Bill 1991, introduced by the previous Greiner Government had also been the subject of over nine hours debate on the second reading and more than 39 hours consideration in committee-of-the-whole over five days, with the Minister for Industrial Relations and future Premier, the Hon John Fahey MP, present at the Table in the Legislative Council chamber for the duration of the committee-of-the-whole.

amendment to another) of their viewpoint.[30] Also evident from a reading of these debates is the frequency of comments from members that they have listened intently to one another (even if ultimately disagreeing), with phrases used including: "I invite honourable members to consider carefully the words uttered..," "I was interested in the contribution…" and "I am interested to hear the arguments…"[31] Perhaps the best example showing the degree to which members listened to, and were persuaded by, one another during these debates is this contribution from the Hon John Tingle at the end of a lengthy debate about an amendment concerning preference in employment:

> I am concerned about the provisions of the bill. I have listened to the debate with great interest and I have been very impressed with the remarks of the Hon. Patricia Staunton, and it is hard for me not to totally agree with her. However, there is a problem that I believe Reverend the Hon. F. J. Nile has touched upon. It takes a very brave individual to stand against a crowd. That could apply to an employer faced with a demand that he agree to union preference. The trade union movement is a big, tough, well-organised body and is able to survive without a preference measure of this type. Therefore, after very careful consideration, I have decided to support the amendment.[32]

At the end of consideration of the Industrial Relations Bill in committee-of-the-whole over six days, the Bill was recommitted to allow further consideration of a number of contentious issues including union rights of entry into workplaces. The deliberative value of the re-committal is evident from the following contribution by another cross bench member, the Hon Elizabeth Kirkby, who indicates at the conclusion of the debate that, having listened to the contributions of others, she is about to reverse her earlier position:

> I have given a lengthy explanation of my views on the matter because the step I am about to take is not an easy one. I will have to vote against my earlier conviction for the sake of the safety of workers in New South Wales. The Minister said to me, "You are not going to support the re-committal, are you?" I said, "Yes, because I want to hear what the Leader of the Opposition has to say." I am glad that I supported that motion to recommit the clause. I could have voted with the Government on the first occasion and none of this debate would have taken place. The recommittal of this clause was not a time-wasting exercise. The debate has revealed so much, and I am sure that we have all benefited from it despite the fact that we are all exhausted after such a lengthy consideration. Humiliating as it may be, I am glad that I have had the opportunity to reverse my vote on this issue.[33]

30 See for example the debates over amendments dealing with union rights of entry to workplaces and notice requirements *NSWPD* (LC), 23/5/1996, pp 1422–1431 and pp 1440–1446.

31 *NSWPD* (LC), 15/5/1996, pp 951, per the Hon John Hannaford; 952, per Revd the Hon Fred Nile; 953, per the Hon Elizabeth Kirkby.

32 *NSWPD* (LC), 22/5/1996, p 1295, per the Hon John Tingle.

33 *NSWPD* (LC), 23/5/1996, p 1445, per the Hon Elizabeth Kirkby.

55th Parliament: 2011–2014 – veto points and negotiated outcomes

The Legislative Council has continued to evolve. The general election for the Legislative Assembly in March 2011 saw the Liberal and National Parties win 69 of the 93 seats in the Assembly. However, although it won 11 of the 21 seats contested in the periodic election for the Legislative Council, the O'Farrell Government found itself short of a majority in the Legislative Council, as does the Baird Government. The current composition of the Legislative Council is 19 Government members, 14 Opposition and 9 cross bench members (consisting of five Greens, two Christian Democrats and two Shooters and Fishers party representatives). With Government members, the Hon Don Harwin MLC, elected President, and the Hon Jenny Gardiner MLC, elected Deputy President, the Government needs three votes to win any division in the House or committee-of-the-whole.

Being the first term of a newly elected Government, the 55th Parliament has seen some intense and robust debate over legislation dealing with matters such as industrial relations, the reform of compensation schemes, privatisation of state assets and local government. Political resolutions have been found in most instances, with only a handful of major pieces of legislation the subject of ongoing disputes between the two Houses. The term has been marked by a continuing high level of parliamentary committee activity, including the establishment of a large number of select committees to undertake specific inquiries. Since 2013, there has also been a return to the same sorts of frequency of orders for the production of state papers seen in previous parliaments.

The scrutiny of legislation in the Legislation Council in the first 12 months of the 55th Parliament has been analysed in an earlier paper.[34] That paper sought to determine the impact of the introduction, in August 2011, of time limits on speeches on government bills. The conclusion reached, upon examining the debates on five contentious government bills and one private members' bill, was that there had been an increase in the number of speakers on controversial bills, but with those contributing making shorter speeches. Non-government members were utilising most of the total debate time (with some exceptions as outlined below), and the degree of scrutiny being applied to legislation in committee-of-the-whole was comparable to that over the preceding decade.[35]

Whilst legislation continues to be subjected to rigorous scrutiny in the Legislative Council in the 55th Parliament, including in committee-of-the-whole, there is an important difference in the dynamic evident now, from that of the 1990's. Whilst the fact that the Government does not have a majority in the Council continues to necessitate negotiation and can result in improvements to legislation, and it is sometimes the case that the outcome on a particular bill or amendment does not become evident until the question is put and the House divides, it is almost always the case that the positions of each party has been determined outside the chamber,

34 David Blunt, "Three unusual and dramatic "sitting days" in the New South Wales Legislative Council and The impact of the introduction of time limits on debate on government legislation in August 2011," Paper presented to the 43rd Presiding Officers and Clerks Conference, Honiara, Solomon Islands, 24–26 July 2012.

35 Ibid., pp 8–10.

prior to the conclusion of debate and the committee stage. Indeed, it is now rare for bills to proceed into the committee stage until negotiations outside the chamber have concluded. Critical negotiations and attempts to resolve impasses seem to take place elsewhere, rather than on the floor of the House. There is, no doubt, a range of reasons for this change, as the House has in a sense "matured" and its composition and the roles of political parties represented have become more stable. An important difference is that, during the 1990s there were a number of members who were the sole representative of their political party and who therefore were not subject to the constraints of decisions in party rooms, there is now no cross bench member from a political party with less than two members (the cross bench currently consisting of five Greens, two Christian Democrats and two Shooters and Fishers party members).[36] The different dynamic does, however, raise a number of questions about the different roles of parliamentary speech in these circumstances.

Police Death and Disability Bill 2011: public justification of decisions reached in negotiations over amendments

The nature of debate about and scrutiny of legislation in the 55th Parliament is perhaps most starkly exemplified by the proceedings on the Police Amendment (Death and Disability) Bill 2011. Introduced into the Legislative Council by the then leader of the Government and Minister for Police, the Hon Michael Gallacher MLC, this was one of a number of bills introduced in the 55th Parliament which have substantially overhauled compensation schemes to address growing deficits. This piece of legislation was the subject of intense criticism from the Police Association, the trade union representing Police officers. Police officers marched on Parliament House and a group noisily protested from the public gallery when the bill eventually passed the Legislative Assembly.

The bill was introduced into the Legislative Council and declared urgent on 9 November 2011. Following the Minister's second reading speech, however, debate did not resume until 23 November. During the intervening period there was clearly a great deal of activity, lobbying and negotiations, particularly involving the Police Association. Indeed throughout the final sitting week of the year, a negotiating team from the Police Association were frequently seen in the parliamentary cafeteria between meetings with cross bench members and government officials.[37] Upon debate resuming 20 members spoke (including a number of Government speakers, apparently while negotiations continued with the Shooters and Fishers Party members who were quoted in the media as stating that they "would not blink")[38] before being adjourned overnight. The next evening debate concluded, with a brief but crucial contribution by the Hon Robert Brown

36 For further information on the changing make-up of the cross bench in the Legislative Council see Lynn Lovelock, "The Declining Membership of the NSW Legislative Council Cross Bench."

37 Meetings in the parliamentary cafeteria were referred to in media reports: Geoff Chambers, "Deal on disability scheme," *Daily Telegraph*, 24/11/2011, p 13.

38 Ibid.

from the Shooters and Fishers Party, in which he described the negotiations conducted behind the scenes:

> A considerable amount of work has been done during this week by the Minister for Police and Emergency Services and his staff and the Police Association. I have a sense that we are there. Let me define there: My left hand is stretched out to the left-hand side of my body, and that is where the Government started; my right hand is stretched out to the right-hand side of my body, and that is where the Police Association started. They are not in the middle but they are somewhere closer to where the Police Association probably wants to be for its members than I thought was possible a week ago.
>
> We have attempted to test the Government's position on the issues that the Police Association has brought to the Christian Democratic Party and the Shooters and Fishers Party. We have done that this week in a number of meetings with both parties individually and with both parties in the same room… At times I did not think we were going to get the concessions that we have. Again, I do not think the Police Association will endorse this amended bill, but I think the association will stand up and say, "It is better than what it started out as…" It is not going to be to everybody's satisfaction, but we are now in a position where we can argue the amendments in the House.[39]

Immediately following Mr Brown's contribution and one further brief contribution from a government member, the Minister spoke in reply, the second reading was agreed to and the House resolved itself into a committee-of-the-whole to consider the bill in detail. One hour and 38 minutes later, the bill was reported with 10 amendments agreed to, out of a total of 12 amendments moved. Those ten amendments evidently represented the final outcome of the negotiations that had been undertaken and finalised that day.[40]

Free votes since 2011: respectful debate and reflection

There is another set of debates which is worthy of consideration in terms of the application of principles of deliberation. During the 55th Parliament there have been five matters the subject of a "free vote" or "conscience vote" in the Legislative Council.[41] A "free vote" occurs where political parties decide that their members are free to vote as they choose on a particular matter, rather than along party lines.[42] Whilst no different procedurally to other matters, debate on matters the subject of free votes tends to take on a different form:

39 *NSWPD (LC)*, 24/11/2011, p 7834, per the Hon Robert Brown.

40 Anna Patty, "$100 million extra for passage of police disability bill," *Sydney Morning Herald*, 26/11/2011, p 9.

41 The five matters are: the conduct of Magistrate Betts, the conduct of Magistrate Maloney, motion on marriage equality, the Rights of the Terminally Ill Bill 2013, and the Same Sex Marriage Bill 2013.

42 Gareth Griffith, *Free votes in the New South Wales Parliament*, NSW Parliamentary Research Service, Background Paper No 10/2014.

> ... a more open, interesting and vigorous deliberation which is less formulaic and partisan in character. With free votes there is more occasion and inclination to listen to the views of others, to acknowledge and even accommodate arguments which a member may not agree with at first… tending to give parliamentary debate more personal colour and intellectual interest than usual.[43]

The parliamentary debate in the Legislative Council on the motion concerning the conduct of Magistrate Brian Maloney was highly deliberative. The motion arose from a report of the Judicial Commission of NSW recommending that the Parliament consider dismissal of the Magistrate on the basis of its consideration of complaints about his conduct and his capacity. Debate on the motion followed closely the consideration by the House of a similar motion concerning another magistrate, but which had been resolved promptly (with the motion for the Magistrate's dismissal resolved in the negative on the voices without a division being called).[44] In contrast, following Magistrate Maloney's address to the House the matter was not brought back on for debate for some three and a half months, during which members received a considerable volume of representations and material. A reading of the debate shows that members were uncomfortable with the role they were required to play in relation to this matter and in endeavouring to do justice to the Magistrate as well as to the issues raised by the Judicial Commission, members carefully listen to and considered one another' views. The debate is replete with numerous references to having listened carefully to one another and of valuing one another's viewpoint.[45] Even where members' ultimately disagreed with the views put forward by others, they expressed their disagreement in the most respectful manner possible:

> I have listened to the careful and detailed presentations made by other members of this House, in particular, the presentation of the Hon. Trevor Khan when he spoke of some of his concerns—concerns that trouble me also in relation to this matter… I do not quite accept the extent of the criticism by the Hon. Trevor Khan….[46]

> We have heard people with a legal background make very good contributions today—people that I quite often disagree with across the Chamber. I admired the diligence with which they addressed the issues before us.[47]

Even having made their own contributions to the debate and stated their current intentions, members' expressed a desire to hear the further contributions of others.[48] Members reflected on the unusual and high quality nature of the debate:

43 Ibid., p 43.
44 Cathryn Cummins, *Who else can judge the judges? The role of Parliament in the removal of judicial officers from judicial office*, Parliamentary Law Practice and Procedure Course 2011, Final paper, p 7.
45 *NSWPD (LC)* 13/10/2011, pp 6162, per Mr David Shoebridge; 6167, per Dr John Kaye; 6174, per the Hon Melinda Pavey; and 6177, per the Hon Michael Gallacher.
46 Ibid., p 6162–3, per Mr David Shoebridge.
47 Ibid., p 6173, per the Hon Duncan Gay.
48 Ibid, p 6166, per Mr David Shoebridge.

> The Hon. Duncan Gay pointed out that this type of debate brings out the best in us all. I greatly respected and appreciated the contributions by many members today, in particular, the contribution of the Hon. Trevor Khan. Yes, it was pointed out that it may have been the case for the prosecution but it was certainly a well-structured, well thought out and well-presented argument that dealt with the case before us…[49]

Members also explicitly referred to the fact that the contributions of others had been persuasive in influencing how they would vote on the matter.[50] Ultimately the matter was resolved in the negative on division (22:15).

Parliamentary committee work: extraordinary outcomes and working relationships

Just as the 55th Parliament has been marked by some very respectful and deliberative debates on matters the subject of "free votes," it has also seen some extraordinary parliamentary committee work: extraordinary in terms of both the outcomes and the working relationships that have been evident. Three examples are illustrative but by no means exhaustive.

In June 2012 the Legislative Council appointed a Select Committee to consider the partial defence to provocation. The Committee undertook its inquiry in a particularly thorough manner and produced a unanimous report recommending that the availability of the defence be restricted.[51] Earlier this year, the *Crimes Amendment (Provocation) Act* was enacted in response to the Committee's report. The debate in the House in May 2013 on the motion to take note of the Committee's report makes clear that members took great pride in the work of the committee and that it had been a process during which members' views developed:

> … I commend the work of the Select Committee on the Partial Defence of Provocation. As a committee member, I extend my genuine gratitude to every member of the committee… In large part we put aside party differences that often generate the heat in this House, if not the light. We had genuine discussions about problems in existing law and came to grips with issues presented to us on both sides of the argument…I would be surprised if a single member who went in with a perception came out with the same view after reading the submissions and hearing the evidence and the discussion around the table over the course of the months that the inquiry proceeded…[52]
>
> I congratulate the seven members of the committee, who were drawn from across the political spectrum. We worked together to produce a report with recommendations that were reached unanimously. That is a major feat as this

49 Ibid., p 6174, per the Hon Melinda Pavey.
50 Ibid., p 6177, per the Hon Cate Faehrmann.
51 Select Committee on the Partial Defence of Provocation, *The partial defence of provocation*, 2013
52 *NSWPD (LC)*, 21/5/2013, p 20456, per Mr David Shoebridge.

> issue is a complex and often contentious one within our legal system. There was no dissenting report or statement from any member of the committee…[53]
>
> I thank the Hon. Trevor Khan, my Labor colleague the Hon. Adam Searle, Mr David Shoebridge and the Hon. David Clarke, who all have a legal background and certainly helped me understand some of the complex issues and consequences of whichever path our recommendations followed. As others have said, this inquiry was an example of the parliamentary committee process at its best. Mr Scot MacDonald, the Chair of the committee, Reverend the Hon. Fred Nile, and I as lay people also contributed to the process to produce a report and suite of recommendations that reflect community expectations and values… Reverend the Hon. Fred Nile was an absolutely excellent Chair of this committee. He brought great skills not only to the hearings, which often were quite difficult and emotional, but also to our deliberative meetings and discussions.[54]

A second inquiry worthy of note was conducted by General Purpose Standing Committee (GPSC) No 4 into the use of cannabis for medical purposes, referred by the House in November 2012. The Committee reported in May 2013, making four unanimously supported recommendations aimed at facilitating access to pharmaceutical cannabis products on a trial basis.[55] The subsequent debate in the House in August 2013 on the motion to take note of the report indicates that some members were originally sceptical of the value of the inquiry and were surprised by the outcome:

> I was a member of this committee. In a sense, I was a reluctant participant. It is a fraught subject and, quite frankly, I thought that little good would come from the inquiry. I was wrong. Unbeknownst to me, all the committee members approached the subject in a moderate and thoughtful way and the issue did not become politicised, as I had expected.[56]

Other members gave an insight into the dynamics within the committee and the value of hearing evidence together:

> This committee investigated a complex area, namely, the use of cannabis for medicinal purposes, and came to an agreement that, I think, in equal measures was open-minded and open-hearted. I should point out that the committee members came from a diversity of backgrounds comprising the Shooters and Fishers Party, the right of the Labor Party, the Hon. Charlie Lynn from the Liberal Party, The Nationals and me representing The Greens. We had different perspectives, yet we reached a unanimous report. It is to the credit of the Hon. Sarah Mitchell,

53 Ibid., per the Hon Walt Secord.
54 Ibid., per the Hon Helen Westwood. Although it should be noted that, during the take note debate, one member who did not serve on the committee, the Hon Dr Peter Phelps, raised concerns about the consensus position reached by the committee.
55 General Purpose Standing Committee No. 4, *The use of cannabis for medical purposes*, 2013.
56 *NSWPD (LC)*, 27/8/2013, p 22746, per the Hon Trevor Khan.

> committee staff and members that we landed somewhere that was positive, open-minded and open-hearted.[57]
>
> I am a very proud conservative, so any discussion about relaxing attitudes towards drugs was always going to be a big call. Therefore, I congratulate those who appeared before the committee because many had strong and informed views about the pros and cons of the use of cannabis for medical purposes.[58]

On 16 September 2014 Premier Baird announced that the NSW Government would support a clinical trial for medical cannabis.[59]

A third, truly remarkable inquiry is currently in progress and will shortly be reporting. The Standing Committee on Law and Justice is inquiring into the family response to three murders that took place in the North Coast community of Bowraville in the 1990s, murders for which no-one has yet been convicted. This inquiry was referred by the House in November 2013, with the Committee required to "give the families the opportunity to appear before the Committee and detail the impact the murders of these children have had on them and their community."[60] The Committee has visited Bowraville on a number of occasions, following careful planning and training to ensure the most effective communication with members of a community who have been repeatedly let down by the criminal justice system. As well as diligently applying itself to the inquiry, the committee has been at pains to ensure that genuine consultation occurs with the community. Members from across the political spectrum and community members have wept together at hearings and less formal consultations in Bowraville. The Committee's report is expected to be tabled shortly.

SOME REFLECTIONS

The purposes of parliamentary speech

The brief analysis of a small number of parliamentary debates in the Legislative Council from 1996 and 2011 confirms a number of the predictions or observations of proponents of deliberative democracy. The proceedings on the Industrial Relations Bill 1996 and the consideration of the conduct of Magistrate Maloney include instances in which members acknowledged that they had reflected on, and occasionally changed, their own preferences in light of the viewpoints expressed by others. According to Dryzek and Braithwaite this is evidence of "authentic deliberation" and the transformative power of deliberation."[61]

57 Ibid., 20/8/2013, p 22373, per Dr John Kaye.
58 Ibid, 27/8/2013, p 22746, per the Hon Charlie Lynn.
59 *NSWPD (LA),* 16/9/2014, p 15, per the Hon Mike Baird.
60 *Minutes of Proceedings*, 26/11/2013, p 2261.
61 Dryzek & Braithwaite, "On the Prospects for Democratic Deliberation," pp 241–242.

However, as recognised by Uhr, politics is concerned with the clash of alternative views, indeed of ideologies. Members are elected for many different reasons, including on the basis of the policy platform espoused by them or their political party. Electors expect that members will act and vote on the basis of that platform. As Griffith points out: "The predictability of voting created by the party system is fundamental to a functioning political system founded on the principle of responsible government; the advantages that attend that system as a rule deserve proper appreciation."[62] Just a few weeks ago a Member of the NSW Legislative Council referred to the writings of author and philosopher Ayn Rand "about the dangers of compromise and the abandonment of one's ideology for the sake of a pragmatic approach."[63] As Uhr points out, "majorities must eventually win." Indeed, one of the fundamental principles of parliamentary law and practice is that, following careful and detailed consideration of matters before it, a parliamentary chamber must be able to come to a decision reflecting the views of the majority: "The utmost latitude of discussion is ensured; but, after free deliberation, the action of the majority is unimpeded."[64]

As Uhr points out, in a majoritarian parliamentary system, the real test of deliberative democracy is whether or not all representatives can contribute to public debate, where decisions that are taken are publicly justified and where decision-makers "meet a basic test of public accountability by openly debating and defending their proposals."[65] In this sense the concise statement by the Hon Robert Brown, outlining the process of negotiation over the Police Amendment (Death and Disability) Bill 2011, and describing the drawing towards one another of the opposing interests, followed by debate about the resulting amendments in committee-of-the-whole, is every bit as deliberative, and in many ways more effective, than any of the more lengthy contributions made in many debates. It also represents the outcomes focus of members seeking to resolve what had become a difficult and divisive issue.

The Hon Jeff Shaw and the Hon John Hannaford were clearly seeking to persuade the cross bench members in the Legislative Council of the merits of their respective views, to influence the decisions they would each be required to make about how to vote on each amendment to the Industrial Relations Bill 1996. Contributors to the other debates analysed in this paper may have been seeking to persuade other members of their viewpoints. More likely, and just as importantly, they were publicly justifying the measure that they were proposing or the decision they had decided to take on the matter. To that extent, the audience being addressed by those members extends well beyond their colleagues present in the chamber of watching proceedings on the in-house television service. There are no doubt a range of audiences that members have in mind for various parliamentary speeches, and an equal variety of purposes for addressing those audiences. These may include, but are certainly not limited to:

62 Griffith "Free votes," p 43.
63 *NSWPD (LC)* 9/9/2014, p 44, per the Hon Dr Peter Phelps MLC.
64 William Edward Hearn, *The Government of England: Its Structure and Its Development*, Second edition, Longmans Green and Co, London & George Robertson and Co, Melbourne, 1887, p 556.
65 Uhr, *Deliberative Democracy in Australia*, p 93.

- seeking to influence public opinion, particularly through traditional media reporting or circulation of speeches on social media;
- encouraging party supporters by reflecting and espousing their views;
- party leaders encouraging, rousing or re-assuring backbenchers;
- ambitious members seeking to impress party colleagues with a view to influencing future decisions about positions to be allocated or even future leadership; and
- influencing pre-selectors.

The list is almost infinite and none of these purposes is mutually exclusive, as a number of objectives may be effected through the one speech. The only way of really knowing the purpose or purposes a member had in mind in making a particularly parliamentary speech would be through interviews or the members' own reflections.

Locations of decision making

In the case of the Industrial Relations Bill 1996 decisions about particular amendments were clearly being made in the chamber, and at times were directly influenced by what was said in debate. By contrast, in the case of the Police Amendment (Death and Disability) Bill 2011, the fate of the bill and nature of amendments to be made and agreed to, were decided in negotiations away from the chamber. As noted above, one media article referred to discussions in the parliamentary cafeteria. In this case there were two interests negotiating with cross bench members: representatives of the Minister for Police on the one hand, and the negotiating team from the Police Association on the other hand. Rarely will the interests wishing to influence decision-making be so limited in number or so clear cut. Whilst negotiation and deliberation are distinguished in the political science literature, they are undoubtedly related, and the veto-points that necessitate negotiation can no doubt help create an environment in which deliberation is possible:

> The question is whether the increase in respect is authentic or merely strategic, in the sense of greasing the wheels of a negotiation process that the majority would have liked to avoid by imposing its will on the minority but could not avoid because of the minority's veto power… much of the change in respect is strategically motivated… but we cannot underestimate the practical importance of changes in speech, even if they lack authenticity… political actors realize they need to adjust their speech acts in order to facilitate negotiation, or they risk never passing any legislation… deliberation is an essential part of negotiation, if the need arises, respectful talk becomes an important instrument for forging winning coalitions…[66]

As noted above, where in the case of the Police Amendment (Death and Disability) Bill decisions had been made in negotiations outside the chamber, and debate resumed and concluded only at the end of those negotiations, during the remaining debate time

66 Steiner et al, *Deliberative Politics in Action*, p 122.

the decisions reached were publicly articulated. This is not always the case with other important decisions taken in the parliamentary context but outside the chamber.

