

Australasian Parliamentary Review

Autumn 2011, Vol. 27, No. 1

FROM YOUR EDITOR

Jennifer Aldred

1

ARTICLES

3

- # A comparative analysis of rights scrutiny of bills in New Zealand, Australia and the United Kingdom: Is New Zealand lagging behind its peers?

Catherine Rodgers

4

- # Anti-corruption agencies: Impact on the privileges and immunities of parliament

Carly Sheen

18

- # Not quite as expected: Victorian Labor and the Legislative Council 2010

Paul Rodan

34

AUSTRALASIAN STUDY OF PARLIAMENT GROUP CONFERENCE 2011: THE EXECUTIVE VERSUS THE PARLIAMENT: WHO WINS?

Parliament and the challenge of executive growth

44

Is the traditional role of parliament still valid in our society?

Sonia Hornery

45

- # Executive growth and the takeover of Australian parliaments

Scott Prasser

48

Balancing the need for the executive's right to govern against the necessity for parliamentary scrutiny

62

A new era of parliamentary reform

Judy Spence

63

- # Resisting executive control in Queensland's unicameral legislature — recent developments and the changing role of the speaker in Queensland

Kate Jones and Scott Prasser

67

Holding oppositions to account: the slow surrender of parliamentary democracy

Jay Tilley

85

Diminishing the efficacy of disallowance motions: quasi-legislation in state jurisdictions

Scott Hickie

91

- # These papers have been double blind reviewed to academic standards

The effects of non-government controlled upper houses on restraining the executive	108
# The impact of multi-party government on parliament-executive relations — examples from Britain and Germany	
<i>Katrin Steinack</i>	109
A case study from the South Australian Parliament	
<i>Jordan Bastoni</i>	126
# Restraints upon the agenda: policy making in Victoria 1982–1992	
<i>Alistair Harkness</i>	134
Victorian perspectives	150
Cabinet confidentiality and parliamentary scrutiny in the information age	
<i>Tony Lupton</i>	151
Victoria's dispute resolution committee and its implications for an effective bicameral system	
<i>Philip Davis</i>	158
Trends in public sector audit legislation: from federation to follow-the-dollar	
<i>Des Pearson</i>	174
Parliamentary committees and the scrutiny of the executive	178
Who cares wins: parliamentary committees and the executive	
<i>Paul Lobban</i>	179
The role of public accounts committees	
<i>Jonathan O'Dea</i>	191
# Prorogation and principle; the Gentrader Inquiry, government accountability and the shutdown of parliament	
<i>Teresa McMichael</i>	196
Redressing the imbalance: recent developments	207
Breaking down the barriers — when parliaments display leadership and the executive follows	
<i>David Gibson</i>	208
<i>Pacific Island parliaments: developmental aspirations and political realities</i>	
<i>Graham Hassall</i>	213
PARLIAMENTARY CHRONICLES	238
'From the Tables' A round-up of administrative and procedural developments in the Australasian Parliaments —	
<i>Robyn Smith</i>	239
BOOK REVIEW	248
David Clune: <i>The Fog on the Hill: How NSW Labor Lost its Way</i>	249

FROM YOUR EDITOR

Jennifer Aldred

As is customary with the Autumn issue of APR, this edition contains the proceedings of the Australasian Study of Parliament Group (ASPG) annual conference. In this case, the 2011 conference held in Melbourne in October titled ‘The executive versus the parliament: who wins?’. Conference sessions were broken into the following subject areas: ‘Parliament and the challenge of executive growth’; ‘Executive growth and parliament’s response: balancing the need for the executive’s right to govern against the necessity for parliamentary scrutiny’; ‘The effect of independents, minority/multi-party governments and non-government controlled upper houses on restraining the executive’; ‘Parliamentary committees and the scrutiny of the executive’; and, ‘Redressing the balance: recent developments’. As conference host, another session was devoted to Victorian perspectives, including the role of the state’s Auditor-General in executive oversight.

On the question of ‘who wins’, this collection of papers offers the range of perspectives as wide as the subject is deep. For some, executive power has been pushed to — and, in some cases, beyond — its limits. For others, the unique role of parliament, its MPs on behalf of the electorate and its committee system all offer a brake on executive dominance over public policy and law making. The collection is a useful contribution to the debate on where accountability should sit. The inherent tensions between the functioning of both the legislative and executive branches of government, however, will ensure the debate will continue for some time to come.

The final paper in the conference collection is by Graham Hassal who considers the oversight role of the executive within the context of Pacific Island parliaments. This is a very useful piece of work for those readers wishing to know more about the current situation within the region.

It should be mentioned that two papers from the conference do not appear here but will be published in the Spring 2012 issue. One draws on significant research to pose questions of whether traditional views on how parliaments function match the

reality. The other looks specifically at the effectiveness of committee scrutiny of the executive in Queensland from 1966 to 2001. Readers should keep their eye out for both pieces in the next issue.

Articles for this issue include two papers from the ANZACATT 2010 Parliamentary Law, Practice and Procedure Program. Prizewinner, Catherine Rodgers compares and analyses the rights scrutiny of bills in her own parliament — New Zealand — with that of the UK, the Victorian state parliament and Australian Senate. She concludes that, on balance, current arrangements in New Zealand are not adequate for ensuring that fundamental rights and freedoms are protected when making laws. Improved information flow and methods of engagement between the executive and the parliament are proposed as desirable changes to ensure New Zealand does not lag behind its peers. Carly Sheen also compares jurisdictions — NSW, Queensland and Western Australia — to compare and contrast those which have legislated for the creation of specialist anti-corruption agencies. Carly also considers the impact of these agencies, and the legislation governing their operation, on parliamentary privilege. Specific cases are examined.

Our third article is by Paul Rodan. In this piece, Paul considers — through the experience of the 2006 and 2010 Victorian elections — whether 2003 reforms introducing proportional representation to the Legislative Council electoral system realised their intent. That intent was to more closely match votes won with seats secured. He believes they have not and develops the little-used notion of the ‘third-party preferred vote’ as a potentially useful tool in assessing proportionality on contests such as the Victorian Legislative Council.

Robyn Smith’s ‘From the Tables’ provides its usual useful summary of administrative and procedural developments in the Australasian Parliaments. Thanks go to Robyn for the effort she puts into ensuring the accuracy and clarity of this information for all who use it.

David Clune completes the edition with a review of the book by Frank Sartor ‘The Fog on the Hill: How NSW Labor Lost its Way’. Frank Sartor was a key player in the former NSW Government after leaving his position as Sydney’s Lord Mayor. The book is an insider’s view of the disintegration of the NSW government which governed the state from 1995 to 2010 and David’s review summarises its value for the reader.

The journal’s relationships with publishers continue to grow, as will the flow of work reviewing new publications relevant to the APR’s readership. All reviews published in the APR appear also on the ASPG website at www.aspg.org.au. Readers are reminded to check the website regularly for a range of useful information on research and writings into the operation of our parliaments. ▲

ARTICLES

Catherine Rodgers is Legislative Counsel, New Zealand Parliament

A comparative analysis of rights