Rhodes, Wanna and Weller ascribe more importance to internal party debates and the decisions taken in party meetings than parliamentary debates and votes. They elevate the influence of the party backbenches and the need for party leaders to maintain their links, with and support base within, the parliamentary party as perhaps the major feature of contemporary parliamentary politics:

> By contrast, internal party debates occur in closed party or caucus meetings, between party members, through the party whips or factions, and through media comments and presentations by key players. This aspect is not necessarily evidence of parliamentary "degeneration", as some critics might suppose. Rather, it reflects a marked shift in the balance of public versus private deliberation, caused by the changing nature of parliamentary politics under the influence of disciplined parties.[67]

One of the recurring, and most divisive, themes in NSW politics for over a decade now has been the subject of restructuring (privatisation) of the electricity industry. Whilst the lease of the electricity generators was authorised by Parliament in 2012, the sale or lease of the distribution network (the "poles and wires") has not been addressed in Parliament. However, it has been the subject of two significant debates within the Government parties, each with a different outcome.[68] The second of those debates has reportedly resulted in an outcome that will see the Liberal and National parties take a policy to the next election of leasing elements of the distribution network if re-elected.[69] From a policy perspective these two debates were two of the most significant debates over the course of the current term of parliament. What were the key determinants of the outcomes of those debates and what role did the quality of speech and argument play in those decisions? Unlike parliamentary debates there is no record of those debates.

Of course, prior to matters being debated within party meetings, they are first considered by the leadership group, or in the case of the Government, by the Cabinet. Like the party room, proceedings in Cabinet are the subject of strict confidentiality rules. The minutes of cabinet meetings only record proposals and decisions rather than the details of discussions and do not identify the views of particular Ministers. Under the *Archives Act 1983 (Cth)* cabinet documents are made publicly available after either 20 years, or 30 years for cabinet notebooks.[70] Cabinet documents in NSW may be the subject of applications under the *Government Information (Public Access) Act 2009*

67 Rhodes, Wanna & Weller, *Comparing Westminster*, p 169.

68 Michaela Whitbourn, "NSW rules out full power sale," *Australian Financial Review*, 25/11/2011, p 3; "Libs were split on power sale," *Sydney Morning Herald*, 26/11/2011, p 13; Andrew Clennell & Alicia Wood, "Mike Lights up the State: Coalition backs Baird on $20b sale of poles and wires," *Daily Telegraph*, 11/6/2014, p 1.

69 Sean Nicholls, "For better or for worse, this is the policy that will define Baird's reign," *Sydney Morning Herald*, 11/6/2014, p 4.

70 Mark Rodrigues, *Cabinet confidentiality*, Parliamentary Library (Australian Parliament) Background Note, 28/5/2010, p 7.

after 10 years, and under the *State Records Act 1998* there is a presumption that they will be open for inspection after 30 year, although they are not the subject of annual publication in the same way as Commonwealth Government cabinet papers, evidently following a lack of media interest in the past.[71] Steiner et al identify processes and debate in cabinets as one area of interest for future research by those concerned with deliberative democracy and the role of discourse, along with other forum and decision making bodies including courts, bureaucracies, inter-governmental and non-government organisations,[72] although the absence of records of debate in many of those bodies would make the conduct of an analysis of deliberations difficult.

Rules of debate and conventions concerning parliamentary speech

The key procedural rules common across Westminster style parliaments are based on the first of the "great principles of English parliamentary law," namely that public business shall be conducted in a "decent and orderly manner."[73] The rules that flow from this first great principle are concerned with such things as the giving of notice, the routine of business and restrictions on the suspension of standing orders. The rules of debate are a subset of parliamentary procedure. According to Uhr, "the rules of debate are the fundamental rules of the game of political deliberation" as they "serve to ease deliberation in common: to raise it to an art; to ensure the hearing of every opinion and side in a just and due proportion."[74]

All parliamentary institutions have rules of debate and conventions in relation to parliamentary speech. Chapter 16 of the Legislative Council's Standing Orders deal with the maintenance of order by the President, the conduct of members in the chamber, and the rules of debate. Some of the specific rules include preclusions on using offensive words against other members, or reflecting on previous decisions of the House, the requirement that contributions be relevant and the right to speak. These rules are filled out by a large body of precedent from previous rulings by Presidents interpreting the Standing Orders. While not strictly binding, Presidents tend to follow the decisions of their predecessors, developing a consistent body of practice. Many of these standing orders and rulings are aimed at ensuring all members have an opportunity to participate in debate that is conducted in a measured and respectful manner.

Uhr, Steiner et al and others point out that the rules and conventions that operate in second chambers tend to promote deliberation. The clearest example of these second chamber rules is the existence of the filibuster as a procedural tool able to be used as

71 Advice from State Records, 29/9/2014. However, Sean Nicholls, "Premier loses the urge for openness," *Sydney Morning Herald*, 1/6/2013, p 29, suggests there might be renewed media interest in such a process of annual publication in the future.

72 Steiner et al, *Deliberative Politics in Action*, p 166–168.

73 For a fuller discussion of these principles see David Blunt, *Parliamentary traditions, innovations and the "great principles of English parliamentary law,"* Paper presented at the professional development seminar of the Australian and New Zealand Association of Clerks-at-the-Table, Canberra, 22 January 2012.

74 Uhr, *Deliberative Democracy in Australia*, p 228.

a veto-point by the minority in the US Senate.[75] Within parliamentary second chambers the equivalent provision is the procedure laid down for the use the "gag" or "guillotine," which in the case of the Legislative Council is clearly designed to make its use an absolute last resort.[76] Other conventions, such as that prior to speaking in debate members should be in the chamber to listen to the contribution of the preceding speaker, so as to be able to respond to that speech, and the following speaker, so as to listen to any responses to their speech, are premised upon parliamentary debate being dynamic and deliberative rather than a series of set piece contributions. The application of these conventions has a self-reinforcing quality: "deliberative norms can become inscribed in an institution with actors following these norms as a normal part of the institutional routine."[77]

The existence of written Standing Orders and long standing conventions is not sufficient, on its own, to ensure that debate is conducted in an appropriate manner. Even in the NSW Legislative Council there have been periods when, despite the best endeavours of Presiding Officers to enforce the rules, tendencies to boorish behaviour on the part of a small number of members have had a disproportionate effect on the tenor of debate. It is therefore pleasing to note that, in recent years, despite intense policy differences, clashes of ideology and complex matters of conscience being debated, there has been a noticeable return to the measured and "deliberative" conduct of debate more typical of the Legislative Council. Such a change does not occur by accident, but rather through the commitment and constant vigilance of all members, and the preparedness of those in leadership roles to counsel members about the appropriate norms of behaviour. Perhaps induction programs for new members have also had a positive impact in this regard.

An enhanced role for parliamentary committees in the legislative process?

Rhodes, Wanna and Weller describe parliamentary committees as the location of not only the most effective parliamentary scrutiny of executive government but also the most effective scrutiny and revision of legislation.[78] As noted above, the outcomes of Legislative Council committee work in the 55th Parliament have been quite extraordinary. Apart from the actual outputs of committee work, Steiner et al suggest they may have ongoing relationship building impacts:

> Furthermore, committees are small face-to-face groups that operate over an extended period of time, which may create habits of working together and friendships, as well as knowledge about each other. These outcomes, in turn, may foster trust and, as such, lubricate the deliberative process.[79]

75 Steiner et al, *Deliberative Politics in Action*, p 127.
76 Uhr, *Deliberative Democracy in Australia*, p 144.
77 Steiner et al, *Deliberative Politics in Action*, p 126–7.
78 Rhodes, Wanna & Weller, *Comparing Westminster*, pp 200–201.
79 Steiner et al, *Deliberative Politics in Action*, p 88.

Given the inquiries in which unanimous cross party outcomes have been produced during the 55th Parliament, it will be interesting to see what, if any, ongoing implications flow from the working relationships that have been forged and which facilitated those outcomes.

There are many reasons behind the success of parliamentary committees. These include their reflection, through their membership, of the broad range of views within the Parliament and the community, the skills and experience that members are able to bring to bear on subjects under examination, and the opportunity to examine matters in an environment better suited to finding good outcomes: "parliamentary committees allow legislators to deliberate without external interference, lower the pressures to follow the wishes of constituents, and make it easier for politicians to reflect, to show respect for the claims of others, or even to change their opinions."[80]

However, perhaps the major advantage of parliamentary committees is that it allows all members to receive and hear evidence together and to engage in a collective process of reasoning in the light of that evidence, with that evidence generally given in public.[81] This is perhaps most fitting in relation to the scrutiny of legislation, and would in many ways be a logical extension of and adjunct to the detailed consideration of amendments in committee-of-the-whole, the origins of which in the House of Commons during the reign of James I seems to indicate a desire on the part of members to deal in open in the House with the process of enacting legislation, which had up until that point been conducted behind closed doors.[82] Griffiths and Clune warned in *Decision and Deliberation* that the transparency of the parliamentary process is at risk if too much of the consultation and negotiation around legislation takes place outside the chamber.[83]

If it is unrealistic for this scrutiny, consultation and negotiation to take place on the floor of the House, perhaps the answer is to transfer some of it to parliamentary committees. There are plenty of models of active involvement of parliamentary committees in the scrutiny of legislation. Scrutiny of legislation by parliamentary committees is now regarded as a normal part of the legislative process in the Australian Senate. According to *Odgers Australian Senate Practice*:

> The consideration of bills by standing or select committees allows more effective scrutiny of legislative proposals than is possible in the whole Senate… Exposing bills to this heightened scrutiny makes for better legislation. Amendments to make improvements to bills are more likely to emerge from the process. If the framers of legislation know that it is to be subjected to this kind of scrutiny, and to the critical examination of those likely to be effected by it, they are likely to give more

80 Steiner et al, *Deliberative Politics in Action*, p 88.
81 Legislative Council, Proceedings of the C25 Seminar marking 25 years of the committee system in the Legislative Council, 20/9/2013, pp 26–27, per the Hon Max Willis.
82 Lynn lovelock, "Amendments in Committee," paper presented to the Fourth Australasian Legislative Drafting Conference, Sydney, 5/8/2005, p 2.
83 Griffiths & Clune, *Decision and Deliberation*, pp 679–680, 699.

> care and attention to their proposals, in anticipation of explaining them to Senate committees… It is not the practice of the Senate to delegate to committees the power to amend bills, but they may recommend amendments, which may then be considered by the Senate. That consideration is apt to be expedited by the work of committees.[84]

In New Zealand almost all bills are referred to select committees for detailed examination. Select committees are required to express an opinion on whether a bill should pass based on "the most minute study of the bill that any arm of the House [of Representatives] makes" and may also recommend amendments.[85] Since 2010 there has also been a presumption that bills would be referred to parliamentary committees in Queensland.[86]

A footnote: the impact of humour on parliamentary speech

The three Legislative Council debates analysed in this paper were all matters of considerable gravity. Amongst the serious and earnest contributions made by Members in the NSW Legislative Council, however, there is always a sprinkling of light hearted and sometimes genuinely funny moments. Whilst humour can sometimes be nasty and destructive, it is also capable of contributing positively to debate. Having often had a vague sense of the positive role of some of the humour used in the House, the following quotes from an article by Professor Sammy Basu of Williamette University in Oregon, written in response to suggestions that humour is somehow an aberrant or dubious form of linguistic behaviour, resonated and just had to be included in this paper:

> Humour provisionally suspends decorum, putting the mind at liberty to hear all sides. It allows one to temporarily suspend one's cherished beliefs and contemplate the implications without treachery… humour finds ambiguities, contradictions and parables in what is otherwise taken literally… humour keeps the process of reasoning open-ended… if humour facilitates cognition, it also prompts dispositional finesse, that is, ease, modesty and tolerance… it makes one available for convivial relations with others and otherness… Comedy permits frankness to be less threatening… humour can be more palatable than the vicious triangle of dogmatism, disputatiousness and deadlock… humour can gain entry into a closed mind… A well-placed joke may, then, act like a firm prod or provocation to another to reconsider what she holds dear in herself and dire in others.[87]

84 Harry Evans & Rosemary Laing (ed.s), *Odgers' Australian Senate Practice*, 13th edition, Department of the Senate, Canberra, 2012, p 307.

85 David McGee, *Parliamentary Practice in New Zealand*, 3rd edition, Dunmore Publishing ltd, 2005, pp 351, 356.

86 *Parliament of Queensland Act*, s 93.

87 Sammy Basu, "Dialogic Ethics and the Virtue of Humour," *The Journal of Political Philosophy*, 7 (4), 1999, pp 378–403, sourced having been quoted in Steiner et al, *Deliberative Politics in Action*.

CONCLUSION

For those interested in deliberative democracy and the institution of parliament, the record of parliamentary debate is a wonderful resource and an almost infinite primary source available for extensive research and analysis of the sorts of issues briefly touched upon in this paper. In advance of such further work, four preliminary conclusions present themselves from this review of a handful of debates and recent committee work in the NSW Legislative Council. Two conclusions are perhaps most relevant for political theorists, and two are hopefully of some use to participants in parliamentary processes.

Firstly, for those interested in deliberative democracy: don't give up on the institution of parliament. As the parliamentary debates in the NSW Legislative Council about the Industrial Relations Bill 1996 and the conduct of magistrate Maloney in 2011 demonstrate, Parliament can and does, at times, meet all of the criteria for effective deliberation, including not only "the giving of good reasons" but also "reflection upon the points advanced by others."[88]

Secondly, even when decisions have been made elsewhere, as with the Police Amendment (Death and Disability) Bill 2011, and parliamentary debate consists of statements by of fixed positions, with no evidence of the debate in the chamber itself having any "transformative power,"[89] parliamentary debate continues to fulfil crucial functions, including by "ensuring that legislative decision-makers meet a basic test of public accountability by openly debating and defending their proposals" and the outcomes of negotiations.[90]

Thirdly, the existing and long-standing rules and conventions, which provide the framework for measured and respectful parliamentary debate, continue to be important. Even where there are marked policy differences and ideological clashes, experience in the NSW Legislative Council suggests it is possible for debate to be conducted in a "deliberative" manner. Such an environment does not arise by accident, though, and its maintenance requires the commitment and vigilance on the part of all participants and those in leadership roles. Induction programs for new members should also include material on the rules of debate and the value of those rules.

Fourthly, there is much recent evidence of the "transformative power" of the collective evidence gathering and deliberative process in NSW Legislative Council committees. Given the effectiveness of this process and the importance for continued public confidence in the institution of parliament of scrutiny and negotiation over legislation being conducted, wherever possible, in a public setting, consideration could be given to sending more bills (particularly major bills) to parliamentary committees for public inquiry and report. Perhaps, it is time for there to be a rebuttal presumption, as in the Australian Senate, New Zealand and Queensland, that bills will be sent to parliamentary committees for inquiry and report as a standard element of the legislative process. Such a development could only enhance the legislative process and improve legislative outcomes.

88 Dryzek & Dunleavy, *Theories of the Democratic State*, p 215.
89 Dryzek & Braithwaite, "On the Prospects for Democratic Deliberation," p 241.
90 Uhr, *Deliberative Democracy in Australia*, p 93.

Beyond Numbers: The Role of Specialised Parliamentary Bodies in Promoting Gender Equality

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ABSTRACT

In the past two decades there has been increased international recognition of the role of specialised parliamentary bodies in promoting gender equality. Such bodies began to proliferate in the 1990s and data on them has been collected by the Inter-Parliamentary Union (IPU) since 2006.

IPU data collection focuses on two main types: single portfolio or multiportfolio Standing Committees and women's caucuses. Standing Committees may have a strongly institutionalised role in applying a gender lens to the legislative process, for example, the FEMM Committee of the European Parliament. By contrast, a cross-party women's caucus such as those found in sub-Saharan Africa may be a much more informal body, specialising in providing support to members through mentoring, capacity-building and networking.

A third type of specialised parliamentary body that can have a gender equality mandate is the all-party parliamentary group. Such groups require a minimum number of parliamentary members from across parties and need to be approved by a presiding officer or comparable parliamentary authority. The number of such bodies with a gender focus has also been increasing.

This paper uses a comparative institutional approach to examine these different types of specialised bodies and their ability to perform functions including legislative scrutiny and providing a channel for community groups and gender experts to participate in the legislative process. It examines existing parliamentary bodies specialising in gender equality in terms of their structure, membership, mandate, working methods and relationships and draws attention to their relative absence in Australia.

INTRODUCTION

During the 1990s, campaigns to increase the number of women in parliament became an important part of the international agenda; in countries transitioning from Communist or authoritarian regimes the under-representation of women was seen as a significant democratic deficit.[1] However it was soon recognised that there was a need to move 'beyond numbers' and to examine the kind of institutional supports that facilitated the representation of women's interests or the so-called 'substantive representation of women'.

Specialised parliamentary bodies dealing with gender equality had started multiplying in the 1990s and the 2000s; for example, there were enough equality bodies in European parliaments for a European Network of Parliamentary Committees for Equal Opportunities to be established in 1997. A decade later a UN survey of national mechanisms for promoting gender equality noted that establishment of mechanisms within parliaments was a growing trend although still not as common as women's policy agencies within government.[2]

In the Nordic region specialised parliamentary bodies are mostly quite recent and have come after the significant inflow of women into parliaments. In Sweden, Speaker Birgitta Dahl established the Speaker's Network for Women Parliamentarians after women had become a record 41 per cent of the parliament in the 1994 general election. She convened a meeting of women from all seven parliamentary parties to advise on how to make best use of this new strength in numbers. In Finland a Women's Network was similarly established after a record number of women entered parliament in 1991 and in following years the Network successfully drafted amendments to the law on gender equality and the right of children to daycare.[3] The same sequence of events has been found outside the Nordic region, with significant increases in women's legislative representation leading to the establishment of cross-party bodies to capitalize on these gains.

The chief multilateral support for the development of such bodies has come from the Inter-Parliamentary Union (IPU), which sees them as providing important infrastructure for 'gender mainstreaming'.[4] In transitional democracies, bilateral and multilateral

1 An earlier version of this paper was presented at the 3rd European Conference on Politics and Gender in Barcelona, 2013: Marian Sawer, Lenita Freidenvall and Sonia Palmieri, 2013. 'Playing their part? Parliamentary institutions and gender mainstreaming'. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488867

This version has benefited from research assistance provided by Richard Reid.

2 Jahan, Rounaq, 2010, *Strengthening National Mechanisms for Gender Equality and the Empowerment of Women: A Global Synthesis Study*, New York: UN Division for the Advancement of Women, p. 24: http://www.un.org/womenwatch/daw/TechnicalCooperation/tcprog_strengthening.htm

3 Sonia Palmieri, 2013, *A comparative study of structures for women MPs women's parliamentary bodies in the OSCE region,* Warsaw: OSCE Office for Democratic Institutions and Human Rights, p. 53: http://www.osce.org/odihr/105940?download=true

4 IPU, 2007. *The Role of Parliamentary Committees in Mainstreaming Gender and Promoting the Status of Women*, Geneva: Inter-Parliamentary Union.

donors have provided technical and other support, for example the National Democratic Institute for International Affairs (NDI) supported the creation of the Committee on Human and Minority Rights and Gender Equality of the Serbian National Assembly.

The IPU has been collecting data on specialised parliamentary bodies since 2006 and by February 2013, it had recorded 100 parliamentary bodies dealing with gender equality across 86 countries.[5] The IPU database contains two types of gender-focussed bodies – standing committees constituted under standing orders and women's caucuses, usually constituted more informally by women parliamentarians. The IPU, together with the International Institute for Democracy and Electoral Assistance (IDEA) and the Organization for Security and Cooperation in Europe (OSCE), has commissioned studies of such bodies and of the factors contributing to their effectiveness.[6] Independently, a number of case studies have now appeared on the role of such committees and caucuses.[7] There is also an extensive United States (US) literature on women's caucuses in State legislatures in particular, replete with varied definitions ranging from 'voluntary associations' to 'institutionalised bipartisan associations'.[8]

A third type of specialised parliamentary body, consists of parliamentary groups, requiring a minimum number of members from across parties and approval by a presiding officer or comparable parliamentary authority. Parliamentary groups have not been systematically included among the types of parliamentary bodies surveyed, by the IPU, despite the growth in recent years of their number, including groups with a gender focus.[9] Nonetheless there is at least one case study highlighting the role of a parliamentary group in the substantive representation of women.[10] Women's NGOs

5 See http://www.ipu.org/parline-e/instance-women.asp.

6 Keila Gonzalez and Kristen Sample, 2010. *One Size does not Fit All: Lessons Learned from Legislative Gender Commissions and Caucuses*. Lima: International Institute for Democracy and Electoral Assistance (IDEA) and National Democratic Institute (NDI) for International Affairs; Sonia Palmieri, 2011. 'Setting up dedicated gender mainstreaming infrastructure', Ch. 5 in Sonia Palmieri. *Gender-Sensitive Parliaments: A Global Review of Good Practice*, Geneva: IPU; Palmieri, *A comparative study of structures for women MPs women's parliamentary bodies in the OSCE region.*

7 Jackie Steele, 2002. 'The Liberal Women's Caucus', *Canadian Parliamentary Review* Summer: 13–19; Joan Grace, 2011. 'Parliament with a Purpose: Holding the Canadian Government Accountable to Women', paper presented at Second European Conference on Politics and Gender, Budapest, 13–15 January; Monica Costa, Marian Sawer, Rhonda Sharp, 2012. 'Women acting for women: Gender-responsive budgeting in Timor-Leste', *International Feminist Journal of Politics* DOI 10.1080/14616742.2012.714119.

8 For example, Leah Olivier, 2005. 'Women's Legislative Caucuses', National Conference of State Legislatures, Briefing Paper on the Important Issues of the Day 13(29); Anna M Mahoney, 2011. 'Politics of presence: A Study of Women's Legislative Caucuses in the 50 States', State Politics and Policy Conference Dartmouth, Hanover, New Hampshire.

9 The number of parliamentary groups in the UK parliament has more than doubled since the 1980s; in 2012 there were 420 such groups, of which around a dozen had a gender focus. Information from Paul Thomas, undertaking a PhD thesis at the University of Toronto, comparing parliamentary groups in the UK, Scotland and Canada.

10 Marian Sawer, 2012. 'What makes the substantive representation of women possible in a Westminster parliament? The story of RU486 in Australia'. *International Political Science Review*, 33 (3): 320–335.

(non-government organisations) work closely with these groups and in the United Kingdom (UK) regularly provide secretariat services for them.

The three types of specialised parliamentary body dealing with gender equality cover the spectrum from the most formalised (dedicated or multi-portfolio standing committees) to the least formalised (cross-party or single party women's caucuses), with parliamentary groups coming somewhere in between in terms of being subject to formal parliamentary approval although not constituted under standing orders. Standing Committees may have a strongly institutionalised role in applying a gender lens to the legislative process, for example, the Committee on Women's Rights and Gender Equality (FEMM Committee) of the European Parliament. By contrast, a women's caucus such as those found in sub-Saharan Africa may be a much more informal body, specialising in providing support to its members through mentoring, training, capacity-building, confidence-building, networking, discussions and information sharing. The resources available to such bodies also vary considerably, whether the parliamentary resources and staff allocated to a standing committee or the technical or research help that may be provided to women's caucuses by, for example, the United Nations Development Programme (UNDP) or by Non government Organisations (NGOs).

While the development of such gender-focused parliamentary bodies is now the subject of an international research network,[11] it is only beginning to be theorised as part of the repertoire of contemporary women's movements and of critical actors. One reason for this neglect may have been an earlier tendency of women's movement scholars to focus on contentious action or disruptive protest and to see institutionalisation in negative terms. However recent theorising has been more inclined to see women's movements as engaging in a range of repertoires, some of which involve autonomous organisation and some of which involve institution-building within existing political and governance institutions. The earlier tendency to privilege 'autonomous' groups over those advocating for women inside mainstream institutions is now disputed.[12]

And the role of feminists in the creation of specialised parliamentary bodies is undeniable and almost without exception. For example, Anne-Marie Lizin, President of the Belgian Senate, has spoken of how she worked to create such bodies in all the institutions in which she served during her career – the European Commission, the European Parliament, the Belgian House of Representatives and municipal government.[13] As we have seen, a feminist presiding officer was also responsible

11 The International Research Network on Gender-Focused Parliamentary Bodies (GenParlNet) was established at the 3rd European Conference on Politics and Gender in Barcelona in 2013 in order to develop information sharing and research collaboration in this area. <http://cass.anu.edu.au/research-projects/genparlnet>

12 Lee Ann Banaszak, 2010. *The women's movement inside and outside the state*, New York: Cambridge University Press; Laure Bereni and Anne Revillard, 2011. 'Contentious Institutions: Rethinking the Movement-State Intersection', paper presented at Second European Conference on Politics and Gender, Budapest, 13–15 January.

13 Anne-Marie Lizin, 2007. 'Keynote Address'. In *The Role of Parliamentary Committees in Mainstreaming Gender and Promoting the Status of Women*. Geneva: Inter-Parliamentary Union, p. 5.

for what became the Speaker's Reference Group on Gender Equality in the Swedish Parliament.

The aim of this paper is threefold: to outline the theoretical and empirical arguments for paying more attention to such parliamentary institution building; to provide a global overview and comparison of such bodies; and to draw attention to their relative absence in Australia. Existing survey material and data collection has been supplemented by interviews conducted in March 2013 with NGOs servicing gender-focused all-party parliamentary groups in the UK parliament and by a global survey conducted in August 2014 of parliamentary groups on population and development. The paper will begin with the case for parliamentary institution building. It will then examine existing parliamentary bodies specialising in gender equality in terms of their structure, membership, mandate, working methods, and relationships.

THE CASE FOR PARLIAMENTARY INSTITUTION BUILDING AND ITS STUDY

Many studies have noted that initial hopes of women in parliament 'making a difference' and acting in women's interests have not always been met. A number of reasons have been offered for this, including that of timing. The inflow of women into parliaments from the 1990s coincided with the increased influence of neoliberalism over mainstream political parties. In this context, raising women's concerns in parliament may run counter to party agendas, if the concerns relate to the gender impact of welfare state restructuring and public sector cuts.[14] Expecting individual women parliamentarians to assume all responsibility for raising, in parliament, the concerns of women in the community is clearly unrealistic and unfair when it may result in marginalisation and damage to political prospects. It may also absolve male parliamentarians from responsibility for raising such concerns.

The constraints on what individual parliamentarians can do underlines the importance of creating bodies that have a mandate to apply a gender lens to policy and to oversee the gender mainstreaming commitments of governments. Such bodies may facilitate the critical acts of individuals but their institutionalised focus on gender equality provide a legitimacy that might otherwise be lacking. This is the same rationale as for other forms of women's movement institutionalisation – to build women's movement agendas into institutional norms and practices, so that new generations are socialised into these agendas. It is only through such institutionalisation that such agendas can be sustained over time, despite new generations arriving that are unfamiliar with them.

14 For an overview see Marian Sawer, 2006. 'From women's interests to special interests: Reframing Equality Claims', in Louise Chappell and Lisa Hill (eds), *The Politics of Women's Interests*. London and New York: Routledge, pp. 111–29.

The role of gender-focused parliamentary bodies varies along with their mandates and structural relationships and a comparison of the role of different types of bodies is presented in the next section. Nonetheless, studies conducted to date have identified important functions performed by such bodies, regardless of specific type.

First, both the institutional mandates of gender-focused bodies and the less formal mandates of collective bodies of women parliamentarians provide a focus and leverage beyond that of individual parliamentarians.[15] As we have noted, regardless of equity commitments, individual parliamentarians are constrained by conflicting accountabilities and limitations on their power to act. The leverage provided by institutionalising gender equality commitments means that such issues can be raised more effectively in the parliament as a whole. As we shall see below, even in the women-friendly Swedish Parliament a gender-focused group was viewed by its members as providing a recognised platform to speak on gender equality issues.[16]

Second, where such bodies are of a cross-party nature they may promote trust across party lines and facilitate joint action to promote gender equality. In the Australian Parliament, joint work within the Parliamentary Group on Population and Development helped build the trust needed for women from four different parties to co-sponsor a successful private member's bill on RU486 – a unique co-sponsorship within a highly adversarial Westminster political culture.[17] In general, such cross-party cooperation is most likely to be forthcoming on issues such as violence against women, equal opportunity and women's health.

Gender-focused parliamentary committees and parliamentary groups also provide opportunities and encouragement for men to become champions of gender equality issues.

Third, gender-focused bodies serve as an 'alternative reference point' for parliamentarians, in other words validating norms that are different from those dominant within the parliament.[18] As Joan Grace has written, a body such as the Standing Committee on the Status of Women in the Canadian House of Commons has enabled Committee members to frame policy discussion through a gender lens in a way that would be impossible in their own party rooms.[19] Collective affirmation of feminist insights and values and the personal support networks generated by such

15 Monica Costa, Marian Sawer, Rhonda Sharp, 2012. 'Women acting for women: Gender-responsive budgeting in Timor-Leste', *International Feminist Journal of Politics* DOI 10.1080/14616742.2012.714119.

16 Sawer, Freidenvall and Palmieri, 'Playing their part? Parliamentary institutions and gender mainstreaming', p. 23.

17 Sawer, 'What makes the substantive representation of women possible in a Westminster parliament?'.

18 Marianne Githens, 2003. 'Accounting for women's political involvement: The perennial problem of recruitment'. In Susan J Carroll (ed), *Women and American Politics: New questions, new directions.* Oxford: Oxford University Press, p. 43; Sandra Grey and Marian Sawer, 2005. 'Australia and New Zealand'. In Yvonne Galligan and Manon Tremblay, *Sharing Power: Women, Parliament and Democracy*. Aldershot: Ashgate, p. 186.

19 Grace, 'Parliament with a Purpose', p. 20.

gender-focused bodies may play a significant role in empowering parliamentarians and enabling them to move beyond cognitive dissonance to be 'brave' on issues.

Fourth, such bodies may provide a channel for participation of NGOs in the parliamentary process. For example, gender-focused parliamentary committees and commissions may regularly call upon women's NGOs to present submissions and give evidence at hearings. This may be particularly significant given findings that in general parliamentary standing committees rarely call upon gender experts or women's NGOs to give evidence.[20] It is specialised parliamentary bodies that may take responsibility not only for bringing a gender perspective to bear but also ensuring that relevant NGOs are involved in both the review of legislation and of its implementation.[21]

Women's caucuses may build partnerships both with women's NGOs and with women's policy agencies within government or statutory commissions. Gender-focused parliamentary groups may have an even closer relationship with the women's NGOs that provide them with secretariat services, resulting in the issuing of joint reports.[22] Such close relationships between parliamentary bodies and women's NGOs fosters the engagement of the latter with processes of legislative review and executive scrutiny. These linkages have also been found to have positive effects on parliamentarians, with those in regular contact with women's organisations having greater commitment to represent gender-specific concerns than those that do not.[23] Women's movement organisations are a source of evidence on the concerns of different groups of women in the community. They may also be a source of external recognition and affirmation of the value of speaking out in parliament on gender-related issues.

The arguments for specialised parliamentary bodies can be summarised as falling under three main headings, depending on whether they are concerned with empowering individual MPs, improving the functioning of parliament or realising feminist values (see Table 1).

20 Anne Maria Holli, 2009. 'The representation of women in the parliamentary standing committee hearings in Finland'. Paper to the IPSA World Congress in Santiago, Chile: http://paperroom.ipsa.org/papers/paper_3991.pdf.

21 Julie Ballington, 2008. *Equality in Politics: A Survey of Men and Women in Parliaments*, Geneva: IPU, p. 68.

22 For example, the 2011 Shadow Report on implementation of the UK National Action Plan on Women, Peace and Security, produced by the Associate Parliamentary Group on Women, Peace and Security and the NGO umbrella group, Gender Action on Peace and Security.

23 For example, Manon Tremblay, 'Do female MPs substantively represent women? A study of legislative behaviour in Canada's 35th parliament'. *Canadian Journal of Political Science* 31(3): 435–465.

Table 1: Arguments for specialised parliamentary bodies dealing with gender equality

Empowerment arguments	• Reduce pressure on individual MPs
	• Create cross-party networks
	• Support 'critical acts', provide leverage
	• Provide scope for male champions
Functional arguments	• Foster cross-party collaboration
	• Apply a gender lens to legislation
	• Oversight gender mainstreaming
	• Promote NGO engagement
Feminist arguments	• Sustain movement agendas through institutional mandates
	• Act as alternative reference point to dominant norms
	• Provide gateway for concerns of diverse groups of women to be registered

Clear practical reasons have been identified for supporting feminist institution-building in parliament, as in other political and governance institutions. Yet specialised parliamentary bodies are also nested within larger institutions with their own norms and practices, including norms of parliamentary behaviour that are far from gender neutral.[24] Do such dynamics, including those of partisan competition, prevent gender-focused parliamentary bodies from having an impact in terms of mainstreaming gender perspectives? One way to answer this question is by examining the expanding number of such bodies worldwide and comparing their roles and relationships.

STANDING COMMITTEES DEALING WITH GENDER EQUALITY

Examples of dedicated gender equality committees include the Belgian Advisory Committee on Equal Opportunities for Men and Women, the Canadian House of Commons Standing Committee on the Status of Women, the Indian Committee on the Empowerment of Women, the Spanish Committee on Equality, and the Task Forces on the Rights of Women and Equal Opportunities for Men and Women in both the French Senate and the National Assembly. These are permanent bodies of their parliaments, constituted under standing orders, with membership reflecting the representation of political parties (or parliamentary party groups) in the parliament. As is the case with any parliamentary committee, dedicated gender equality committees may hold public hearings and consult with their policy communities to determine the gender effect of

24 Fiona Mackay, 2014. 'Nested Newness, Institutional Innovation and the Gendered Limits of Change'. *Politics & Gender* 10(4): 549–571.

policies, programs and legislation. Ministers and government officials may be brought before the committee to answer questions. Half of the countries responding to a 2011 OECD survey indicated they used such committees as an accountability mechanism and to oversight progress in implementing gender equality policies.[25]

Dedicated parliamentary committees have been found to make an important contribution to gender mainstreaming, including initiation of gender equality laws, review of implementation and application of a gender lens to other legislative proposals. In South Korea, the Standing Committee on Gender Equality and the Family has promoted initiatives such as the gender budgeting clause included in the 2006 *National Finance Act*. Dedicated gender equality committees have also been tasked with auditing national women's machinery as in India, or may commission audits of gender mainstreaming in government, as in Canada. As with all specialised parliamentary bodies, good working relationships with women's policy agencies, gender research institutes and women's NGOs may be helpful in identifying key gender issues.

The best-known of the dedicated parliamentary committees on gender equality is probably the FEMM Committee of the European Parliament and it is considered here as an exemplar of this type of specialised parliamentary body. As with so many of these bodies, the catalyst for its establishment was both a feminist presiding officer and an influx of women parliamentarians. In this case it was the election of Simone Veil as the President of the European Parliament that was the key factor, along with an increase in the number of female MEPs (from five per cent to 16 per cent) after the first direct election to the parliament in 1979.[26] Originally an ad hoc committee, it became a permanent committee in 1984.

The FEMM Committee consists of representatives from all political parties represented in the European Parliament. Its major tasks include overseeing women's rights policies in the EU and evaluating policies and programs that concern women. Other tasks include monitoring the implementation of international agreements and conventions involving the rights of women. As one of the standing committees of the European Parliament, it also reviews draft legislative documents and amendments that have been assigned to it by the Parliament and appoints a *rapporteur* to draft a report. Proposed amendments are discussed and voted upon in committee before the text is finalised. The Committee also votes on 'gender mainstreaming amendments' prepared for other standing committees in order to integrate gender issues into their reports.

Reports of the FEMM Committee are usually based on background work conducted by committee personnel, who consult both civil society organisations and the research community for their work. Researchers are also invited to carry on studies on the behalf of the Committee, for example, the regularly updated study 'Electoral Gender Quotas and their implementation in Europe' led by Drude Dahlerup. The most recent

25 OECD, *Women, Government and Policy Making in OECD Countries: Fostering Diversity for Inclusive Growth*, Paris: OECD Publishing, 2014, p. 158.

26 Johann Kantola, 2010. *Gender and the European Union.* Basingstoke: Palgrave Macmillan.

study shows there are now eight EU countries that have introduced electoral gender quotas by law, most recently Greece and Ireland. [27] In terms of legal reviews, there has been a focus on treaties such as the Equal Treatment Directive 2002 and the Good and Services Directive 2004 as well as on issues such as violence against women and trafficking. Gender mainstreaming has also been important subject for the Committee's attention.

Besides its ordinary committee work, the FEMM Committee also organises hearings, workshops and other events, engaging actively and sometimes proactively with women's advocacy groups. For example, in the run up to a public hearing on women and climate change, the Committee brought together women's advocacy, aid and environment organisations to promote an international network on the issue. As is clear from this example, the Committee's focus is not restricted to matters internal to the European Union (EU). In 2012, a delegation to Tunisia led to a draft resolution on the need for the EU to support the participation of women in the democratisation process including support for a women's caucus or special parliamentary committee in the Tunisian parliament.[28]

However the Committee also has an important role in relation to internal EU gender policy such as a hearing in 2012 addressed by gender experts on the best legal and institutional mechanisms for achieving gender equality in the EU. Sometimes workshops are organised to enable MEPs to put questions to and exchange views with experts on subjects related to current committee work such as the costs and benefits of maternity and paternity leave. Interestingly, the differences expressed within the Committee are often more between member states than between political parties. On 8 March in 2012, as part of its International Women's Day celebration, an inter-parliamentary committee meeting was organised in Brussels for members of national parliaments as well as members of the European parliament on the topic of equal pay for work of equal value.

When it comes to cooperation with other gender policy actors, the FEMM Committee stays in contact with other EU policy agencies, such as the European Commission's Advisory Committee on Equal Opportunities for Women and Men. The FEMM Committee also has a strong NGO partner in the European Women's Lobby (EWL), which has observer status on the Committee. Like most gender-focused parliamentary institutions the FEMM Committee has been under threat on a number of occasions and the EWL has campaigned to ensure its continuing existence.[29] The operation of the FEMM Committee illustrates what Alison Woodward calls the 'velvet triangle' of policy actors within the European Union sharing a collective feminist identity and

27 Drude Dahlerup et al, 2008, 2011, 2013. 'Electoral Gender Quotas and Their Implementation in Europe'. Policy Department C, Citizens' Rights and Constitutional Affairs, European Parliament. http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493011/IPOL-FEMM_NT(2013)493011_EN.pdf

28 Silvia Costa (Rapporteur), 2012. *Draft Report on the Situation of Women in North Africa* (2012/2102 (INI)), Committee on Women's Rights and Gender Equality, European Parliament, p. 6.

29 Kristi Kolthoff, 2007. 'The European Women's Lobby', *Role of Parliamentary Committees in Mainstreaming Gender and Promoting the Status of Women.* Geneva: IPU, p. 95.

often acting in alliance.[30] The 'triangle' consists of feminist politicians, typically found on the FEMM Committee, femocrats found in the European Commission and other EU institutions, academics and experts advising on feminist policy, and women's non-government organisations.

Apart from dedicated parliamentary committees like the FEMM Committee, in many parliaments there are multi-portfolio committees that include gender equality. IPU data suggests that there are two predominant sub-groups of multi-portfolio committees that include gender equality concerns: those that have a heavy emphasis on social affairs and the family and those that are more interested in human rights, and legal and constitutional matters. Examples of the former category include the Committee on Families, Women and Children in El Salvador, the Committee on Family and Social Policy in Poland, and the Norwegian Parliament's Standing Committee on Family and Cultural Affairs. The latter category includes the Estonian Constitutional Committee, Irish Joint Committee on Justice, Defence and Equality and Zambia's Committee on Legal Affairs, Governance, Human Rights and Gender Matters.[31] While multi-portfolio committees may result in a gender focus being brought to bear on a number of policy areas, they may also have less time to devote to gender issues.

In Sweden all parliamentary committees have been given responsibility for considering gender equality issues within their respective fields of work. However, in practice the Committee on the Labour Market plays a major role. The *Riksdag Act* allocates special responsibility for dealing with issues relating to equality between women and men in working life to this committee, which also prepares appropriations falling within expenditure area 13, 'Integration and gender equality'.

Table 2: Parliamentary committees dealing with gender equality, February 2013

Committee type	Number of bodies	Membership (% women)	Leadership (% women Chairs)
Dedicated gender equality committees	40	66	87.5
Multi-portfolio committees	53	38	41.5

Source: Table prepared by Sonia Palmieri from the IPU Database of specialised bodies dealing with gender equality.

30 Alison Woodward, 2000. 'Building Velvet Triangles: Gender in EU Policy Making', paper presented at European Consortium for Political Research 28th Joint Sessions, Copenhagen, April.

31 Palmieri's categorisation of multi-portfolio committees is from Sawer, Freidenvall and Palmieri, 'Playing their part? Parliamentary institutions and gender mainstreaming', p. 12.

The membership and leadership of these two categories of parliamentary committees are presented in Table 2 (above). Women constitute the majority of the membership of the dedicated parliamentary committees on gender equality (66% of all members). Women are also far more likely to chair these dedicated committees (87.5%) than multi-portfolio committees (41.5%).

In some countries the membership of committees with a gender equality remit is not restricted to parliamentarians, for example the Croatian Committee on Gender Equality has, in addition to its parliamentary members, three appointed members from institutions in the field of the promotion of gender equality and the protection of human rights.

WOMEN'S CAUCUSES

A second type of gender-focussed parliamentary body is a parliamentary women's caucus. These are often found in conjunction with a dedicated standing committee and can play an important role in building a cross-party consensus on an issue before it is considered more formally.[32] They also characteristically provide a support network and mentoring for women parliamentarians, with their mode of operation decided by those establishing the caucus.[33] Jennifer Piscopo, argues that while in Latin America women's caucuses may often be formal rather than informal in terms of rules and recognition by the legislature, their tactics need to be informal to maximize their adaptability and effectiveness.[34]

Women's parliamentary caucuses may be either of a cross-party type, common in transitional democracies, or of the single-party type often found in countries with stronger party systems including Australia, Canada and Norway. Women's cross-party parliamentary caucuses are common in Latin America, Sub-Saharan Africa and in the former Soviet bloc countries.[35] Some include men, in an attempt to ensure that gender equality issues are not only advanced by women, but this is not the case in Latin America.

Women's caucuses have been created to serve a number of purposes and functions, some of which are covered above in the general arguments for gender-focused parliamentary bodies. First, they may seek to ensure that gender equality issues are mainstreamed across the work of the parliament and government, as when the Women's Caucus in the Timor Leste Parliament introduced its gender responsive

32 Palmieri, *Gender-Sensitive Parliaments,* pp. 49–50. See also Susan Markham, 2012. 'Strengthening Women's Roles in Parliaments', *Parliamentary Affair*s 65, doi: 10.1093/pa/gss024.

33 National Democratic Institute, 2008, 'Women's Caucuses Fact Sheet', Washington: NDI.

34 Jennifer Piscopo, 2014. 'Committees and Caucuses: How Legislative Institutions Shape Substantive Representation in Latin America'. Paper presented at the IPSA World Congress, Montreal, July, p. 8. https://www.ipsa.org/sites/default/files/ipsa-events/montreal2014/papers/paper-28984-2014-07-04-0100.pdf

35 Gonzalez and Sample, *One Size does not Fit All,* pp. 18–19.

budgeting initiative.[36] They may play an important role in the passage of legislation such as the Law on Gender Equality in Albania and in the introduction of gender electoral quotas.[37]

In the US, the Congressional Caucus for Women's Issues (in existence since 1977) boasts of legislative achievements including the *Pregnancy Discrimination Act*, the *Violence against Women Act* and *the Commission on Advancement of Women and Minorities in Science, Engineering and Technology Development Act.*[38]

Most distinctively, in terms of the three types of specialised parliamentary bodies, women's caucuses are likely to provide support to their members in the form of mentoring, training, capacity-building, confidence-building, networking, discussion and information sharing. For example: the Network of Women Deputies of the Finnish Parliament organises seminars and informal events to promote information exchange and to raise awareness of gender issues; the Rwandan Women Parliamentarians' Forum organises training to fill in skills and knowledge gaps.

It is rare for a women's parliamentary caucus to have full-time dedicated staff.

although international organisations such as the UNDP and the IPU have sometimes provided women's parliamentary caucuses with both financial and technical assistance.[39] Women's non-government organisations and research institutes may also help women's caucuses identify key gender issues in proposed legislation and in turn women's caucuses as well as standing committees can enhance the access of NGOs to the legislative process.

Women's caucuses benefit from good relations with the relevant parliamentary committee tasked with gender mainstreaming. Formalising such relationships can prove a successful strategy. For example, the leadership of the Macedonian Women's Parliamentary Club has 'ex officio' status on the parliamentary committee on Equal of Opportunities for Women and Men. While the Club serves as an informal forum where gender-related policies are debated and agreed across party lines, those policies are then formally discussed within the Committee, giving them the attention of the Minister. This process resulted in the adoption of the Law for Equal Opportunities of Women and Men, and the Law on Maternity Leave.[40]

36 Costa et al, 'Women Acting for Women'.

37 For examples including Albania, Macedonia and Poland, see Palmieri, *A Comparative Study of Structures for Women MPs in the OSCE Region,* pp. 28–29.

38 'Caucus Accomplishments', 2014. http://www.womenspolicy.org/our-work/the-womens-caucus/caucus-accomplishments/

39 The Gender Caucus in the National Assembly of Burkina Faso (established 13 October 2005 by resolution of the Assembly President), for example, has a formal bureau and a plan of action.

40 Palmieri, *A Comparative Study of Structures for Women MPs in the OSCE Region,* pp. 42–43.

PARLIAMENTARY GROUPS

As we have seen, one of the distinctive features of parliamentary groups is the role often played by NGOs in providing their secretariat. For example, in the UK, the Fawcett Society ('Closing the inequality gap since 1866') helps provide the secretariat for the All-Party Parliamentary Group for Sex Equality, the Howard League for Penal Reform provides the secretariat for the All-Party Parliamentary Group on Women in the Penal System and Gender Action for Peace and Security (GAPS) assists the relevant parliamentary group on women, peace and security. Issue-based parliamentary groups tend to strengthen the relationship between NGOs and the parliamentary process and provide a channel whereby NGO expertise is shared with parliamentarians and NGO priorities can inform the legislative process.

Internationally it is the parliamentary groups on population and development that have been the most active of the gender-focused groups. These have been established in all regions of the world particularly to support and promote the Program of Action adopted at the 1994 International Conference on Population and Development (the Cairo Program). This was a landmark program in its recognition of reproductive health and rights, as well as women's empowerment and gender equality, as was seen as one of the cornerstones of population and development programs. The parliamentary groups put gender equality at the heart of their objectives as in this self-description of the Australian group: 'We are a group of politicians across Federal, State and Territory Parliaments who have put our political differences aside to work together to champion women's empowerment, break down gender discrimination and advocate access to safe reproductive health services'.[41] The parliamentary groups (or the bodies servicing them) have received assistance from the United Nations Fund for Population Activities and family planning associations as well as from US philanthropic foundations such as the Rockefeller and Hewlett Foundations. This was part of an explicit strategy following the Cairo Conference, when the creation of parliamentary groups (like that established in the UK in 1979) was seen an effective way to bring pressure on donor governments to meet the commitments they had made. Today the many parliamentary groups being established in transitional democracies also have an important role in promoting and gaining public support for the rights of women, particularly their sexual and reproductive health rights

There are now some 65 parliaments with parliamentary groups on population and development, with at least half of them created since 2000. In addition there are related regional forums of parliamentarians in each continent. For example, the European Parliamentary Forum on Population and Development (EPF) was registered in Brussels in 2000. It coordinates the work of 31 all-party parliamentary groups in parliaments across Europe. Its website points out that Europe is home to 18 of the world's 23 donors of development assistance and hence that the parliamentarians

41 See http://www.pgpd.asn.au/#!about/cqn6

in this forum have a crucial role in ensuring aid commitments are met by national governments.[42]

In recognition of the importance of its role in keeping up pressure on national governments, the EPF attracts support from a wide range of donors, including German and US philanthropic foundations as well the United Nations Population Fund (UNFPA) (previously the United Nations Fund for Population Activities) and the European Commission. These resources enable the EPF to support participation in its events by members of new national parliamentary groups such as the Armenian All-Party Group on Population Growth and Reproductive Health. Like most parliamentary groups on population and development, the EPF provides an important space for male champions, although women form the majority of activists and executive members. In 2014 the EPF joined with the European Women's Lobby and other groups to oppose a European Citizen Initiative that sought to prevent EU funding of any 'abortion-related' family planning services.

Since 2002 there has also been an international Parliamentarians' Conference (IPCI) on Implementation of the Cairo Program. The sixth of these international conferences was hosted in 2014 by the Swedish All-Party Group on Sexual and Reproductive Health and Rights, together with the European Parliamentary Forum on Population and Development. The parliamentary groups on population and development are credited with promoting or defending policies on reproductive health and women's rights. For example, the UK All-Party Parliamentary Group on Population, Development and Reproductive Health (the model for many others around the world) is credited with being the catalyst for new legislation on female genital mutilation,[43] while the Australian Parliamentary Group was eventually successful in the restoration of family planning programs in Australian development assistance.

Somewhat similar in operation to a parliamentary group, but with parliamentary staff rather than an NGO providing secretariat services was the Speaker's Reference Group on Gender Equality in the Swedish Parliament (initiated, as noted above, in 1995 by Speaker Brigitte Dahl and operating until 2014). It was chaired by the Speaker, had one representative from each parliamentary political party and a staff of two parliamentary officials with gender expertise. It held breakfast meetings and seminars to promote awareness of gender issues and develop the capacity to apply a gender lens in parliamentary work. It also produced gender-disaggregated statistics and reports. The rules of procedures regulating the Speaker's Reference Group were stipulated in the *Gender Equality Action Plan of the Swedish Parliament 2010–2014.* It did not have formal power to review legislation but was a meeting point for gender equality spokespersons from the different parliamentary parties and provided institutional legitimacy for a

42 See the European Forum's website, (http://www.epfweb.org/about-epf.

43 Moira Dustin and Anne Phillips, 2008. 'Whose agenda is it? Abuses of women and abuses of "culture" in Britain', *Ethnicities*, 8 (3), p. 415.

focus on gender issues. It also enables the sharing of information concerning what the different political parties are doing about gender equality. [44]

The Speaker's Reference Group had relations with a range of parliamentary bodies as well as with NGOs. It had overlapping membership with the Committee on the Labour Market, the standing committee with special responsibility for gender issues, and also cooperated with other parliamentary networks such as the Network of Male Parliamentarians for Gender Equality and the Network against Discrimination and Crime in the Name of Honour. While the Reference Group involved the Swedish Women's Lobby (SWL), and the national federations of women's organisations in some of its activities, the relationship was not apparently close, unlike the case with parliamentary groups elsewhere.[45] Internationally the Speaker's Reference Group visited the FEMM Committee in the European Parliament and the European Institute for Gender Equality (EIGE) in Vilnius.

AUSTRALIAN GENDER EQUALITY ARCHITECTURE

While Australia was a pioneer in terms of women's policy machinery and was once regarded as a source of best practice, the parliamentary component of its gender equality architecture has always been extremely weak. There have been some important parliamentary enquiries, for example into pay equity or the effectiveness of sex discrimination legislation; however there has never been a standing committee in any Australian parliament tasked with promoting gender equality or overseeing gender mainstreaming. Neither has there been a cross-party women's caucus, although events such as women's dinners have been organised from time to time.

One exception to this absence of specialised bodies has been the existence for over 30 years of an effective single-party caucus, the Federal Parliamentary Labor Party's Status of Women Committee (SWC). This was established by a feminist Senator, Pat Giles in 1983 and is still in operation despite occasional threats, for example from streamlining of party committees in 1996 and 2007. Similar bodies within State Parliamentary Labor Parties have been less successful. The SWC has been important in drawing the attention of Labor ministers and shadow ministers to the gender implications of policy proposals. In 1993 the SWC was responsible for a temporary reprieve for the federal government's women's budget statement, an Australian innovation that was the forerunner of the gender budgeting process now recommended by the OECD.[46] Although federal governments stopped producing full women's budget statements covering the gender effects of outlays, the SWC took on the role of presenting analyses of the gender implications of government budgets at annual budget

44 See Freidenvall's case study on the Speaker's Reference Group in Sawer, Freidenvall and Palmieri, 'Playing their part? Parliamentary institutions and gender mainstreaming'.

45 Ibid.

46 OECD, 2014. *Women, Government and Policy Making in OECD Countries: Fostering Diversity for Inclusive Growth.* OECD Publishing: pp. 190–96; p. 199.

breakfasts.[47] Women's NGOs are a primary audience for these budget breakfasts and women's NGO representatives also bring issues of particular concern to the SWC, for example over the cancelling of a national time-use survey in 2013.

In addition to the single-party women's caucus, there are also currently three parliamentary groups in the federal parliament with a gender or sexuality focus. As we have seen, there has been a Parliamentary Group on Population and Development in the federal parliament since 1994 and this has a government chair and opposition and minor party vice chairs. Its first chair was feminist Senator, the Hon. Margaret Reynolds and its secretariat was provided by the Australian Reproductive Health Alliance, created for this purpose with funding from US philanthropic foundations and the UNFPA. Today its secretariat is provided by Care Australia and it still has some UNFPA funding. It has 48 members from the different parties in the federal parliament and 43 from parties in the State and Territory parliaments.[48] Its most high-profile achievement was its role in the success of a cross-party private members' bill on RU-486.[49] More recent parliamentary groups in the federal parliament dealing with gender and sexuality issues are the Parliamentary Friendship Group for LGBTI Australians and the Parliamentary Friendship Group for Women in Science, Maths and Engineering. None of these bodies has been reported to the IPU in response to the surveys on specialised parliamentary bodies concerned with gender equality and nor do they appear in Australia's UN reporting on its gender equality machinery, so they have a low profile internationally.

CONCLUSION

Parliamentary committees on gender equality, parliamentary groups and women's caucuses play different, but complementary, roles in promoting gender equality and applying a gender lens to legislation and policy. Their effectiveness varies, and the strength of party adversarialism, the nature of parliamentary culture or lack of strong leadership may lead to marginalisation. However, the very creation of parliamentary institutions with a gender equality mandate provides space for deliberation on gender issues.

Such bodies provide an alternative reference point to dominant parliamentary norms as well as a platform for gender-focused debate. They can provide leverage and legitimacy beyond that of individual parliamentarians. At the same time, they may be a source of networks and partnerships that amplify the effectiveness of individuals and provide support for their interventions. Regardless of their particular type, they all provide some additional access for women's civil society organisations to the legislative process.

47 Alicia Turner, 2014. 'An Inquiry into the Functions of the Status of Women Caucus Committee of the Federal Parliamentary Labor Party'. Hons thesis, School of Politics and International Relations, ANU.

48 See http://www.pgpd.asn.au/#!about/cqn6

49 See Sawer, 2012. 'What makes the substantive representation of women possible in a Westminster parliament? The story of RU486 in Australia'.

Despite the achievements of such specialised parliamentary bodies, as identified by their members in surveys and case studies, we still lack systematic knowledge of the role of such parliamentary bodies within processes of gender mainstreaming. We need to know more about perceptions of these roles – not only from members of such bodies but from others within the parliament, and from the women's NGOs that work with them. Only comparative research, similar to that now available on women's policy agencies, will provide a clearer picture of the contribution of gender-focused parliamentary institutions to the promotion of gender equality. This is important knowledge for understanding the kind of institutional supports needed if the substantive representation of women is to be achieved, rather than simply more women in parliaments.

Participation and Power: Aboriginal Representation and Members of the Northern Territory Legislative Assembly 1974–2014

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BACKGROUND AND INTRODUCTION

The starting point for this paper was inspired by an opinion piece in the *Australian Financial Review* where the political editor Laura Tingle wrote in 2013 as follows:

> *Take Prime Minister Julia Gillard's move to get Nova Peris onto Labor's Northern Territory Senate ticket. What a shock it was to see the local ALP establishment which has singularly and disgracefully failed to promote any Indigenous candidates expressing outrage at the PM's move. Quelle surprise!*[2]

How does this claim sit against the reality that on 34 occasions in the Northern Territory over 12 Assemblies since 1974, a person of Aboriginal heritage has been elected as a Member of the Legislative Assembly?

In each of the twelve Assemblies there has been at least one Aboriginal Member and a number of candidates at each election.

On that basis, the comment deserves some analysis as to why it is so framed and whether it is fair in the overall context of representation in the jurisdiction. This paper does not analyse whether Aboriginal Members of Parliaments achieve results for Aboriginal peoples. For an analysis of that matter see Sarah Maddison's 2010 article[3].

This somewhat dismissive comment arguably undervalues and diminishes the contributions made by so many Aboriginal people as candidates, potential Members and Members in the Northern Territory.

The theme of the 2014 Australasian Study of Parliament Group conference – *How Representative is Representative Democracy,* lends itself well to developing this

1 The author is an outsider to the Territory, first arriving more than ten years ago, the locals often demand layers of credentialing before becoming the mythical authentic 'Territorian'. Interestingly, not one of the Territory's ten Chief Ministers since 1978 was born in the Northern Territory.

2 *Like Lincoln, Gillard Grabs the Nettle* Laura Tingle Australian Financial Review Friday 1 February 2013 page 47

3 *White Parliament, Black Politics: The Dilemmas of Indigenous Parliamentary Representation* Sarah Maddison Australian Journal of Political Science Vol 45 No 4 December 2010 page 663

discussion looking factually (as far as possible) rather than critically, at what 'Aboriginal representation' is and what people think it should mean, in the context of the Northern Territory of Australia.

The paper explores participation by Aboriginal peoples in Northern Territory elections and the Legislative Assembly and suggests that there is an unsatisfied longing for the Northern Territory to be the 'authentic voice' of Aboriginal Australia in terms of representation and resolving difficult matters.

The paper only superficially examines contemporary matters relating to some of the Aboriginal Members in the existing and previous Assemblies and acknowledges the distinctive historical attitudes by electors resident in the Territory to governance itself, which could be characterised as resentful[4].

Many commentators and writers have noted this quality[5] and to some extent it is borne out in the words of former Territory Chief Ministers themselves in a recent book[6] when they considered the challenges they faced with governance and service delivery, and the large proportion of traditional and urban Aboriginal peoples in this sparsely populated and vast jurisdiction.

The States versus the Commonwealth tug of war and blame game has been a permanent feature and a vastly magnified one of the Northern Territory's relations with the Commonwealth. This is due in part to its entrenched inferior constitutional status and the retention of Commonwealth control over Aboriginal land, two significant national parks and uranium mining, which are normal state based powers elsewhere in Australia.

4 North Australian Research Bulletin: *Elections in the Northern Territory 1974–1977* D NARU Bulletin No 4 1979 Jaensch and P Loveday Eds. Page 11

5 Carment, Jaensch and Loveday as well as a range of former Chief Ministers cited elsewhere in this paper.

6 *Speak For Yourself: Chief Ministers Next 1 347 525km*^{2} Clare Martin and Mickey Dewar CDU Press 2012

THE NORTHERN TERRITORY IN CONTEXT

The Northern Territory is a jurisdiction of some 230 000 residents with a small Legislative Assembly of 25 members and two Representatives and two Senators totalling just four MPs in a Federal Parliament of 276. In other words, 272 of those people meeting in the Parliament in Canberra represent the rest of Australia.

Has the Northern Territory failed in terms of Aboriginal representation in the Australian Parliament? Queensland elected Senator Neville Bonner in 1972 (appointed previously on a casual vacancy in 1971), New South Wales elected Senator Aden Ridgeway to the Senate in 1999, Western Australia sent the Member for Hasluck Ken Wyatt to the House of Representatives in 2010 and the Northern Territory sent Senator Nova Peris to Canberra in 2013.

Because it has only two Senators and two Members, while each existing Australian state has a constitutionally guaranteed 12 senators and a minimum of 6 Members each, the Northern Territory appears to have a disproportionate responsibility.

For 74 of 113 years of Federation the Northern Territory had no Senators, and has only had two Members of the House of Representatives since 2001.

The Tingle comment appears to be a fairly common criticism, but one that needs to be examined to see whether it carries any weight to go with its tone of strident outrage. Outrage, which appears to be expressed not only on behalf of Aboriginal peoples, but also on behalf of the rest of simpatico Australia against the mendicant Territory.

In the context of Tingle's comment, this paper does not explore pre-selection matters in political parties; however the belief expressed by the journalist is, it is submitted, an example that in the minds of some, the Northern Territory has a special and significant role to play over and above any other Australian jurisdiction in promoting Aboriginal participation.

The Northern Territory, in its existing (12th) Assembly has 6 of a total 25 Members who identify with Aboriginal heritage.

What is the national context? The basics are: the Territory is one sixth of the Australian landmass, and home to one per cent of the Australian population.

The proportion of Aboriginal peoples living in the Northern Territory relative to the entire Territory population is much higher than in any other jurisdiction at 29.8% (as at June 2011). However, constituting approximately 10% of all Australian Aboriginal people, a lot of expectation appears to rest on the shoulders of Northern Territory Aboriginals and those elected to public office to solve so called Aboriginal matters[7].

There was an estimated 631,757 Aboriginal people in Australia as of June 30th 2011. Of these, 202,674 were living in NSW, or 32.1 per cent of the total Australian Aboriginal

7 Housing, employment, education, health and sanitation, are of course matters of concern to all when they are not available or not delivered.

population[8]. Only Queensland has a comparable Aboriginal population to NSW with an estimated 164,557 or 26% of Australia's Aboriginal peoples living in that state.

To put these results into perspective, there were more Aboriginal peoples living in NSW than the whole of South Australia, Western Australia and the Northern Territory combined (190,871) (NT = 68 850).

Is there an assumption that greater participation by Aboriginal peoples as a Member of Parliament is going to result in a greater focus on Aboriginal matters and better solutions to difficult challenges?

While parliamentary representation is important in a symbolic sense, without structural transformation it will never be an adequate vehicle for representing Aboriginal needs and concerns[9].

Whether Aboriginal peoples vote for Aboriginal candidates or for political parties was the subject of some scrutiny after the 1983 Northern Territory election and the finding was mainly that Aboriginal voters tended to vote for parties and policies ahead of the Aboriginality of the candidate[10].

As stated above, the Northern Territory is a jurisdiction with only four MPs in the Federal Parliament, compared to a jurisdiction such as NSW with 60 MPs (48 Members and 12 Senators). NSW has a larger population of Aboriginal residents yet has no Aboriginal representation in the Federal Parliament, and has only ever had one Aboriginal Member in its State Parliament, since the Legislative Assembly became fully elected in 1856.

Given the proportion of Aboriginal peoples living in the Territory relative to the entire Territory population arguably the results in the Northern Territory are as they should be.

It is only in the 12th and 10th Assemblies where something like a mathematical equation of proportionality, with 6 out of 25 being similar to the overall proportion in the population.

Political parties may see a need to recruit candidates to reflect their constituencies. A long tradition of Aboriginal candidates in bush seats has been practised in the Northern Territory by different political parties. However, parties require party loyalty and these are matters that come to the fore when considering representation on the basis of a group of people in a society.

The fact that it is now fairly unremarkable to have six Aboriginal Members in the Northern Territory Assembly is what brings the Tingle quote into perspective.

8 These statistics are ABS sourced and included in the 2014 NT Budget Papers.

9 Maddison Op Cit page 665.

10 Chapter Eight *Aboriginal Voters and Aboriginal Candidates* P Loveday and W Sanders in A Landslide Election, the NT 1983 Peter Loveday and Dean Jaensch (eds) Australian National University North Australia Research Unit Monograph Series 1984 page 65.

The claims of failure to preselect are not borne out in practice. Compared to other jurisdictions, the Northern Territory record is singularly spectacular as is demonstrated in the lists and discussion of all the candidates below. Perhaps it is the journalist's disappointment in outcomes that has led to the statement. Has the existence of Aboriginal Members been unfairly conflated with a desire to see an end to difficult matters impacting upon Aboriginal peoples?

According to former Territory based Charles Darwin University historian David Carment, the population of seven of the 25 Legislative Assembly electorates was, in 2001, 'over half indigenous'.[11] Yet not always do we see these electorates voting for Aboriginal candidates. At the 2012 election not one candidate from the First Nations Political Party was elected to the Northern Territory Assembly.

Historically the 'dilution' of the Northern Territory population has continued apace but has stabilised at about 25% or slightly more since 1971.

In 1958 almost half of the Northern Territory population was Aboriginal[12] but there was no Aboriginal representation in the then Legislative Council, the administering arm of government dominated by appointed public servants at the expense of a minority of elected locals, from 1948 to 1974.

The proportion of Aboriginal peoples in the Northern Territory was 29.8% as at June 2011. This indicates a decline in the Territory's share of the national Indigenous population from 12.4% in June 2006 to 10.3% in June 2011.[13]

For an uninterrupted 40-year period the Northern Territory Assembly has had Aboriginal Members. This comes from the 34 occasions where a candidate with Aboriginal heritage has won a seat in the Legislative Assembly at either a Territory-wide election or by-election.

Each of the twelve general elections has resulted in a range of people seeking election including a significant proportion of Aboriginal peoples. They have also succeeded in quests, which are equally as legitimate as becoming an elected member of the Assembly. This includes achieving seats at the local government level and being elected to Land Council executive positions.

The Legislative Assembly election outcomes are outlined below and each Aboriginal candidate is highlighted in *italics* and **bold** text indicates the successful candidate who became the Member:

11 *Territorianism* David Carment Australian Scholarly Publishing 2007 page 3

12 North Australian Research Bulletin: *Elections in the Northern Territory 1974–1977* D NARU Bulletin No 4 1979 Jaensch and P Loveday Eds page 2.

13 Budget 2014–15 *Northern Territory Government Budget Paper – Northern Territory Economy* page 41.

1. Legislative Assembly General Election – 19 October 1974

Alice Springs	**Bernard Kilgariff**; Jean Leunig, Alan Gray
Arnhem	**Rupert Kentish**; *Elizabeth Pearce*
Barkly	**Ian Tuxworth;** Eric Marks
Casuarina	**Nicholas Dondas**; Allan Dunstan, Robert McGahey, Dudley Orr
Elsey	**John (Les) MacFarlane**; Kevin Frazer, Leslie James, James Martin
Fannie Bay	**Grant Tambling**; James Bowditch, Eleanor Fisher, John McCormack
Gillen	**James Robertson**; Peter Leunig
Jingili	**Paul Everingham**; Thomas Bell
Ludmilla	**Roger Steele**; Hazel Robertson, Edward D'Ambrosio, Brian Smith, Grahame Stewart, William Sullivan
Macdonnell	**David Pollock**; *Bruce Breadon*, Malcolm Wolf
Millner	**Roger Ryan**; Jack Hunt, William Forrest, John Quinn
Nightcliff	**Dawn Lawrie**; Edward Ellis, Alfred Hooper
Nhulunbuy	**Milton Ballantyne**; John Flynn, William Hendry
Port Darwin	**Ronald Withnall**; James Gallacher, William Jettner, Brian Manning
Sanderson	**Elizabeth Andrew**; Mark Phelan, Alexander Allan-Stewart, Herbert Sinclair
Stuart	**Roger Vale**; *Harry Nelson*, Reginald Harris
Stuart Park	**Marshall Perron**; Geoffrey Loveday, William Fisher, John McNamee
Tiwi	***Hyacinth Tungutalum***; Peter Lawrence, Robert Oaten, Noel PadghamPurich, Lou Stewart
Victoria River	**Godfrey (Goff) Letts**; *Wiyendji Nunggula*, Charles Renfrey

Candidates who are Aboriginal 5 out of 65
Members who are Aboriginal 1 out of 19

Aboriginal voters were granted voluntary enrolment and voluntary voting from 1974[14] until 1977 when, if enrolled (still voluntary), they were required to vote. From 1980 compulsory voting and enrolment applied to all over the age of 18.

14 By 1974 enrolments amongst Aboriginal electors had reached 44% about half of whom voted according to Murray Goot in *The Aboriginal Franchise and its Consequences Australian Journal of Politics and History* Volume 52 No 4 2006 page 536.

2. Legislative Assembly General Election – 13 August 1977

Alice Springs	**Rod Oliver**; Rosalie McDonald, Brian Evans
Arnhem	**Bob Collins**; Rupert Kentish, Philip Brain
Barkly	**Ian Tuxworth**; *Jean "Peg" Havnen*, Neville Andrews, Margaret Conway, Billy Foster
Casuarina	**Nick Dondas**; Dennis Bree, Robert Hoey
Elsey	**Les MacFarlane**; Deidre Killen, Davis Daniels, Patricia Davies
Fannie Bay	**Pam O'Neil**; Grant Tambling, Edward Osgood, William Fisher
Gillen	**Jim Robertson**; John Thomas, Peter Johncock
Jingili	**Paul Everingham**; Diana Rickard, David Cooper, John McCormack, George Tarasidis
Ludmilla	**Roger Steele**; Christopher Draffin, Terry Johnson
Macdonnell	***Neville Perkins***; Dave Pollock, Mark Fidler
Millner	**Jon Isaacs**; Roger Ryan, Elva Pearce
Nhulunbuy	**Milton Ballantyne**; Denise Fincham, Jacob De Vries
Nightcliff	**Dawn Lawrie;** Ronald Nobbs, Uldis (Tony) Blums
Port Darwin	**Tom Harris;** Michael Scott, Ian Smith, Brian Manning, Ron Withnall
Sanderson	**June D'Rozario**; Liz Andrew, Geoffrey Bennett, Kitty Fischer, Herbert Sinclair
Stuart	**Roger Vale**; Trevor Cutter, Kenneth Kitto
Stuart Park	**Marshall Perron**; Judith Muras, Kenneth Day, Ernest Chin
Tiwi	**Noel Padgham-Purich**; Harry Maschke, *Bernard Tipiloura, Cyril Rioli*, George Ryan, Terrence O'Brien, Strider
Victoria River	**Jack Doolan**; Goff Letts, Frank Favaro

Candidates who are Aboriginal 4
Members who are Aboriginal 1 out of 19

Labor did not win any seats in the Assembly at the election in 1974. It was not until 1977 that there was a change and they won their first six seats, including with an Aboriginal candidate in the seat of MacDonnell, now the remote central desert seat of Namatjira.

In the context of the 1977 election Jaensh and Loveday wrote: *The Aboriginal vote was central to the election. A large number of the Aboriginal people of the Northern Territory were non-literate, isolated and politically uneducated and individuals and groups in the Northern Territory took steps to clarify the situation with the electoral office in relation*

to the non-literate voter. The major political parties were well aware of the value of the Aboriginal vote, and many allegations have been made over the years relating to the 'abuse' of the Aboriginal vote.[15]

The use of compulsory preferential voting was argued as disadvantageous and the Central Land Council and Central Australia Aboriginal Congress stated that the Country Liberal Party (CLP), in collusion with the government in Canberra, had 'rigged the voting system to stop Aboriginals having a full say in the democratic process … despite evidence from the Chief Electoral Officer that such a system discriminated against the Aboriginal voter'.[16]

The CLP nominated two Aboriginal candidates in Tiwi, Arnhem and Victoria River. While two Labor (ALP) candidates vied for Tiwi at this election. This was not permitted under ALP rules at subsequent elections. More on this tactic is outlined below in the context of the 1983 election results.

3. Legislative Assembly General Election – 7th June 1980

Alice Springs	**Denis Collins**; *Ted Hampton*, Rod Oliver, David Pollock
Arnhem	**Bob Collins**; *Gatjil Djerrkura*, Mark McAleer
Barkly	**Ian Tuxworth** Neville Andrews, William Thomson
Casuarina	**Nick Dondas**; Dennis Bree, Klaus Roth
Elsey	**Les MacFarlane**; Maged Aboutaleb, Patricia Davies, James Forscutt, Lawrence Hughes, R.T. Reilly
Fannie Bay	**Pam O'Neil**; Ella Stack
Gillen	**James Robertson;** Rosalie McDonald
Jingili	**Paul Everingham**; Peter Hansen, Peter Read
Ludmilla	**Roger Steele;** Roy Barden, Kay Spurr
MacDonnell	***Neville Perkins****; Rose Kunoth-Monks*
Millner	**Jonathan Isaacs**; J.P. (Shorty) Robinson
Nhulunbuy	**Daniel Leo**; Milton Ballantyne, Michael O'Reilly
Nightcliff	**Dawn Lawrie;** Anne Amos, Charles Coombes
Port Darwin	**Tom Harris**; Jack Haritos, Len Myles, Peter Taylor
Sanderson	**June D'Rozario**; Ron Mann, Daryl Manzie
Stuart	**Roger Vale;** John Thomas
Stuart Park	**Marshall Perron**; Peter Cavanagh, John Duffy, Terry Wilson

15 Jaensch and Loveday Op Cit Page 196
16 *NT News* 8 July 1977

Tiwi	**Noel Padgham-Purich**; Harry Maschke, Len McLear, Jenny Smither
Victoria River	**Jack Doolan**; Bronte Douglas, Jack McCarthy, John Millhouse

Candidates who are Aboriginal 4
Members who are Aboriginal 1 out of 19

Rosalie Kunoth Monks is an active member of local government in the Northern Territory and a long standing advocate for a range of matters impacting upon her community; she was named by the *NT News* in August 2014 as one of the "Top 50 most interesting Territorians" and is a member of the First Nations Political Party.

4. Legislative Assembly General Election – 3rd December 1983

Arafura	**Bob Collins**; Kevin Doolan, Bob Woodward
Araluen	**James Robertson;** Allen Joy, Goff Letts
Arnhem	***Wes Lanhupuy***[17]; David Amos, *David Daniels, Des Rogers*
Barkly	**Ian Tuxworth;** Charles Hallett
Berrimah	**Barry Coulter**; Colin Young
Braitling	**Roger Vale;** Ross Kerridge
Casuarina	**Nick Dondas;** Lionel Crompton
Elsey	**Roger Steele**; James Forscutt; Trevor Surplice
Fannie Bay	**Marshall Perron;** Gerald Luck, Pam O'Neil
Flynn	**Ray Hanrahan**; Pamela Gardiner, Peter Hughes
Jingili	**Paul Everingham**; Martin Jacob
Koolpinyah	**Noel Padgham-Purich**; Murray Leeder, Michael Sanderson, Robert WesleySmith
Leanyer	**Michael Palmer**; John Waters
Ludmilla	**Colin Firmin**; Allan O'Neil
MacDonnell	**Neil Bell**; *Ted Hampton*, Ian McKinlay
Millner	**Terry Smith** Christopher Fenner, Lorraine Palfy
Nhulunbuy	**Daniel Leo;** Kevin Graetz
Nightcliff	**Steve Hatton**; Colin Dyer, Dawn Lawrie
Port Darwin	**Tom Harris**; Russel Kearney
Sadadeen	**Denis Collins**; Morgan Flint

17 Pre-selected as a result of intervention by the Federal Executive of the ALP after a non-Aboriginal candidate had been the previous choice.

Sanderson	**Daryl Manzie;** June D'Rozario
Stuart	**Brian Ede**; *Bob Liddle*
Victoria River	**Terry McCarthy**; Dennis Bree, Jack Doolan, *Maurie (Japarta) Ryan*, Ron Wright
Wagaman	**Fred Finch**; Brian Reid
Wanguri	**Don Dale**; Pat Burke, Edward Miller

Candidates who are Aboriginal: 6
Members who are Aboriginal: 1 out of 25

Maurie Japarta Ryan, who stood for the Democrats at this election, is also a former candidate for the Senate and the existing Chair of the Central Land Council. He was a founder of the First Nations Political Party formed in 2009 and stood for the seat of Stuart at the 2012 election.

Some 18 months ahead of the 1983 election there was talk of the formation of an Aboriginal political party to contest seats at the election. On 19 June 1982 the *NT News* editorially criticised the move as 'divisive'. The proposal did not reach fruition in time for the election.

A feature of past Northern Territory elections, which is no longer available to parties and candidates, was to allow more than one candidate in an electorate from the same political party. In this election the candidates for Arnhem, David Daniels and David Amos were both CLP endorsed candidates. The idea being Mr Amos would pick up the non-Aboriginal vote at the mining lease at Groote Eylandt and Mr Daniels the Aboriginal vote elsewhere in the electorate[18].

Victoria River also featured two (non-Aboriginal) CLP candidates with how to vote cards designed to secure an exchange of preferences, should preferences be counted. This tactic was aimed at large electorates with little community of interest where pastoralists of European heritage and traditional nomadic peoples of Aboriginal heritage coexist but over huge distances and with vastly different views on matters of land management and resources.[19]

18 ALP rules did not permit dual candidates. The party endorsed only one. The CLP left it to the electorate where there was more than one from their party. The practice ceased at the 2008 election.

19 *A Landslide Election, the NT 1983* Peter Loveday and Dean Jaensch (eds) Australian National University North Australia Research Unit Monograph Series 1984 page 55.

5. Legislative Assembly General Election – 7th March 1987

Arafura	***Stanley Tipiloura;*** *Dorothy Fox*, Peter Watton
Araluen	**Eric Poole**; Enzo Floreani, Diane Shanahan
Arnhem	***Wesley Lanhupuy***; Brian Dalliston, John Hancock, Bruce Foley
Barkly	**Ian Tuxworth**; Keith Hallett, Maggie Hickey, Gary Smith
Braitling	**Roger Vale**; Mike Alsop, Max Stewart
Casuarina	**Nick Dondas**; Giuseppe Nicolosi, John Reeves
Fannie Bay	**Marshall Perron**; Stephen Marshall, Edward "Ossie" Osgood, Strider, John Waters
Flynn	**Ray Hanrahan**; Jacqueline Anderson, John Omond
Jingili	**Richard Setter**; Harry Maschke, Robert Wharton
Karama	**Michael Palmer**; Robyn Crompton, Lionel Preston
Katherine	**Michael Reed;** James Forscutt, Phil Maynard
Koolpinyah	**Noel Padgham-Purich**; Peter Ivinson, Patrick Loftus, David Loveridge
Leanyer	**Fred Finch**; David Lamb-Jenkins, David Wane
Ludmilla	**Colin Firmin**; Sydney Cross, Chris McMah, Brian Thomas
Macdonnell	**Neil Bell**; Davis, *Ron Liddle*
Millner	**Terry Smith**; *John Baban*, Michael Foley
Nhulunbuy	**Daniel Leo**; Deane Crowhurst, Pat Ellis, Pamela Steele-Wareham
Nightcliff	**Steve Hatton**; Brian Brent, John Rowell
Palmerston	**Barry Coulter**; Tony Henry, Michael Ting
Port Darwin	**Tom Harris**; Russell Kearney, James Maclean
Sadadeen	**Denis Collins**; Meredith Campbell, Lynne Peterkin, Shane Stone
Sanderson	**Daryl Manzie**; Lawrence Armstrong, Peter McQueen
Stuart	**Brian Ede;** Ian Drennan, Vincent Forrester, Jim Sinclair
Victoria River	**Terry McCarthy**; Lance Lawrence, Leon White, Ronald Wright
Wanguri	**Don Dale**; Graeme Bevis, Peter McNab

Candidates who are Aboriginal: 5
Members who are Aboriginal: 2 out of 25

Ahead of this election, former Chief Minister Tuxworth resigned from the CLP and joined the Nationals in the context of the *Joh for PM* push. Mr Tuxworth was the only Member of the Assembly from the National Party, notwithstanding the number of National Party

candidates at this election. The NT Nationals were not endorsed from head office but were an offshoot of the Queensland branch and were dissolved in the Northern Territory in 1990.

Ms Padgham-Purich and Mr Collins both former (dis-endorsed) CLP members re-took their seats as Independents.

6. Legislative Assembly General Election – 27th October 1990

Arafura	***Stan Tipiloura**; Barry Puruntatameri*
Araluen	**Eric Poole**; Brian Doolan; Enzo Floreani
Arnhem	***Wes Lanhupuy***; Rodney Ansell, Tony Hayward-Ryan
Barkly	**Maggie Hickey**; Tony Boulter, Charles Hallett, Kenneth Purvis, Paul Ruger
Braitling	**Roger Vale**; Leslie Oldfield, Matthew Storey, Damien Ward
Brennan	**Max Ortmann**; Colin Firmin, Ian Fraser
Casuarina	**Nicholas Dondas**; Rod Ellis, Lea Rosenwax
Fannie Bay	**Marshall Perron**; Paul Costigan, Bob Ellis, Strider
Goyder	**Terry McCarthy***; Jack Ah Kit*, Kezia Purick, Louise Size, Thomas Starr; Ian Tuxworth
Greatorex	**Denis Collins**; Harold Furber, David Johannsen, Robert Kennedy
Jingili	**Rick Setter**; Fiona Stuchbery, Penelope Thomson
Karama	**Mick Palmer**; Janet Durling, Margaret Gillespie
Katherine	**Mike Reed**; Jim Forscutt, Laurie Hughes, Phil Maynard
Leanyer	**Fred Finch**; Jim Davidson, Alan MacKenzie
Macdonnell	**Neil Bell**; Brendan Heenan, *Alison Hunt*
Millner	**Terry Smith**; Janice Collins
Nelson	**Noel Padgham-Purich**; Graeme Gow, Peter Ivinson, David Sanderson
Nhulunbuy	**Syd Stirling**; Susan McClure
Nightcliff	**Steve Hatton**; John Dunham, David Pettigrew
Palmerston	**Barry Coulter**; Chris Draffin, Timothy Fowler, Ronald Wright
Port Darwin	**Shane Stone** Peter Cavanagh, David Fuller, Lady Jessie Kearney
Sanderson	**Daryl Manzie**; Graeme Parsons, Alan Perrin, Andrew Wrenn
Stuart	**Brian Ede**; Alexander Nelson, Eric Pananka
Victoria River	**Gary Cartwright**; Stephen Dunham
Wanguri	**John Bailey**; John Hare

Candidates who are Aboriginal: 4
Members who are Aboriginal: 2 out of 25
(Stan Tipiloura replaced by Maurice Rioli at a by election in 1992)

Once again the CLP nominated two candidates in a bush seat where there was a majority of Aboriginal voters.

7. Legislative Assembly General Election – 4th June 1994

Arafura	***Maurice Rioli***; Colin Newton, Lothar Siebert
Araluen	**Eric Poole**; Mescal Yates
Arnhem	***Wes Lanhupuy***; Veronica Januschka
Barkly	**Maggie Hickey**; Geoffrey Freeman, Paul Ruger
Brennan	**Denis Burke**; Geoff Carter, Max Ortmann
Casuarina	**Peter Adamson**; Clare Martin
Fannie Bay	**Marshall Perron**; Susan Bradley
Goyder	**Terry McCarthy**; Jamie Johnson, Gerry Wood
Greatorex	**Richard Lim**; Denis Collins, Kerry Nelson
Jingili	**Rick Setter**; Edward (Ted) Warren
Karama	**Mick Palmer**; Christopher Inskip, Goncalo Pinto, John Tobin
Katherine	**Mike Reed;** Gibby Maynard
Leanyer	**Fred Finch**; Cossimo Russo
Macdonnell	**Neil Bell**; Pam Waudby
Millner	**Philip Mitchell**; Ilana Eldridge, Ken Parish
Nelson	**Noel Padgham-Purich**; Wayne Connop, Chris Lugg
Nhulunbuy	**Syd Stirling**; Mick O'Shea
Nightcliff	**Steve Hatton**; Robert Adams, Paul Henderson
Palmerston	**Barry Coulter**; Kevin Diflo, David Elliott
Port Darwin	**Shane Stone**; Rodney Haritos, Andrea Jones
Sanderson	**Daryl Manzie**; Denise Horvath
Stuart	**Brian Ede**; Tony Bohning
Victoria River	**Tim Baldwin**; Gary Cartwright, Jack Noble
Wanguri	**John Bailey**; Steve Balch

Candidates who are Aboriginal: 2
Members who are Aboriginal: 2 out of 25

8. Legislative Assembly General Election – 30th August 1997

Arafura	***Maurice Rioli;*** *Jacob Nayinggul*
Araluen	**Eric Poole;** Lilliah McCulloch
Arnhem	***Jack Ah Kit***; Lance Lawrence; *Thomas Maywundjiwuy*, Alan Wright
Barkly	**Maggie Hickey**; Mark John, Barry Nattrass
Blain	**Barry Coulter**; Richard Bawden
Braitling	**Loraine Braham**; Peter Brooke
Brennan	**Denis Burke**; Stephen Bennett
Casuarina	**Peter Adamson**; Douglas McLeod
Drysdale	**Stephen Dunham**; Stewart Edwards, Paul Nieuwenhoven
Fannie Bay	**Clare Martin**; Michael Kilgariff
Goyder	**Terry McCarthy**; *Wayne Connop*, Strider
Greatorex	**Richard Lim;** Peter Kavanagh
Jingili	**Steve Balch**; Stephen Barnes, Ross Forday, Catherine Phillips
Karama	**Mick Palmer**; John Tobin
Katherine	**Mike Reed**; Peter Byers, Michael Peirce
Macdonnell	**John Elferink**; Kenneth Lechleitner, Mark Wheeler
Millner	**Philip Mitchell**; Ian Mills, *June Mills*, Peter O'Hagan
Nelson	**Chris Lugg**; *Theresa Francis*, Dave Tollner
Nhulunbuy	**Syd Stirling**; Richard Davey
Nightcliff	**Steve Hatton**; Paul Henderson, Theo Katapodis, Betty McCleary
Port Darwin	**Shane Stone**; Geoffrey Carter, Lex Martin
Sanderson	**Daryl Manzie**; Michael Atkinson
Stuart	**Peter Toyne**; Tony Bohning
Wanguri	**John Bailey**; Peter Styles

Candidates who are Aboriginal: 7
Members who are Aboriginal: 2 out of 25

9. Legislative Assembly General Election – 18th August 2001

Arafura	***Marion Scrymgour****; John Christophersen, Dorothy Fox, Puruntatameri*
Araluen	**Jodeen Carney**; Tony Bohning, Michael Bowden, Meredith Campbell
Arnhem	***Jack Ah Kit***; Lance Lawrence, Cliff Thompson, Alan Wright
Barkly	***Elliot McAdam***; Gavin Carpenter, Bill Cross
Blain	**Terry Mills**; Joseph Mulqueeney, Peter Shew
Braitling	**Loraine Braham**; Peter Brooke, Peter Harvey, Peter Jarvis, *Eddie Taylor*
Brennan	**Denis Burke**; Duncan Dean, Simon Hall
Casuarina	**Kon Vatskalis**; Peter Adamson, Necmi Bayram, Craig Seiler
Daly	**Tim Baldwin**; Rob Knight, Wayne Norris, *Frank Spry*
Drysdale	**Steve Dunham**; Inger Peirce
Fannie Bay	**Clare Martin**; Mary Cunningham, Peter Johnston
Goyder	**Peter Maley**; Diana Rickard, Alan Smith, Merv Stewart
Greatorex	**Richard Lim**; Peter Kavanagh, David Mortimer
Johnston	**Chris Burns**; Steve Balch, Jo Sangster
Karama	**Delia Lawrie**; Mick Palmer
Katherine	**Mike Reed;** Tony Coutts, John Donnellan, Michael Peirce, Rob Phillips
Macdonnell	**John Elferink**; Philip Alice, Harold Furber
Millner	***Matt Bonson***; Andrew Arthur, Diane Baird, Andrew Ivinson, David Mitchell
Nelson	**Gerry Wood**; Tony Hardwick, Bob Hare, Chris Lugg
Nhulunbuy	**Syd Stirling**; Gordon Davey, Peter Manning, David Mitchell
Nightcliff	**Jane Aagaard**; Jason Hatton, Peter Ivinson, Gary Meyerhoff
Port Darwin	**Sue Carter**; Chris Bond, Nick Dondas
Sanderson	**Len Kiely**; Gary Haslett, Susan Murdoch, Peter Poniris
Stuart	**Peter Toyne**; Ken Lechleitner
Wanguri	**Paul Henderson**; Robyn Cahill, Meredith De Landelles

Candidates who are Aboriginal: 9
Members who are Aboriginal: 4 out of 25

This was the election that changed the Government for the first time in 27 years.

Going into the election, the ABC election analyst Antony Green noted that the Labor Party had not defeated a sitting Country Liberal Party Member in 20 years in the

Northern Territory[20]. Retiring Government Members and two Independents (one a former Government Member) assisted Labor to obtain a one Member majority in the Assembly.

10. Legislative Assembly General Election – 18th June 2005

Arafura	***Marion Scrymgour***; August Stevens, *George Pascoe*
Araluen	**Jodeen Carney**; Alan Tyley, John Gaynor
Arnhem	***Malarndirri McCarthy****; Djuwalpi Marika*, Lance Lawrence
Barkly	***Elliot McAdam***; Val Dyer, Janeen Bulsey
Blain	**Terry Mills**; Sue McKinnon, Duncan Dean, Brendan Cabry
Braitling	**Loraine Braham**; Sue West, Michael Jones
Brennan	**James Burke**; Denis Burke, Nelly Riley
Casuarina	**Kon Vatskalis;** Scott White, Wendy Green, Gary Mills
Daly	**Rob Knight**; Debbi Aloisi, Elke Stegemann, Dale Seaniger
Drysdale	**Chris Natt**; Stephen Dunham
Fannie Bay	**Clare Martin**; Fiona Clarke, *Edward Fry*
Goyder	**Ted Warren**; Diana Rickard, Mary Walshe, Andrew Blackadder, Keith Phasey
Greatorex	**Richard Lim**; David Mortimer, Fran Kilgariff
Johnston	**Chris Burns**; Ross Connolly, Gary Myerhoff, Kate Neely, Steve Saint
Karama	**Delia Lawrie**; Trevor Sellick
Katherine	**Fay Miller;** Sharon Hillen
Macdonnell	***Alison Anderson***; Andre Longmire, John Elferink, Vincent Forrester, David Chewings
Millner	***Matthew Bonson***; Rob Hoad, Paul Mossman, Phil Mitchell, Rob Inder-Smith
Nelson	**Gerry Wood;** Lisa McKinney-Smith, Chris Lugg
Nightcliff	**Jane Aagaard;** Stuart Highway, Ilana Eldridge, Andrew Arthur, Anthony Reiter
Nhulunbuy	**Syd Stirling;** Peter Manning
Port Darwin	**Kerry Sacilotto**; Sue Carter
Sanderson	**Len Kiely**; Peter Styles

20 Cited in Will Sanders The 2001 Northern Territory Election: The End of an Era *AQ* Nov-Dec 2001 page 22

Stuart	**Peter Toyne;** Anna de Sousa Machado (***Karl Hampton*** at by election September 2006)
Wanguri	**Paul Henderson**; Kerry Kyriacou

Candidates who are Aboriginal: 8
Members who are Aboriginal 5 out of 25
Then 6 out of 25 from September 2006 (by election)

This election saw a massive reversal of fortune for Labor, who in 1974 had no Members, to in 2005 winning 19 of the 25 seats in the Assembly. The CLP were reduced to only four Members after a long period of dominance in the Assembly. Much was made at the time of whether the CLP still held 'party status' but for the purpose of entitlements there is no such distinction in the Northern Territory.

On the 7th of May 2007, the Chief Minister faced a stand-off with Aboriginal Members of the Labor caucus when three crossed the floor of the Assembly to vote against legislation to allow expansion of the McArthur River mine, overturning a Supreme Court decision made earlier that week. The decision was criticised by native title holders in the area, especially because the law was changed two days before the funeral of an Aboriginal elder who was a key leader in the campaign to save the McArthur River.

11. Legislative Assembly General Election – 9th August 2008

Arafura	***Marion Scrymgour****; Tristan Mungatopi*, Jone Lotu, Angie Siebert
Araluen	**Jodeen Carney**; Linda Chellew, John Gaynor
Arnhem	***Malarndirri McCarthy***
Barkly	**Gerald McCarthy**; Barry Lee Nattrass, Randall Gould, Mick Adams
Blain	**Terry Mills**; Ken Vowles
Braitling	***Adam Giles***; Aaron Dick, Eli Melky, Jane Clark
Brennan	**Peter Chandler;** James Burke
Casuarina	**Kon Vatskalis**; Gary Haslett
Daly	**Rob Knight;** David Pollock, *Wayne Connop*, August Stevens
Drysdale	**Ross Bohlin**; Justin Tutty, Chris Natt
Fannie Bay	**Michael Gunner**; Garry Lambert
Fong Lim	**Dave Tollner**; *Matt Bonson*
Goyder	**Kezia Purick**; Ted Warren
Greatorex	**Matt Conlan**; Penny Aronsten, Jo Nixon
Johnston	**Chris Burns**; Jo Sangster
Karama	**Delia Lawrie**; *Dorothy Fox*, Natalie Hunter, Tony Bacus

Katherine	**Willem Westra Van Holthe**; Toni Tapp Coutts, Sharon Hillen
Macdonnell	***Alison Anderson***
Nelson	**Gerry Wood**; Maureen Kohlman, Justine Luders-searle
Nightcliff	**Jane Aargaard**; Emma Young, Peter Manning
Nhulunbuy	**Lynne Walker**; *Djuwalpi Marika*
Port Darwin	**John Elferink**; Gary Abbott, Kerry Sacilotto
Sanderson	**Peter Styles**; Len Kiely
Stuart	***Karl Hampton;*** *Rex Granites Japanangka*
Wanguri	**Paul Henderson**; Duncan Dean, Kerry Kyriacou

Candidates who are Aboriginal: 11
Members who are Aboriginal: 5 out of 25

From a position of only four Members at the previous election, the Country Liberals achieved a comeback with 11 Members in this Assembly, the Labor Government 13 and one Independent.

The decision by the Country Liberals not to field candidates in the seats of Macdonnell or Arnhem, where the Labor Members were returned unopposed, may have been a tactical error.

The Member for MacDonnell later left Labor and joined the CLP giving the Opposition 12, the Government 12 with the Independent supporting Labor to allow it to retain government.

12. Legislative Assembly General Election – 25th August 2012

Arafura	***Francis Xavier Kurrupuwu*** *; Ben George Pascoe, Dean Rioli, Jeannie Gadambua*
Araluen	**Robyn Lambley**; Edan Baxter, Adam Findlay
Arnhem	***Larisa Lee****; Malarndirri McCarthy*
Barkly	**Gerry McCarthy**; Stewart Willey, *Valda Naparula Shannon*, Rebecca Healy
Blain	**Terry Mills;** *Daniel Fejo*, Geoff Bahnert
Braitling	***Adam Giles***; Colin Furphy, Deborah Rock, *Barbara Shaw*
Brennan	**Peter Chandler**; *Russell Jeffrey*
Casuarina	**Kon Vatskalis**; Jane Johnson
Daly	**Gary Higgins**; David Pollock, Trevor Jenkins, Rob Knight, *Bill Risk*
Drysdale	**Lia Finocchiaro;** James Burke; Ross Bohlin

Fannie Bay	**Michael Gunner**; Ken Bird, Tony Clementson
Fong Lim	**David Tollner**; Ashley Marsh, Peter Burnheim, Matt Haubrick
Goyder	**Kezia Purick**; John Kearney, Damien Smith
Greatorex	**Matt Conlan**; *Rowan Foley*, Evelyne Roullet, Phil Walcott
Johnston	***Ken Vowles***; Peter Bussa, Krystal Metcalf, Alana Parrott-Jolly, Jo Sangster
Karama	**Delia Lawrie**; Rohan Kelly, Frances Elcoate
Katherine	**Willem Westra van Holthe**; *Cerise King*, Teresa Cummings
Namatjira	***Alison Anderson***; Des Rogers, *Warren Williams*
Nelson	**Gerry Wood**; Sharon McAlear, Judy Cole
Nightcliff	**Natasha Fyles**; Owen Gale, Stuart Blanch, Andrew Arthur, Felicity Wardle, Peter Rudge, Kim Loveday
Nhulunbuy	**Lynne Walker**; Allen Fanning, Kendall Trudgen
Port Darwin	**John Elferink**; Rowena Leunig, David Andrews, Alan James
Sanderson	**Peter Styles**; Jodie Green, Dimitrious Magripilis, Jillian Briggs
Stuart:	***Bess Price****; Karl Hampton, Maurie Japarta Ryan*
Wanguri	**Paul Henderson**; Rhianna Harker

Candidates who are Aboriginal: 20
Members who are Aboriginal: 6 out of 25

At this election the First Nations Political Party ran candidates in the seats of Arafura, Barkly, Blain, Namatjira and Stuart but did not have any of their candidates elected to the Assembly.

The CLP regained the bush seats of Arnhem (lost in 1977), Stuart (lost in 1983) and won the seat of Arafura, which had never been held by the CLP since its creation in 1983.

By August 2014 the (CLP) Government retained 13 seats, three previous Members of the CLP (including Arnhem and Arafura) sat on the cross bench as the Palmer United Party and Labor had eight seats with one independent Member making up the total. As at the commencement of 2015, the Palmer United Party no longer had a presence and one former Member of that party has returned to the Government benches with the other two remaining on the cross bench.

Former Senator Aden Ridgeway said in 2010 that *it is not secret that Indigenous people in this country do not vote in such numbers to make a difference to any side of politics.*[21] However, in 2012 the political orthodoxy, that the Northern Territory Government's

21 *Voting Attitudes and Behaviour Among Aboriginal Peoples: Reports form Anangu Women* Lisa Hill and Kate Alport *Australian Journal of Politics and History* Volume 56 No 2 page 246.

fortunes are based on the seats in the northern suburbs of Darwin, was turned on its head as it was a change of vote in the remote seats that resulted in the change of Government. Four previously Labor held bush seats went to the Country Liberals.

MEMBER THOUGHTS ON THE IMPORTANCE OF ABORIGINAL MATTERS

These figures are a historical record, which arguably demonstrates that Aboriginal people are strongly engaged in politics in the Northern Territory. They are actively engaged in the pursuit of problem solving through the available systems of representation. Perhaps these figures will help to dispel any myth of apathy, malaise and passiveness when it comes to matters of participation in governance by Aboriginal people.

In preparation for this paper, the author canvassed 16 sitting or former Members of the Assembly who were or who are in senior leadership positions or who identify as people with Aboriginal heritage. They were asked three questions (see below). Just one former Member and one sitting Member responded. Full extracts of their unedited responses follow.

Clare Martin's Response

Former Chief Minster (2001–2007) the Hon Clare Martin replied to the three questions below on 13th of June 2014 as follows:

In your view, are candidates at Northern Territory Assembly elections expected to have a thorough understanding of matters relating to Aboriginal people in the Territory and propose solutions to matters relating to disadvantage that are often associated with Aboriginal peoples? (Expand as you see fit)

Not necessarily.

There was a time for the ALP, when we had been in Opposition for over two decades, that it was very difficult to get anyone to stand for us.

People weren't keen to stand for a party with a losing reputation. But despite that impediment, people did stand and went through the pre-selection process. For me, the most important qualities that I looked for were: Labor values and commitment; a good understanding of and recognition in the electorate they were preselecting for: a capacity to learn as a politician – I wasn't looking for someone with 'all the answers'.

If the electorate was one with a large Aboriginal population, then certainly the candidate would be questioned about their connection to the electorate, their knowledge of, and of course discussions about the kind of solutions to Aboriginal disadvantage that the ALP was proposing.

Two examples from my own experience: When I stood for Casuarina in 1994 there was no pre-selection process. I was endorsed without interview. When I stood for Fannie Bay in 1995, I was questioned about everything from my very recent membership of the party to what I knew about soccer. I think the pre-selection committee was most impressed with my recognition in the electorate and my link with schools and pre-schools.

In your view, are Aboriginal people who stand as candidates and those who are elected to the Legislative Assembly in the Northern Territory expected to have a greater insight and capacity to address matters of disadvantage often associated with Aboriginal peoples than other candidates and Members? (Expand as you see fit)

Probably, but not necessarily.

Much depended on what electorate they were standing for – urban or bush and what experience they were bringing with their candidacy.

I can think of two parliamentary colleagues who were not Aboriginal, but represented electorates with large Aboriginal populations who knew more about their communities and worked harder for them than most Aboriginal members.

Have Aboriginal matters influenced your participation and practice as a Member of the Legislative Assembly? (Please explain response)

Of course and greatly.

Expanding on this question would take me pages. But very briefly, Labor was for decades defined by the CLP Government as the' party for the Aborigines' – Land Rights, threatening suburban backyards, holding up Territory development, being responsible for urban anti-social behaviour and lots more.

To win government we had to reshape that image and turn a negative to one where we had solutions. We worked hard at it – two hard fought examples, Native Title legislation and Mandatory Sentencing for Property Crimes.

The majority of decisions I made in government had Aboriginal Territorians at the forefront or at least carefully considered.

The Howard Intervention was indescribably disheartening and offensive.

Ken Vowles MLA Response

The following response was provided by the Member for Johnston, Mr Ken Vowles MLA who is the Shadow Minister for Indigenous Policy amongst other shadow portfolio responsibilities.

In your view, are candidates at Northern Territory Assembly elections expected to have a thorough understanding of matters relating to Aboriginal people in the Territory and propose solutions to matters relating to disadvantage that are often associated with Aboriginal peoples? (Expand as you see fit)

Fundamentally as elected Members we are here to represent the interests and issues of our electorate. In the electorate I represent there are approximately 20% of the people who identify as Aboriginal, and many are from well-established and highly respected Aboriginal families.

While my electorate is an urban one, many of our extended family members live in our remote communities, some of which have the highest socioeconomic rates of disadvantage in Australia.

There can be significant flow-on effects of disadvantage for Aboriginal families living in the electorate which I am well aware of, for example many families are unable to purchase their own homes or afford private rental and are living in public housing with all the challenges that this can face.

Due to this historic and current disadvantage, I find that my role is often as an advocate, seeking the improved access to key essential services such as housing, health and schooling for many Aboriginal families.

That said, I do believe that there are many, many strengths that, despite our disadvantage, shine through, including our strong sense of family and community and our resilience!

In your view, are Aboriginal people who stand as candidates and those who are elected to the Legislative Assembly in the Northern Territory expected to have a greater insight and capacity to address matters of disadvantage often associated with Aboriginal peoples than other candidates and Members? (Expand as you see fit)

I have the privilege of working with other Labor colleagues who have extensive professional experience in working with Aboriginal people and while they are not Indigenous they do have rich insights into the issues affecting Aboriginal Territorians.

I have worked extensively with Aboriginal people in urban and remote communities. However, as a parliamentarian with Aboriginal heritage, I do believe that through my 'lived experience', and that of my family that it has significantly enriched my insight and ability to understand the unique Aboriginal issues.

My family were directly affected through the forced removal of children by governments in the 1920 – 1950s, and so have many other Indigenous families in the electorate. I have lived firsthand the follow-on impact of separation from family and culture.

The cultural nuances of growing up in a culturally diverse family, like many Indigenous families, meant that I have personal insight into the stresses and issues which many are unique to Aboriginal people, and most importantly I hope empathy to my personal lived experience.

Have Aboriginal matters influenced your participation and practice as a Member of the Legislative Assembly? (Please explain response).

Yes greatly, both personally and professionally.

In my experience in the Territory, many Aboriginal people are suspicious and untrusting of authority and governments. However as I am from a recognised and respected Aboriginal family I am in a privileged position of trust with my Indigenous constituents and Indigenous Territorians who are actively seeking my assistance of an elected Member for the first time.

Due to this trust I have been requested to advocate on many matters including land rights, the recent proposed amendments to the Racial Discrimination Act and local issues such as the clearing of land for development that cultural custodians of the land say contain sacred sites.

The couple of examples I have mentioned highlight for me, some of the reasons why I became involved in politics in the Northern Territory.

CONSIDERATION OF THE RESPONSES

The words of the Former Chief Minister the Hon Clare Martin and the Member for Johnston speak for themselves.

This paper provides no analysis or comment, however the reader may wish to consider and analyse the responses in the context of the theme of this conference: *How Representative is Representative Democracy?*

It was interesting that no other sitting Member or former Member approached to provide a response was willing to respond to the questions. One Member said they were 'too political'.

Is it really the case that answers must be so closely scripted and guarded that to consider such questions and being willing to supply answers exposes a politician to unwanted scrutiny and potentially unwelcome and politically divisive and distracting criticism?

Sarah Maddison had more luck in 2010 and her article contains a number of quotes from interviews she had with Members. Interestingly she quotes the now Chief Minister Hon Adam Glies from the time he was an Opposition Member as sharing with *Neville Bonner the paradox of championing Indigenous rights from within a conservative party. In our interview Giles tells me he eventually decided that he believed in Liberal values after something of an ideological journey.*[22]

22 Maddison Op Cit page 670

THE 2007 INTERVENTION INTO ABORIGINAL COMMUNITIES AND GOVERNANCE OF THE NORTHERN TERRITORY[23]

It is well known that in 2007 there were significant differences in the views of people about the so called Intervention into the Northern Territory when it was announced by then Prime Minister Howard on 21 June that year.

At the time, the Prime Minster said *Why now and why in the Northern Territory? Because we can…*[24] Due to the constitutional status of the Northern Territory, that capacity remains easier than intervening in this way in one of the six states.

The appeal of the intervention in the Northern Territory was aimed at a broader Australian community of voters, not at the people of the Northern Territory and not at the communities targeted. Every one of those communities sits within the Labor stronghold of the federal seat of Lingiari and that remained the case after the 2007 federal election.

Whether that policy shift, in the mix of all the other factors at the 2007 election, resonated with the electorate is unclear. But the 'something has to be done' effect seemed popular, yet within the year, the political landscape had changed with the defeat of Prime Minister Howard and Minister Brough (Minister for Families and Community Services and Indigenous Affairs 2006–2007) both losing their seats in parliament. Clare Martin resigned as Chief Minister in the Northern Territory and retired at the 2008 election.

In spite of this, it appears the policies continued to resonate with broader Australia and were not changed by the Rudd and Gillard Governments. They continue in a modified version today but basically the same form applies. Seven years later, it is a matter for others to determine what successes may have come from these policies in Aboriginal Australia.

In the book *Black Politics*, when discussing the Intervention, there is a reference to the Northern Territory Member of the Legislative Assembly Ms Alison Anderson MLA as follows:

> *Despite the hint of concern in Pearson's analysis, he concluded that 'Whatever one thinks of Howard and Brough, their strategy is justified on the basis of the fate of the children.' Others such as Warren Mundine and Alison Anderson agreed*[25].

Alison Anderson is the Member for Namatjira and was a Minister in the Martin Government at the time.

If the Intervention was not politically aimed at those it targeted, what was their electoral response?

23 Also known of as the Emergency Response to the Little Children are Sacred Report

24 Reported in *Sydney Morning Herald* 21 June 2007

25 *Black Politics: Inside the Complexity of Aboriginal Political Culture* by Sarah Madison – Allen and Unwin 2009 at page 17

LOCAL VOTER RESPONSE

Aboriginal voters appear to have reacted strongly against the policy. Voting patterns in the Federal seat of Lingiari at the 2007 election are of interest in the context of 'representation' and the impact this policy may have had on voting responses[26].

The sorts of votes at the Lingiari booths do not change governments at the national level yet they were the direct 'beneficiaries' of the Intervention and it appears they were not impressed.

Of 723 voters at the Wadeye booth at the 2007 election only 26 voted for the Country Liberal candidate. At Angkarripa in Central Australia 5 out of 503 votes went to the Country Liberals and at Yirrikala in Northern East Arnhem land of 266 votes cast at that booth, two went to the Country Liberal candidate.

The Federal seat of Lingiari contains all of the 73 Aboriginal communities impacted by the Intervention. Votes in the seat in booths in Aboriginal communities delivered Labor votes in the 90-percentile range.

Yet the incoming government did not change the policy on the Intervention in any significant way apart from some re-branding; while the army trucks policy was short lived, most of the former government's approaches were continued.

Five years later, the local Northern Territory Assembly seats in these same areas were delivered to the CLP, many for the first time in a long time, and helped the Party take Government at the August 2012 election.

Given the lack of popularity in Aboriginal communities, why did the high profile non-CLP or non-ALP aligned Aboriginal candidates, such as Maurie Ryan, not fare better in 2012? Perhaps the Loveday research from, 1984, which indicates policies and not Aboriginality per se are the key, remains relevant today[27].

In this context, it was a very interesting outcome during March 2014 when three Members of the Assembly elected for the CLP moved to the cross bench. At the time speculation was rife that they would join or create an Aboriginal party. Maybe these Members reached the same conclusions as Loveday in 1983.

THE PALMER UNITED PARTY EMERGES IN THE NORTHERN TERRITORY

Those who did not think that the Palmer United Party (PUP) was concerned with Aboriginal matters had this view challenged for a very short period by the manifestation of this political party in the Legislative Assembly of the Northern Territory.

26 The seat of Lingiari encompasses the entire Northern Territory and the Indian Ocean Territories but excludes urban Darwin and the satellite 'city' of Palmerston.

27 Loveday and Jaensch Op Cit ANU NARU Monograph at pages 55 to 68.

Tension between party rules, identification and Aboriginal people, coupled with the effective representation of Aboriginal interests, have been experienced by the major political parties.[28] They and perhaps the PUP faced these same challenges given that PUP no longer has an elected presence in the Territory .

How the PUP emerged in the Assembly is chronicled as follows. On 21 March Jane Barden from the *ABC's 7.30 Report* was reporting:

> *The unhappiness of the Country Liberals' Indigenous Members about their inability to deliver on election promises has been on repeated public display in Parliament. They hope to persuade the Chief Minister to commit more money and a Minister to the bush. But they're warning they won't be divided and ruled.*

On 24 March 2014 Amos Aikman from *The Australian* was reporting:

> *The Northern Territory faces another torrid week in parliament, as three Indigenous backbench MPs continue a dispute over bullying and foul language, and their Country Liberal Party government's perceived failure to deliver promises it made to the bush.*
>
> *The three are attempting to take advantage of a temporary reduction in the government's majority. But all could end up on the cross benches, forcing the CLP to rely on support from an independent until a by-election scheduled for April 12.*

Three days later *The Australian* (on 27 March) reported:

> *The Northern Territory government is teetering on the edge of a crisis after three indigenous MPs staged a walkout at the start of question time, protesting their government's perceived failure to deliver for bush electorates.*

A day later the Chief Minister expelled the Member for Namatjira from the Parliamentary wing of the Country Liberals. Meanwhile the Member for Arnhem and the Member for Arafura remained members of the Country Liberals until all three of them resigned on the 5th of April.

The Member for Stuart and Community Services Minister Ms Bess Price, an Aboriginal Member from Central Australia, remained in the Government and reacted strongly to the Member for Namatjira's criticism of her remaining in the party.

The Government had to win a by-election on April 12 in the seat of Blain to retain an outright majority after the resignation of the three Members. The seat was won by the government with a reduced margin.

The leaked list of demands published by News Corp Australia newspapers asked for a new Aboriginal Affairs Department with the Member for Namatjira to be the Minister, the Member for Arnhem to be junior minister for youth, sport and recreation, parks and wildlife and women's affairs, and the Member for Arafura to be made a parliamentary secretary and chair of an audit committee responsible for Aboriginal affairs, education, heath, community development, economic development and employment.

28 Maddison Op Cit page 667

On April 2, the Member for Namatjira called the Chief Minister a "little boy". "We need a grown up leader, not a little boy," Ms Anderson told ABC radio. The Chief Minster held a press conference that afternoon describing the member for Namatjira as "yesterday's news".

> *It's no skin off my nose; they can go out there and play games in a little sideshow off to the side. I'm getting out there … and doing the job that everyone expects us to do and that's govern for the NT.*

By the 4th of April *The Australian* was reporting: *Rebel MPs to form new party in NT* and the *NT News* was reporting: *The NT News understands the trio – Ms Anderson, Larisa Lee and Francis Xavier – are poised to defect to the First Nations Political Party.*

> *Their relationship with Chief Minister Adam Giles and senior CLP figures has broken down irretrievably – to the point there is no realistic prospect of them re-joining the parliamentary wing.*[29]

On the 7th of April *The Australian* was quoting a senior community leader (see the notes in relation to the election of the Members of the third Assembly in 1980 above) as follows:

> "Alison Anderson must step up: Kunoth-Monks".
>
> *It's time for Alison Anderson to show the Northern Territory she has policies to offer, says a senior member of the First Nations Political Party.*
>
> *Ms Anderson and fellow Aboriginal backbenchers Larisa Lee and Francis Xavier resigned from the Country Liberal Party (CLP) on Friday, plunging the government to a minority position of 12 seats in the 25-seat Legislative Assembly.*
>
> *Ms Anderson told the ABC on Friday they would begin their own regional party that is not race-based, which is an insult to First Nations, says Rosalie Kunoth-Monks, a senior member of the party.*

On the 28th of April, media outlets were reporting that the Member for Namatjira had eschewed forming her own party or joining an established Aboriginal party and had instead, after considering the Katter Party, joined Palmer United. The Palmer United Party founder promptly declared that Alison Anderson would be Chief Minister after the next Territory election, after announcing that she, Larissa Lee (Arnhem) and Francis Xavier Kurrupuwu (Arafura) were now part of the Palmer United Party[30].

Two days later the NT News was reporting: *First Nations Party: Rogue MLAs missed opportunity to do something for Indigenous people.*

> *Mr [Kenny] Lechleitner and senate candidate Rosalie Kunoth-Monks went to Darwin to meet with the rebels last month. He said the First Nations pitch was unconditional,*

29 *Bush Trio do their Bloc* by Ben Smee *NT News* website April 04, 2014 2:00AM
30 Sky News Report 28 April 2014

gave them the freedom to shape policy, and that Ms Anderson would have likely stepped into his role as leader.

"Going to another party you're limited in your capacity in terms of you much you can do for Indigenous people.

The First Nations Political Party never heard back from Ms Anderson, Ms Lee and Mr Xavier. Mr Lechleitner said he wished the trio well but was disappointed at their decision.

First Nations founder Maurie Japarta Ryan — also the chairman of the powerful Central Land Council — suggested the party had rejected Ms Anderson and the bush bloc after the Darwin meeting.[31].

The PUP did not become a third political force in the Northern Territory. The former Leader of the Party in the Northern Territory, the Member for Namatjira has since publically labelled the party an embarrassment[32].

PAST CHIEF MINSTERS' VIEWPOINTS

The final words go to the past Chief Ministers (1978–1995) who have been interviewed extensively on a range of matters including Aboriginal matters[33]. The first Labor Chief Minister, Clare Martin's views are extracted above.

While these snippets from the interviews in the book *Speak for Yourself: Chief Minister's Next 1 347 525 km^2 (squared)* are perhaps unfairly out of context, they provide a small insight into the consistent challenges of race politics overlaying policy matters and inter jurisdictional relations in the Northern Territory.

Paul Everingham (First Chief Minister 1978)

In the context of Self Government and the powers to be devolved to the Northern Territory Paul Everingham said:

We wrangled about Aboriginal parks and uranium for a very long time. They'd (the Commonwealth) reserved those powers. I don't regard that as intervention. I regard that as them doing something that I don't agree with… a political decision… unacceptable.

I'm sure that the Labor Party then, and perhaps even now, might think that national parks should be owned by Traditional Owners. I'm very cynical about Aboriginal Land Rights whilst not disagreeing with them. Having been in meetings at Ayers Rock I worry

31 *First Nations Party: Rogue MLAs missed opportunity to do something for Indigenous People. NT News* 30 April 2014 by Ben Smee

32 *Palmer MPs Quit* Amos Aikman *The Australian* 29 November 2014

33 These quotes are extracted from the book *Speak for Yourself: Chief Ministers Next 1 347 525 km^2*

about people who give advice to Aboriginals being dispassionate and objective but that's another big area we could talk (about) all day[34].

I don't know what to do honestly about Aboriginal policy because in my time we were enthusiastic…how could Aborigines have good health in these communities where the roads were dusty, there mightn't be running water? So we started a five-year plan. I thought, and I mightn't have said it very loudly, but I thought it was pretty disgraceful that at the end of sixty something years of administration by the Commonwealth not all Aboriginal communities had these services. But we decided that we would provide then within five years – and from memory we did.

Former Chief Minster Everingham also discusses the failures of alcohol policy and the entrenched difficulties in communities. His candid conclusion is: *So you tell me. I don't know. We gave it our best shot*[35].

Ian Tuxworth (Second Chief Minister 1984)

We had John Kerin who was holding back funds… We had Hawke and Everingham having a blue every now and then over different things. We had Clyde Holding using whatever mechanism he had to assist Aboriginals at the expense of the Northern Territory wide population…[36]

I think the development of the Territory Workforce with Indigenous Participation was the key to the future. It doesn't matter what country you are in anywhere in the world if you've got 25% – 30% of your people who are mendicant on the state for whatever reason they are dragging you down[37].

Former Chief Minister Tuxworth went on to explain his five pillars theory[38] and conceded as follows:

What we've done is to institutionalise failure for Aboriginal people by the way we do budgets, there's absolutely no way they can get out of the gutter unless you apply the five pillars….it's giving them a little bit that's really killing them and making their lives a misery.

Steve Hatton (Third Chief Minister 1986)

The controversy and conflict in the NT over the Land Rights Act was well established when I became Chief Minister. I faced the same barrage of criticism and conflict that my predecessors and successors as Chief Minster faced.

34 Op Cit at page 7
35 Op Cit at page 15
36 Page 28
37 Page 32
38 Shelter, clean drinking water, proper waste water systems, diet , education

The perception that the CLP government was anti land rights was false, but it served its political purpose for our opponents despite the social damage it caused to the NT community.

The facts are, and were that the CLP was not against land rights per se, the CLP was opposed to the structure of the legislation that disempowered the Traditional Owners and favoured the Federal government and the two large land councils.

The fact that the Federal government passed legislation that only applied in the NT. If they were honest in their belief that the provisions of the Act were so good, why didn't they operate it throughout Australia, or alternately mandate it to be a law of the NT, administered by the NT?

Mr Hatton described the role of the Territory Government in testing the land claims as an essential element to the claim process to ensure legitimate claims and the correct traditional owners prevailed. He states that this role was a vacuum left by the failure of the Commonwealth to test any of the claims made under their own laws[39].

He maintains that the Commonwealth was very successful in using the legislation as a point of conflict. In his advice to future Chief Minsters he says:

The NT must find a way to heal the rift between Aboriginal and Non Aboriginal Territorians. In this it is important to support and reinforce the empowerment of Aboriginal people by recognising Aboriginal law and culture in a manner that does not offend against international obligations but enables them to be empowered to redevelop social cohesion in their communities.[40]

Shane Stone (Fifth Chief Minister 1995)

On the proposals associated with Statehood and a future state constitution, Stone explains that:

I certainly had strong views on some of the ideas that were being advocated including reserved Indigenous seats, proved unnecessary given how many Indigenous Territorians sit in the Legislative Assembly.

When expressing his views on Aboriginal disadvantage, he explained that:

My government on most occasions found ourselves locked out of the conversation as we were considered the enemy. Various Commonwealth Aboriginal Affairs Ministers during the Hawke Keating administrations encouraged hostilities …[41]

39 Page 59
40 Page 63
41 Page 113

CONCLUSION

The assertion made at the beginning of this paper, was that the tone of the Tingle argument seems to reflect a broader prevailing perception of the Northern Territory being populated by redneck outliers who oppose participation by Aboriginal people, when in fact Aboriginal people have flourished as participants in Territory elections.

Territory residents are perhaps somewhat sensitive about commentators from the south seeking to locate the authentic voice and a remote solution to 'Aboriginal problems' solely in the Northern Territory.

The facts about the participation of Aboriginal persons in representative democracy in the Northern Territory demonstrate that low participation is not a feature.

It is very easy to group the Northern Territory with all other Australian jurisdictions when considering the history of under-representation of Aboriginal peoples in parliament, whereas the reality is different.

While such participation may not have been 'enough' or met expectations, there is an abundant and rich history of political activity amongst Aboriginal peoples in the Northern Territory despite the odds, such as lower rates of literacy, language barriers and cultural matters.

Former Northern Territory Minister John Ah Kit is quoted as saying that the growth in the number of Aboriginal Members in the Northern Territory should be a *source of pride to all Territorians and an indication that the Territory was moving beyond the politics of exclusion and towards and open and just society*[42].

This paper amply demonstrates that the Northern Territory as a jurisdiction has seen the active engagement and participation of Aboriginal peoples in the Australian political system and to a far greater extent than any other Australian jurisdiction.

The view that the Northern Territory cannot be trusted with Aboriginal matters and the benevolent Commonwealth can be trusted perhaps prevails. Why this is so is not clear. If that is in fact the predominant view, the holders of that view must surely question representative democracy in the guise of the Commonwealth.

How representative is the Commonwealth Government on these matters considering that the Territory has over the past 40 years elected Aboriginal Members to its own Assembly on 32 occasions at 12 general elections, and on two other occasions at by-elections, and yet the record in the Australian Parliament is so poor?

While challenges continue and representative democracy requires vigilance – according to a media release from the Northern Territory Electoral Commission issued on 14 July 2014, the Australian Bureau of Statistics figures indicate there are 30 000 eligible persons in the Northern Territory (population 230 000) not on the electoral role. For such a young jurisdiction, the Northern Territory is a surprisingly mature participant in relation to Aboriginal representation. This paper has attempted to dispel any mistaken notion that this is not the case.

42 Maddison Op Cit page 675

Disability, Inclusion and Democracy – an Uncomfortable Fit

David Gibson

David Gibson is former Liberal National Party member for Gympie in the Queensland Parliament

INTRODUCTION

It would be easy to believe as a result of the bi-partisan support for the National Disability Insurance Scheme (NDIS) and with the various types of disability legislation enacted over the years at both State and Federal levels, that Australia has become a veritable paradise for people with disabilities. However the evidence shows this is not the case.

In asking the question "How representative is representative democracy?" specific attention must be given to the engagement of democratic processes with those citizens in the community who have a disability.

As a general principal within Australia the only individuals disenfranchised from the electoral process are those "serving a sentence of imprisonment"[1] or "by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting"[2]. Therefore the majority of people with a disability would have not only the right to vote but also the legal obligation under our nation's compulsory voting laws. Yet the harsh truth is that people with a disability face barriers to both access (equity) and opportunity (equality) to engage in the democratic process, which results in them becoming a part of a broader body of disenfranchised voters.

In a modern and thriving democracy such as we have across Australia, the right to vote and to engage in democratic processes is widely recognized as a fundamental human right. Indeed in 2010 the Australian Human Rights Commission wrote that

> *"A health democracy makes sure that all members of the community have equal access to the political process… However, even though almost all Australians over 18 years old have the right – and the obligation – to vote, not all Australians enjoy that right as a practical matter."*[3]

1 Sect 106 Qld Electoral Act 1992
2 Sect 93, Commonwealth Electoral Act 1918
3 The right to vote is not enjoyed equally by all Australians, Australian Human Rights Commission, Feb 2010

So what has gone wrong?

In 2008 the Australian Government released a discussion paper on why Australia needed a National Disability Strategy and what might be included in one. The final report *Shut Out: The Experience of People with Disabilities and their Families in Australia,* highlighted the ongoing barriers that people with disabilities face across a range of areas in contemporary Australia.

> *People with disabilities may be present in our community, but too few are actually part of it. Many live desperate and lonely lives of exclusion and isolation. The institutions that once housed them may be closed, but the inequity remains. Where once they were physically segregated, many Australians with disabilities now find themselves socially, culturally and politically isolated. They are ignored, invisible and silent. They struggle to be noticed, they struggle to be seen, they struggle to have their voices heard.*[4]

HISTORICAL CONTEXT

Australia has had a long association with championing the rights of the disabled at the international level, being one of the eight nations involved in drafting the Universal Declaration of Human Rights, which in Article 21 sets out, amongst other rights, the right to vote for all citizens – including those people with disabilities.

In August 1980 Australia ratified the International Covenant on Civil and Political Rights, which in article 25 again reiterates the right of people with a disability to vote. These rights began to be implemented through domestic law with the Disability Discrimination Act 1992 (Cth), and other State and Territory based legislation like the Anti-Discrimination Act 1991 (Qld).

Most recently, in July 2008, the Australian Government formally ratified the United Nations Convention on the Rights of Persons with a Disability (CRPD), which under Article 19 includes the right to *"...* full inclusion and participation in the community*"* for people with a disability.

State parties to the CRPD are required to take appropriate steps to promote an enabling environment in which people with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others. They also have a duty to adopt positive measures to encourage the active involvement of people with disabilities in non-governmental organisations and associations concerned with public and political life, and in political parties, as well as the forming and joining of organisations of people with disabilities at the local, regional, national and international levels.

4 SHUT OUT: The Experience of People with Disabilities and their Families in Australia, National Disability Strategy Consultation Report, 2009

The promise offered by these international treaties along with the various Federal and State legislations was the realisation of the rights enshrined in those documents and a subsequent society where people with disabilities are recognised and valued as equal participants. Their needs are understood as integral to the social and economic order and not identified as being 'special'.

RESEARCH

As part of the research for this paper a confidential survey of all Australian State and Territory MPs as well as MPs from the Commonwealth parliament and those from the New Zealand parliament was undertaken using the web based survey instrument, *Survey Monkey*. A total of 77 responses were received from representatives across all parliaments.

Also in the preparation for this paper a review was undertaken of a variety of sources from Australia, New Zealand (NZ), Canada and the United Kingdom (UK). This included relevant academic literature as well as various government reports into disability and a NZ Parliamentary report of the Government Administration Committee *Inquiry into the accessibility of services to Parliament*.

This review of material confirmed the view that people with a disability face barriers in participation resulting in too few opportunities for meaningful engagement in democratic processes. The barriers result in isolation and frustration as they struggle to participate in political and public life on an equal basis with others.

Indeed the study contained in the *Journal of Community Engagement and Scholarship*, 'Civic Engagement and People with Disabilities: The Role of Advocacy and Technology'[5] observed that increasing the political engagement of people with disabilities will 'ensure that new policies do not continue the cycles of oppression and marginalization historically experienced by this population'.

Before analysing the survey and research, some fast facts help to provide context.

5 S Parker Harris, R Owen and C De Ruiter, 'Civic Engagement and People with Disabilities: The Role of Advocacy and Technology', *Journal of Community Engagement and Scholarship*, 2012, vol 5(1), pp70–83, p 81.

FAST FACTS

- Approximately 18.5% (4.2 million) Australians have a disability – 1 in 5 people. Of these, 1.4 million Australians have a profound or severe limitation affecting their mobility, self-care or communication.
- Rates of disability increase with age. Less than 1 in 20 children under the age of five have a disability, compared to almost 9 in 10 people aged 90 years and over. Just over half (52% of people) aged 60 years and over have a disability.
- 1 in 6 Australians have a hearing disability.
- 1.5% (357,000) Australians are blind or have low vision.
- 2.7% (668,100) Australians have an intellectual or development disorder.
- People with a disability who were employed were more likely to be working part time (38%) than those with no disability (31%).
- Females with disabilities have a much higher rate of part time employment (56%) compared with males with part time employment (22%).
- In June 2011 around 819,000 people with a disability in Australia received the Disability Support Pension. (Disability in this instance is defined as being unable to work for two years because of illness, injury or disability or being permanently blind).[6]
- Disability is 1.2 times more common among men in regional and remote areas than major cities and at similar rates among women.[7]
- In non-remote areas, Aboriginal and Torres Strait Islander adults are twice as likely as non-Indigenous Australian adults to have a disability or long-term health condition that requires care, services or assistance to meet their self-care, mobility or communication needs.

6 Australian Bureau of Statistics, *Australian Social Trends*, March Quarter, Cat No 4102.0, ABS 2012
7 National Rural Health Alliance, 'Delivering equitable services to people living with a disability in rural and remote areas', 7 June 2013

SURVEY RESULTS

The survey (conducted through Survey Monkey and referred to above) looked at how MPs engaged with constituents who have a disability and what support their parliament provided them to undertake this engagement.

In summarising the survey results, the following points are made:

- Nearly 90% of respondents had a constituent with a disability contact them on an issue they felt strongly about in the past 12 months.
- Direct contact to an elected official or a Government Department or Minister is the most common form of activity at over 80%, with methods like petitions the least common at below 18%.
- The majority of responses regarding assistance provided by the MP's parliament to engage with people with a disability focused on physical access.
- The majority of respondents had not used external support to meet with a disabled constituent.
- MPs generally indicated a broad understanding of the barriers faced by people with disability from civic participation.

The Council of Australian Governments (COAG) National Disability Strategy[8] (NDS) 2010–2020 identified six outcomes as part of its aim to develop a high-level policy framework to guide all levels of government activity. Whilst all six policy areas are important in fulfilling obligations towards the human rights of people with a disability, the two relevant policy areas for consideration for the purposes of this paper are *Inclusive and accessible communities* and *Rights protection, justice and legislation*.

Clearly the role that parliaments, MPs and governments play in this space is an important one as it was recognised that people with a disability may experience restricted access to a range of events and opportunities including: political engagement opportunities, as a result of factors like the built and natural environment; services and programs; and the way information is provided.

Whilst the NDS identified that:

> *Sometimes societal barriers can stand in the way of people exercising their rights as citizens, including within the political and justice systems. For instance while most people with disability may not be directly excluded from voting, some experiences may discourage individuals from staying on the electoral roll.* [9]

8 COAG, National Disability Strategy 2010–2020, 2011
9 COAG, National Disability Strategy 2010–2020, p37

This resulted in an 'area for future action' being identified as:

> *2.8 Ensure people with a disability have every opportunity to be active participants in the civic life of the community – as jurors, board members and elected representatives.*

However, there is little evidence available of any proactive strategies for reducing the barriers to civic participation being implemented as a result of the NDS.

In response to question 4 'What assistance does your parliament provide your electorate office to engage with people with a disability?' over 40% of answers focused on the disability access to the building.

Of concern is that 20% of respondents indicated they were not aware of any support available or that cost was a limiting factor in obtaining support.

> *When we identify something that would help, we ask for it but cost is a factor. We have no steps to the office but an electric door would make it easier for those with mobility issues, but cost is prohibitive.*

Some respondents indicated that their MP's electorate office did not meet current disabled access standards and that the MP would conduct home visits or mobile offices to facilitate meetings with people with a disability in a more accessible location.

The inability of people with a disability to access an electorate office is a simple and yet powerful barrier to their full inclusion in civic participation.

Further barriers beyond the physical environ such as access to information or cost of engaging support services by Members of Parliament add to barriers that people with a disability face in having their voices heard by their elected representatives.

Despite the regulative oversights in place, there remains a gap between the principals espoused in various statutes and the reality faced by people with a disability.

Question 2 in the survey asked '*In your capacity as an MP have you had constituents with a disability contact you on some issue they feel strongly about in the past 12 months?'*

The response highlighted that constituents with a disability are likely to contact their elected member on an issue they feel strongly about, with only 12% of respondents indicating that they had no contact from a person with a disability in the past 12 months.

Contact was more likely to be made on a local issue (78%) compared to a national issue (65%), with matters such as accommodation, transport and cost of living being mentioned along with the NDIS.

Surprisingly 66% of responses to question 5 'Have you ever had the need to use external support to meet with a disabled constituent? (e.g. Deaf relay service, advocate etc.)' indicated they had not. This response runs contrary to the literature, which indicates that people with a disability faced multiple barriers to civic participation including access to external support.

Possible reasons for the lack of use of external support by MPs may be the result of ignorance or misconceptions as to the support available or as a result of a lack of resources to engage that support.

The final question asked 'What barriers are you aware of that prevent people with a disability from getting more involved in civic participation in their local community.'

Most responses identified multiple barriers including the built environ (40%), lack of support services (48%), cost (7%) and societal attitudes (16%).

There were views displayed in response to this question that underscored the greatest barrier people with disability face is often confronting negative attitudes or outdated stereotypes – even amongst MPs. One respondent indicated that:

> *The biggest barrier is mainly their own mindset. There is so much help available.*

Whilst another said:

> *They are so preoccupied with caring for themselves and their disability to have time to participate.*

The fact that these two responses were provided by MPs to the survey question is, in part, disturbing in society today. However the responses are also honest and they highlight the attitudinal barriers that are still displayed towards people with a disability even by their own elected representatives.

NEW ZEALAND REPORT

As part of the literature review, referred to above, the 2014 report by the NZ Parliamentary Government Administration Committee – *Inquiry into the accessibility of services to Parliament* was considered. As far as could be determined this was the only report into the accessibility of parliament undertaken by any Australasian parliament and is a credit to the NZ Parliament and the members of the Government Administration Committee, both from the point of view of the subject matter considered and from the engagement with the disabled community to ensure their views were considered.

The report addressed a range of topics including physical access to the parliament and members' offices, the accessibility of information from the parliament, to people with a disability engaging with parliament and the support provided to MPs with a disability.

The very act of a parliament conducting a review into its own accessibility is one that all parliaments could benefit from. Any inquiry to ensure that a parliament complies with the human rights of people with a disability, will assist in increasing awareness of the rights themselves as well as addressing the very barriers that people with a disability face in accessing those rights.

CONCLUSION

It is evident from the literature reviewed and the survey results, that there is still a long way to go in addressing the barriers that exists for people with a disability to participate and engage in the political and democratic processes within society.

Despite international treaties being ratified and lofty policy intents being enacted in legislation, report after report highlights the failure to realise that basic of human rights – to have your voice heard.

It is acknowledged that the barriers to civic participation are complex depending on a person's disability, and the intersection of that disability with the issue for engagement. It could be as simple as the physical barrier to accessing an electorate office preventing a meeting with their local MP, to those attitudinal barriers that exist in relation to some elected representative.

It is evident that despite all the work undertaken to date that neither the physical nor societal barriers have been adequately addressed.

Whilst Sir Winston Churchill famously said,

> *"No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time."*

It is generally recognised that the strength of the Westminster style of democracy is that it recognises and protects the value and equality of each individual.

Parliaments, elected representatives and governments at all levels have undertaken a vast amount of work to try to ensure that they engage with all individuals in their society so that they can truly be said to be a 'representative democracy'. However, it is evident that there is still ongoing work that needs to be done to ensure that the voices of people with disabilities are properly heard and that they are able to be meaningfully involved in a representative democracy.

Chapter Seminars

Politics in Parliament: Is it Overrated?

Harry Phillips

Dr Harry Phillips is Parliamentary Fellow (Education) Western Australian Parliament and Honorary Professor (Edith Cowan University) and Adjunct Professor (Curtin University)

NOTES FROM AN AUSTRALIAN STUDY OF PARLIAMENT GROUP SEMINAR: WESTERN AUSTRALIAN CHAPTER: 18 SEPTEMBER 2014.

Peter Kennedy, guest speaker, award winning journalist and recent author of the best selling book, *Tales from Boom Town: Western Australian Premiers from Brand to Barnett*, addressed the seminar topic *Politics in Parliament: Is it Overrated?* It was advertised to broadly contend that 'having the edge' or 'winning the week' in parliament is overrated: that events in the Chambers may not actually have that much impact outside the building; and that the influence of parliamentary debate on political decision making is subject to dispute. Of significance, though, was the political arm wrestle of 'winning the week'. Respectively providing a Member's perspective on the topic was President Hon Barry House, MLC, elected in a by-lection in 1987. The other Member the Hon. Michelle Roberts MLA, with a by-election victory in 1994 she is destined, in November 2015, to become the longest serving woman in the Western Australian Parliament since responsible government in 1890.

PETER KENNEDY

In his typically interesting manner Peter Kennedy was able to report on three parliaments, Western Australia, New South Wales (NSW) and the Federal Parliament. With the presentation of several examples, Kennedy claimed that parliament is more than just a place where legislation is debated. Indeed 'it is a place where; reputations are won or lost; there can be considerable humour as well as many tears shed; and members need to be on their toes to either win a point, or save their reputation'.
A focus was placed on Sir Charles Court who was judged to be 'a towering figure in parliament'. Incidentally, Court was quoted as saying 'there were people who I would find quite normal and trustworthy, in connection with everyday affairs, or business affairs, professional affairs, but I learnt I couldn't trust them politically.' Court, too, 'worked the media' and was also one of the first ministers in the 1960s to have former

journalists on his staff, churning out material. When working for the *Sydney Morning Herald,* Peter Kennedy found grounds to support John Howard's observation made in the former Prime Minister's book *Lazarus Rising*, that Neville Wran 'was a polished media performer'. He 'mixed the fluent logical argument of a QC and tirades of savage abuse'. Referring to the 1970s and 1980s especially, Kennedy noted that the rise of the electronic media and personality politics made the contest in NSW more gladiatorial than it had been previously. It led 'to a relentless need for a political leader to reaffirm constantly his superiority and feed the media's hunger for sensational stories'.

Back in the West, Peter Kennedy found that former Premier Brian Burke, about whom he was accused of going 'soft' on in his previously mentioned book, 'was superb in Parliament and on television'. In some ways he appeared to model himself on Wran. 'Appearance was important, as well as the message. And he was obsessed about the media' and was said to be 'also a master of 'deflection'. Another former Western Australian Premier, Peter Dowding was judged to have performed strongly in Parliament but his lack of personal political skills contributed to his downfall at the hands of his party room. In fact Peter Kennedy indicated that he had recently spoken to two former federal MPs who were of the view that what happens in the party room is far more important than what happens in the parliament.

Mentioning the length of service, before coming Premier, of John Tonkin, Charles Court, Colin Barnett, Geoff Gallop, Richard Court and even Brian Burke led Kennedy to observe that there 'was no substitute for experience'. Indeed an MP's standing is influenced by his or her performance in the chamber and party room. However, in the wider community it is a raffle…that in now 'fluky' because of the fall-off in coverage and decline in the reach of traditional media outlets. Often, these days some television channels resort to 'gotcha moments'.

Significantly, Peter Kennedy contended that 'fewer young voters read papers or watch the evening news bulletins'. Many younger voters have had more years of formal education than previous generations, 'but this is not matched by their knowledge or apparent interest in political developments'. This is a huge challenge for political parties 'and gimmicks abound'. In this context Kennedy cited reports on the performance of Clive Palmer in the House of Representatives, voting in only 19 out of 202 divisions. This can lead to a judgement that 'proceedings in parliament do not seem to rate highly with him, although there is plenty going on in the backroom. And there is nothing wrong with his recognition rating'.

It appears that the 'problem for political parties and MPs is that while the parliamentary stage is little changed, the captive audience in the seats is dwindling'. Moreover 'the challenge for all participants then is how to reach the wider audience which is not tapped into the mainstream media'. Indeed 'the side that can do that, when times are good, can truly claim "to win the week". And they might also win the election'.

PRESIDENT BARRY HOUSE

President Barry House, formerly a schoolteacher and youth education officer with an Economics degree (and fine cricketer with under 19 cricket representation for Australia), indicated that his comments about the role of parliament and parliamentarians were made against a background of changes that have transpired over his 27 years as Member of the Legislative Council (MLC). Five main observations were made followed by a range of interesting comments. Firstly, the President observed that the demographics of members had changed with the Legislative Council having the highest proportion of women (15 out of 36) of any Australasian parliament, together with a trend to younger members. This has had a profound impact on the tone of the Western Australian Parliament. Secondly, when Barry House first gained a seat at a by-election in 1987 the parliamentary committee structure was just starting to emerge. Nowadays, a member typically devotes much more time to committee work than was previously the case. With substantial select and standing committee experience, the President of the Legislative Council made the observation that some of the best work done by members in both Houses is through committee work, but this is not given the recognition it deserves. Thirdly, the change in communication technology has been substantial. When Barry House conducted his first campaign he was introduced to a car phone, a mobile phone 'the size of a large house brick and a fax machine which printed on heat based paper where the print disappeared in 20 minutes if left in sunlight'. MPs from regional areas had access to a 'country typist' at Parliament House who would translate hand written drafts akin to formal letters. There was only one major newspaper to report the affairs of parliament. Since the 1990s parliamentary proceedings have been televised live, with the reporting of leading items in Question Time in the Legislative Assembly being particularly important. Talkback radio is now a significant communication medium with social media becoming 'all too invasive and immediate'.

It was judged that 1987 was the 'tail-end' of an era when announcements from the Executive, Premier and Ministers, were made first in parliament, then the media reported on them to the community. Now the Executive and Opposition make announcements via media releases, media conferences, doorstops and occasionally in the parliament, to suit the media cycle. This does not fully respect parliament and its pre-eminent role of accountability. Reforms to the voting system in both the upper and lower Houses, is the fourth change that has impacted on parliament. In particular, the introduction of proportional representation for the 1989 Legislative Council election has drastically changed the role members' play. A fifth point made by the President is that over the last 30 years the salaries and entitlements of MPs have declined drastically in relative terms with Western Australian parliamentarians now being paid some $50,000 less than their Federal counterparts. The superannuation arrangements have also deteriorated but politicians still 'cop flak'. In fact Barry House stated: 'I believe the Salaries and Allowances Tribunal has let the profession and the Institution down. All of these factors have led to shorter parliamentary careers and this affects the corporate memory and intellectual property retained in the Institution.'

A significant observation made by the President was that much of the history and knowledge of parliament resides with the parliament's clerks and other officers and staff who are very important for the credibility and effectiveness of parliament. In Barry House's analysis a distinction can be made between politicians, community representatives and parliamentarians. Everyone gets elected as a politician, with most members connected to a political party. They fight political campaigns to get nominated and then elected and the focus is on political parties and party issues. The campaigns are usually run in a 'presidential style' by the media and the main players. Entry to parliament is characterised 'with very little knowledge of what is involved or what goes on in the Parliament'. Whilst everyone has to remain a politician to survive, it is interesting in Barry House's view to observe how members need to 'graduate' to become 'community representatives' in a representative democracy and a 'parliamentarian', who gathers knowledge and respect for the institution and its processes. Those who do not move from the first stage generally fail to be re-elected. Indeed, President House noted that an obvious way of distinguishing a politician from a community representative can be determined by observing how two different members may treat an issue raised with them by a constituent. The 'ideal type' politician will use the issue to focus attention on themselves, 'by grandstanding in the media and parliament and pulling stunts which get publicity'. On the other hand a community representative 'might also raise the issue responsibly in parliament and the media but will also generally try resolve it by making proper representations to the relevant Department and Minister, arrange meetings (not just media appearances) for the constituent, make an effort to fully understand the matter, develop empathy for the community and work responsibly to change the policy or legislation to get a genuine outcome'.

In summary, President Barry House addressed the theme of the seminar 'Politics in Parliament: Is it Overrated? by answering YES. He said this 'because this is the impression most of the public gain from what they see'. Most of the electorate get their impressions from a 10 second grab on television, often take from Question Time, which is mostly about the theatre and politics of parliament, not the substance. 'Apart from the role-played by MPs…a large degree of responsibility for this regrettable trend lies with the media and the community. In seeking a solution the President, who chairs the Parliamentary Education Advisory Committee, said 'I think the only way is to continually advocate and implement civics education in schools, universities, work places and [in the] community. [Moreover] we have to learn to use the mediums we blame for the slip in standards over the years, [which include] the mainstream media, social media and every other avenue we can get access to'.

HON. MICHELLE ROBERTS

The final speaker for the evening was the Hon Michelle Roberts, MLA for Midland. Formerly a schoolteacher she entered politics in 1994 by winning a by-election. In late 2015, she will become the longest serving woman in the Parliament of Western Australia. Moreover, very few women have had more ministerial experience in the State than her. Some of her long-running, key ministerial portfolios are Police and Emergency Services, Housing and Works and Indigenous Affairs. In Opposition she also had long periods of 'shadow cabinet' service in areas such as Multicultural and Ethnic Affairs, Education and Women's Interests and as Opposition Leader of House Business. From 1996 to 2001 she was the Parliamentary Secretary of the Labour Party. As was the case with the previous speakers, Ms Roberts' opinions were significant and her delivery clear and interesting.

In opening, Michelle Roberts cited the Annual Lowry Institute Poll for 2014, which found that fewer than two-thirds of Australians believe that 'democracy is preferable to any other kind of government and that only 42% of young Australians (i.e. between 18 and 29) hold that view'. Nearly half of the total respondents (47%) chose a 'strong economy' over a 'good democracy'. According to Michelle Roberts 'these figures, if accurate, reflect the emergence of a profound cynicism within the electorate', as when asked to justify their view, the respondents' principal reasons were either 'democracy is not working because there is no real difference between the policies of the major parties' or 'democracy only serves the interests of a few and not the majority.'

These findings led Michelle Roberts to briefly articulate President Barry House's faith in civic education, by suggesting that 'we do not work hard enough to educate people about what democracy does and why, and how it is that we have it, and about what the alternatives are.' As an experienced parliamentarian and Minister, she advocated the case for parliamentary democracy, despite its apparent shortcomings, as the best political system for managing the inherent conflicts within a society. In pursuing this case Michelle Robert reminded seminar participants of Winston Churchill's 1947 statement to the House of Commons on a proposed amendment to the Parliament Act (1911). Churchill said:

> Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect and all wise. Indeed, it has been said that democracy is the worst from of government except all those other forms that have been tried from time to time.

Michelle Roberts noted that:

> Churchill's aphorism is often repeated, often misquoted, but it is none the less true for all of that. Democracy, specifically representative democracy of the Westminster kind, may be cumbersome and too transparent for its own good, but at least it manages transitions of power so that nobody actually dies through their occurrence and if people go to prison, it is not because of what they believe but generally they are, in some measure, corrupt.

Significantly, she, believes:

> The truth is that, no matter how unexciting parliamentary democracy appears to be, we need it. Question Time may be theatre and debates may be choreography, but they are a theatre and choreography developed for the precise purpose of channelling conflict into creative solutions rather than destructive ones.

The member for Midland drew attention to the significant work done through the parliamentary committee system. She pointed out that it may be considered by some to be the more 'mundane' side of parliament, however, it does enables 'members from all sides to get together and work together well.' An advantage of committee work, in her view 'is that it enables politicians to see each other as adversaries and not as enemies.' At the same time, she maintained that if we take all of the needle and the agro out of politics, then we fail in our most basic responsibility to represent the divisions within our community.' Furthermore, 'it may seem odd in a society in which "mateship" is seen as civic virtue', but people actually expect politicians to be in conflict. As the great conservative commentator Lord Hailsham has reminded us… politics is a spectator sport for 'the moment politics becomes dull …democracy is in danger.'

In Michelle Roberts' view, there is a great temptation for respective party colleagues to use Question Time, the formal confrontations of the parliamentary week, as a gladiatorial occasion. Question Time alternates between a Government trying to trumpet policy through answers to 'Dorothy Dixers' and an Opposition striving for that 'gotcha' moment when a Premier or Minister 'fatally stuffs up'. In fact, Roberts observes, 'rarely is there a question asked purely for information to which the questioner does not know the answer'.

In this battle to 'win the week' the non-parliamentarian player in the battle is the media, with Michelle Roberts noting that *The West Wing* is 'still mandatory for political wonks'. However, 'getting the media to focus on policy is like trying to get a child to eat their greens. They know that it is good for them, but the other stuff is much more fun'. Michelle indicated that she would prefer to have a public debate about privatisation, or about the nature of welfare support, or in her own present opposition portfolio area of community safety. However, 'in public forums our media run sound bytes rather than statements, and slogans rather than arguments'. Unfortunately 'policy and principle are usually the first casualties when political fireworks begin. It is not that they are jettisoned, but they are eclipsed by the one-liners, the slogans, the jibes and the stunts'.

Roberts argued that the 'fireworks' begin in parliament, but she went on to say that 'it is not enough for one side or the other to claim that we are better managers, we must show that we are better thinkers, better advocates and possessed of a better set of principles'. She added that 'the beauty and wonder of a Westminster Parliament is that it has evolved over the years so that it can be used for this purpose,' but she admits 'the current obsession with the news cycle has taken from it oratory and colour.'

Without doubt, the audience of some 50-seminar participants, including parliamentarians, officers from both Houses of the Western Australian Parliament, academics and students were presented with a plethora of rarely published understandings of parliament, particularly as it operates in Western Australia. Emeritus Professor David Black, who chaired the proceedings, thanked those in attendance and recognised and praised the speakers for their contributions, many of which were particularly thought provoking.

Chronicles

From the Tables — July–December 2014

Robyn Smith

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INTRODUCTION

In September 2014, Australia's National Terrorism Alert System level was raised from Medium to High. This resulted in most parliaments reviewing and, if necessary, modifying security standards and procedures.

AUSTRALIAN PARLIAMENT

The Senate Privileges Committee's 160th Report, *The Use of CCTV Material in Parliament House*, was tabled on 5 December 2014. At issue was (1) whether the closed circuit television system, a security device, had been inappropriately used by the Department of Parliamentary Services (DPS), which did or had the potential to improperly interfere with the free performance of the duties of a Senator; and (2) whether disciplinary action had resulted for an employee, which may constitute a contempt. The matter first came to light during an Estimates hearing of the Finance and Public Administration Legislation Committee in May when it was alleged that CCTV cameras had been used by DPS to establish the movements of a staff member in the Senate wing of Parliament House. On the first matter, the committee found that the DPS had used the CCTV system without proper authorisation, and with a lack of accountability to the Presiding Officers, on whose behalf they manage the system, and to the Parliament itself. The committee concluded that action was required to remove any apprehension that the system might continue to be used in an unauthorised manner. The committee made no specific finding in respect of the second matter, but noted that it was available to the Senate to deal with any action arising as a contempt. The committee recommended to the Senate that no finding of contempt be made. A further four remedial recommendations in respect of CCTV use and procedures were made, and in relation to structured training of DPS staff in the principles of parliamentary privilege. The report will be considered by the Senate in 2015.

The House of Representatives Procedure Committee presented its first report of the 44th Parliament in September 2014, *Use of electronic devices in the Chamber and*

Federation Chamber. It arose from Members' increasing participation in social media from the Chambers. The report cautioned Members to be mindful of the rights of other Members and the dignity of the House. It also noted that devices should not be used in any way, which disrupted the House or the Chamber, divulged information to other Members, photographed or recorded proceedings, or made audible signals. A draft resolution confirmed that social media communications from the Chamber were unlikely to be protected by parliamentary privilege and that Members' reflections on the Chair were liable to be treated as matters of order. The Government has yet to respond to the report.

Sitting hours in the House of Representatives were adjusted to accommodate a condolence motion for former Prime Minister the Hon Edward Gough Whitlam AC QC, who died on Tuesday 21 October 2014 aged 98. Further adjustments were made in November to accommodate addresses by the leaders of the United Kingdom, the People's Republic of China and the Republic of India, which followed a July address by the Prime Minister of Japan. Four addresses by foreign leaders during a six-month period is a record unlikely to be surpassed in the House of Representatives. A total of 13 Heads of State or Government have addressed the House, either directly or at a joint sitting to which Senators were invited.

Simplified procedures were adopted in the Senate under a trial change to Standing Orders, which streamlined processes for presentation and debate of documents and committee reports. The new procedures dispense with the requirement to seek leave to table some documents but not others and provide for debate on the documents three times per week. Procedures for the postponement of business were also simplified from a motion from the floor to a signed document lodged with the Clerk, but they provide for a question to be put in the event that there is a requirement for the Senate to vote on it. Postponed items on which no question is sought are taken to have been agreed to. Changes have also been made to adjournment debates, allowing Senators latitude without application of the rule of relevance.

The Senate Regulations and Ordinances Committee noted[1] that since 2013 there has been a rise in general rule-making power in bills, which is delegated to agencies, as opposed to regulation-making power, which falls to the Office of Parliamentary Counsel. In particular, the Committee was concerned about: (a) the lack of consultation with the Committee about what it regards as a new form of delegated legislation; (b) a consequential decline in the quality of drafting and quality-control mechanisms; (c) the impact of potentially lower quality instruments on the work of the Committee; (d) ensuring that matters relating to rights, obligations, liabilities, and penalties remain the subject of regulations; and (e) whether rule-making power should be delegated at all.

1 *Delegated Legislation Monitor*, a weekly Senate publication. For details in respect of the *Williams* matters (school chaplains programs), see *Delegated Legislation Monitor No 15 of 2014*.

AUSTRALIAN CAPITAL TERRITORY

Membership of the Legislative Assembly will increase from 17 to 25 at the General Election in 2016 following the August 2014 passage of two bills, which required a two-thirds majority of support. This should alleviate critical mass issues experienced by the Legislative Assembly in respect of populating Assembly Office Holders, the Executive and Committees.

The Assembly adopted a resolution in September 2014 which established guidelines for the ACT's Lobbyists Register, which commenced on 1 January 2014. The resolution empowers the Clerk to maintain the register and deal with any complaints in respect of unauthorised lobbying of Ministers, Members, their staff and all ACT public servants.

Dates for Estimates Committee hearings have been streamlined to give all parties certainty for planning. When setting the sitting dates for 2015, the Assembly provided for agencies to be questioned on their annual reports for three weeks in November. In the past, individual portfolio committees have set dates for inquiries into annual reports, which resulted in hearings over several months.

The final sitting day of 2014 featured a recall of the Assembly for one additional day to consider and debate the Standing Committee on Public Accounts report on the Appropriation (Loose-Fill Asbestos Insulation Eradication) Bill. The report was debated on 4 December. Following the resignation of Chief Minister Katy Gallagher to contest a casual Senate vacancy, the Assembly was again recalled on 11 December when Gallagher's deputy Andrew Barr was elected Chief Minister.

NEW SOUTH WALES

The government Members for Charlestown and Newcastle, Andrew Cornwell and Timothy Owen, resigned from the Legislative Assembly on 12 August following admissions to the Independent Commission Against Corruption (ICAC) that they accepted money from developers who are banned under NSW electoral laws from making political donations. By-elections were held on 25 October, Jodie Harrison winning Charlestown and Tim Crakanthorp Newcastle, both representing the ALP.

An otherwise routine statute law revision bill introduced on 5 November 2014 attracted the interest of opposition Members because of amendments proposed to the *Public Interest Disclosures Act*. The Attorney-General, sponsor of the bill, provided answers to the Opposition's concerns and the bill was passed by the Assembly. Upon debate in the Legislative Council on the same day, the bill was divided after the second reading by the Committee of the Whole, which created a second bill into which proposed amendments to the *Ombudsman Act* and *Public Interest Disclosure Act* were

incorporated. The original bill, Statute Law (Miscellaneous Provisions) Bill (No 2), was then considered without the omissions and agreed to. The second bill was the subject of considerable debate, with government amendments being accepted and opposition amendments rejected. Both bills were read a third time after which the bills were returned to the Assembly seeking endorsement of the Council's action and agreement to the bills as divided and amended. On 20 November, the Assembly concurred and agreed to the proposed amendments. Division of a Legislative Assembly bill by the Legislative Council is rare, but not unprecedented.

The 2014 Spring session was the final sitting of the 55th Parliament before a General Election scheduled for 28 March 2015. Among the retiring Members was Father of the House Richard Amery, the ALP Member for Mt Druitt, who served 31 years as a Member of the Assembly, eight as a Minister under Premiers Bob Carr and Morris Iemma.

Election preparations included a November delegation from the Legislative Council to its Privileges Committee to publish documents, which had been subject to a claim of privilege after consideration by the independent legal arbiter resulted in the claim being rejected. This role would normally fall to the Council itself, which would not sit again before the General Election and which had outstanding claims of privilege to be settled. Legacy Reports from Council Standing Committees on Law and Justice, State Development and Social Issues of the 55th Parliament were tabled in order to apprise Committees appointed in the 56th Parliament of their predecessors' work.

NEW ZEALAND

The much anticipated Parliamentary Privilege Bill was enacted unopposed, after referral to the Privileges Committee for consideration in 2013. This was done prior to the dissolution of the 50th Parliament on 14 August 2014.

The General Election of 20 September 2014 resulted in the first single-party majority under the Mixed-Member Proportional voting system. Prime Minister John Key led his National Party to a third term in Government, securing 47.4 per cent of the vote or 60 seats in the 121-seat Parliament.

The 51st Parliament was opened on 20 and 21 October 2014 at which the Right Honourable David Carter was re-elected Speaker. Parliament adjourned for the Summer break on 10 December.

NORTHERN TERRITORY

During August 2014, the Independent Member for Nelson, Gerry Wood, successfully moved that the Legislative Assembly establish an inquiry under section 4A of the *Inquiries Act* into 'all aspects of political donations in the NT in the interests of public transparency and accountability' over the past 20 years. This infuriated and embarrassed the Government, which was caught short with numbers on the floor of the Assembly when the question was put and carried on the voices. That evening, the Leader of Government Business sought to rescind the motion by suspending Standing Orders. The question to suspend Standing Orders was the subject of a division, which resulted in a 12–10 vote to the Government, insufficient for the absolute majority required by Standing Order 306. The matter appeared to rest there, but on 22 October the Leader of Government Business gave Notice of a Motion to rescind the resolution of 20 August. That motion was debated and resolved in favour of the government after which the government moved to establish a vastly diluted investigation in the *process* of political donations in the Northern Territory. The report of that investigation, which will work through the Department of the Chief Minister, must be with the Assembly during the first quarter of 2015. Wood's motion arose after intense media and political speculation about the legal status of an organisation named Foundation 51 and its relationship with the Country Liberal Party.

Following Commissioner John Lawler's findings in relation to the Stella Maris hostel being tabled in the Legislative Assembly in June[2], Leader of the Opposition Delia Lawrie lodged an appeal in the Supreme Court in July in which she claimed she had been denied procedural fairness and sought to have Lawler's findings quashed. The usual preliminaries were undertaken before the matter was set down for trial before Justice Stephen Southwood in January 2015.

The ALP Member for Casuarina, Kon Vatskalis, resigned on 18 September 2014. A by-election on 18 October resulted in the ALP's Lauren Moss being elected. At 27, Moss is the youngest Member in the history of the Legislative Assembly.

On 27 November 2014, former CLP members Alison Anderson and Larisa Lee announced their resignations from the Palmer United Party (PUP) to sit as Independents. That move took PUP from a representation of three in the Legislative Assembly in April to zero by year's end.

On 12 December, Adam Giles reshuffled his Ministry for the seventh time since becoming Chief Minister in March 2013. It was the 11th reshuffle since the CLP won the General Election of 2012. In the December 2014 reshuffle, Deputy Speaker Gary Higgins was elevated, taking the number of Ministers from eight to nine.

2 See APR, Vol 29, No 2, Spring 2014; p181—182.

QUEENSLAND

The Ethics Committee reported on four matters of privilege between July and December 2014, including an alleged failure to register interests and an alleged attempt to improperly influence the conduct of a Member.

A by-election in the seat of Stafford was held on 19 July and resulted in a large swing against the Liberal National Party (LNP) following the resignation of short-lived incumbent and Health Minister Dr Chris Davis. The ALP's Dr Anthony Lynham won the seat comfortably, securing a 17 per cent swing. He was sworn in on 5 August 2014.

Two former LNP members who resigned to join the Palmer United Party (PUP), Dr Alex Douglas and Carl Judge, resigned from PUP in August and October respectively. They now sit as Independents and have rendered PUP unrepresented in the Queensland Parliament.

The Select Committee on Ethics' inquiry, relating to evidence by the Acting Chair of the Crime and Misconduct Commission to the Parliamentary Crime and Misconduct Committee, remained suspended at the end of 2014 subject to the outcome of other matters.

SOUTH AUSTRALIA

On 21 December 2014, the Clerk of the South Australian Legislative Council, Jan Davis AM, reached the milestone of 50 years of service to the Parliament of South Australia. When she was appointed Clerk of the Legislative Council in 1992, Davis was the first woman appointed Clerk in any Australian parliament. The occasion was marked by a President's dinner and on the last sitting day of the year in the Council itself.

VICTORIA

The final chapter in the Geoff Shaw saga was played out in the Victorian Parliament during the closing months of 2014. Shaw served his 11-day suspension and was entitled to return to the Assembly on 2 September after which he was required to 'apologise appropriately' to the House. His apology displeased Premier Denis Napthine, who gave notice of a motion that the apology, being inappropriate, constituted a contempt of Parliament and that Shaw be expelled. The Labor opposition unsuccessfully moved for his expulsion in June and did not support the Premier's motion, which was, unsurprisingly, also opposed by Shaw. The motion was defeated. Further theatre was created by the potential for a motion of no confidence in the Napthine Government, which did not eventuate after Shaw stated that he would not move such a motion notwithstanding that he had no confidence in the government.

Arising from the various inquiries and investigations into Shaw's behaviour was a recommendation to the Standing Orders Committee from the Privileges Committee that it investigate the need for a Parliamentary Commissioner for Standards in Victoria. By the end of the 57th Parliament, the matter was unresolved. The Privileges Committee recommended that the matter be taken up by the Standing Orders Committee appointed when the 58th Parliament convened.

In October 2014 the Legislative Council adopted proposed Standing Orders recommended by the Procedure Committee following a three-month review. The new orders, which would be effective from the 58th Parliament, included a new 'closed' category of hearing for Council Committees, an independent arbiter to determine executive privilege in cases where documents have been ordered produced by government agencies, removal of the requirement to give notice of a bill initiated in the Council, expeditious passage of an Assembly bill identical to one that has been initiated and debated in the Council, removal of an unused standing order relating to the Government Business Program, and allocating speaking rights according to proportionality of House composition in the event of a balance of power situation.

The 57th Parliament came to an end in October and a General Election was held on 29 November 2014. The ALP won government from the Denis Napthine-led Liberal Party with a relatively small overall swing of 1.8 per cent to the ALP and a 1.6 per cent swing away from the Liberal Party. In Frankston, where controversial and beleaguered Liberal-turned-Independent-with-the-balance-of-power Geoff Shaw faced 13 challengers, Shaw secured almost 13 per cent of the primary vote with the real contest going down to the wire between the ALP and Liberals. The ALP's Paul Edbrooke just edged out Sean Armistead by 0.5 per cent in a tiny swing of 0.9 per cent. Daniel Andrews emerged as the new Premier with a comfortable margin of nine seats in the Lower House. The Legislative Council, where the former government had a comfortable majority, proved more problematic with the ALP and Liberal Party having 14 Members each; the Greens five; Shooters and Fishers two; and the Democratic Labour Party, Nationals, Sex Party and Vote 1 Local Jobs Party one each.

The 58th Parliament was opened on 23 December 2014. Telmo Languiller was elected Speaker of the Legislative Assembly and Bruce Atkinson, who was presiding officer in the 57th Council, was re-elected President.

WESTERN AUSTRALIA

Arising from a Private Member's Bill introduced in the Legislative Assembly in June 2014, a Joint Select Committee was appointed to inquire into and report on recognition of Aboriginal people in WA's constitution. The Committee is required to report to both Houses by 25 March 2015.

The Legislative Council adopted a temporary standing order for trial during the first half of 2015 which altered sitting times on certain days and which provided new arrangements, and longer debates if necessary, for the consideration of committee reports. The latter case will be particularly relevant in situations where reports are of significant public interest. The Council amended Standing Order 37 to tidy up rules in relation to speaking to amendments in cases where Members who had spoken to the substantive motion could speak again but Members who were yet to speak had to address both the substantive motion and the amendment. Standing Order 37 now provides for all Members to speak on any amendment to a motion on notice with the Procedure and Privileges Committee suggesting that the change be free from abuse by strict application of the relevance test.

The Council's Standing Committee on Environment and Public Affairs has been inquiring into hydraulic fracturing for shale gas since July 2013 and is expected to report in 2015. Other jurisdictions have conducted similar inquiries in recent years. The NSW Legislative Council General Purpose Standing Committee 5, self-referred an inquiry into Coal Seam Gas in 2011 and reported on 1 May 2012. The Northern Territory government established an independent inquiry in March 2014 with a report expected late in the year. The parliament of South Australia commenced an inquiry in November 2014. Governments that have imposed a moratorium on the practice include Victoria (since 2012) and Tasmania (March 2014 for 12 months).

Book Reviews

Cradle of Australian Political Studies. Sydney's Department of Government

by Michael Hogan. Connor Court 2015, 296 pp, RRP $39.95.

Jennifer Aldred

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In what comes through as the desire to give back to an organisation with which he has been associated since 1967 – and to mark the centenary of the establishment of the Department in 2017 – Michael Hogan has produced a reflective and insightful read, particularly for those of us who are products of the University of Sydney's Department of Government. The book documents the development of the academic study of government, the contribution of the various individuals that made it happen and the pressures over time on the institution that was, arguably, first to house it. It shows the signs of trained and disciplined researchers such as Hogan and his long time colleague, Michael Jackson, but is nicely sentimental in parts with a collection of photos of staff from the 1970–80s, including one of departmental stalwart and scholar Ken Turner in what is captioned his 'post-prandial glow'. In tribute, there is an honour roll with a list of Departmental staff from 1917 to 2014 and those who worked or studied there who went on to become professors. There is also recognition of certain graduates who pursued careers in the government sector such as NSW Legislative Council Presidents Meredith Burgmann and Don Harwin, former NSW MPs and Ministers, Rodney Cavalier, Michael Knight and Terry Metherell, Managing Director of the ABC, Mark Scott, and psephologist Antony Green, to name a few. This is a nice touch. Any sensible salute to the Department should lay claim to those graduates who chose to work 'in the industry' as a measure of its success.

The book also stands as a chronicle of institutional change reflecting (or, indeed, influencing, depending on your take) broader social change over the decades. It plots the growth in demand for higher education and, bringing with it, a more diverse range of students. The effects of the post-war period, abolition of fees, increased rates of participation of women, opening up to older students and – with mass immigration from the 1950s – groups of students from varied social-economic backgrounds. More recently also – from the late 1980s – the 'corporatisation' of universities as changes in government policy required of them the need to serve a wider audience and in a different way.

Within the Department under this latter shift, many remained loyal to 'the brand' but critical of the methods:

> ….[W]e've fallen into a culture of hyper-competitiveness where universities are regarded by their managers and governments essentially as competitive firms

> competing with each other for resources, rather than what's the reality, which is a knowledge system based on cooperation and sharing (Professor Raewin Connell, 2014 cited on p. 182).

The heady, perhaps easier, days in the Department were in the 1960s and 1970s. There was big expansion between 1963–1966 (p. 85) but not sufficient for all offices to have a telephone which had to wait for the '70s (p.103). Social movements opposing spies, war and nuclear testing, favouring women, gay and Aboriginal land rights were all forces for change and, for the Department, there is no doubt, '…course enrolments were pushed up by the heightened interest in politics…' (p.109). In the chapter 'Real politics in the 1970s', the agony and the ecstasy of the era are recorded. Student participation in decision-making, collective not hierarchical control systems and women's representation on staff, particularly in senior roles.

Into this mix, is the impact on the Department of Government of the destabilising feud within economics over the legitimacy of political economy (PE). I was one of many PE students enlisted at the time to support the proposition that PE was foremost the study of economic systems and not social ones. To no avail it seems. The compromise to this long running and bitter dispute was the creation of a BEc (Soc.Sc.) and a separate Department of Political Economy. The separation remains:

> Even within the one faculty the Department of Political Economy is located in the School of Social and Political Sciences, not in the School of Economics (p.222).

Cold comfort perhaps for those PE academics who may have changed the organisation's design but not its thinking. For Government too, the dynamic of the period was, apparently, more in the process than in the product and, by the end of the 1970s, staff:

> …generally agreed that they were better teachers and researchers than political activists…[and]…if staff were to evaluate their own political performance as if they were grading an academic essay, the result would be a reasonable Credit mark (p.148).

The book concludes, for me, on a mournful note. It describes a Department – indeed, a university – which may have lost its soul. The expansion of digital communication and information systems, coupled with changes to the University's employment conditions of service, has diminished the need for bricks and mortar and the personal interactions that characterised education service delivery for centuries. University ranking, as the essential attracter of research funds, quality staff and full fee paying students, now drives the system. To those not close to it, it is a complex arrangement of performance measures, with world ranking the most arbitrary but giving those rated highly a competitive edge.

Hogan is not drawn on the future of his former Department in the years ahead but he is realistic:

> No institutional structure in modern life is guaranteed permanency. This is even more the case in a corporate environment where restructuring and rebranding are major instruments of management (p. 255).

Yet he remains optimistic for the future and the move to the new traditions in academic learning and teaching. I do, however, detect a sense of relief that the drive to meet this challenge rests with others.

Australia 1901–2001: A Narrative History

by Andrew Tink. NewSouth Publishing, 2014, 432 pp, RRP $39.99

David Clune

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Australia is short of good general histories. The old war horses, Geoffrey Blainey and Manning Clark, still hold pride of place. This is a pity because there is strong demand for such works as, for example, the best-selling British histories of Simon Schama demonstrate. A sound, readable general history can be a treat for the novice and also present facts afresh to the knowledgeable. Andrew Tink's *Australia 1901–2001* is therefore to be especially welcomed.

Tink has been a successful barrister, senior NSW MP and, more recently, the author of several well-regarded works of Australian history. There is much talk at present about the decline of the political gene pool. Reading Tink's book makes one think that some new historical DNA might not go amiss. He writes in an unashamedly evocative, narrative style that a traditional academic historian would find difficult to bring off. Yet Tink does not sacrifice accuracy for effect. The thoroughness of his research is impressive and his command of the historical currents striking. Tink has an eye for an anecdote that brings his text alive without ever seeming forced. The narrative segues seamlessly from major events to pungent vignettes. As an example, after several chapters celebrating the exploits of Australians in the First World War, Tink notes:

> For those diggers who had their faces obliterated or hideously disfigured, or chunks of their skulls sheered off, for those who were incontinent, paralysed or dismembered, or had had their minds enfeebled, or for other reasons could not remain with their families, the Red Cross ran the Graythwaite Anzac Hostel, a grand two-storey mansion located in lush gardens overlooking the harbour at North Sydney. It was here that such invalids found a welcoming refuge (pp75–76).

If I have a criticism of *Australia 1901–2001* it is that there is not enough questioning or analysis. A general history does not have to avoid conclusions – John Hirst's excellent recent work is entitled *Australian History in Seven Questions*. It is a pity that Tink does not talk more about the broader perspective as many interesting ideas lurk below the surface of his book.

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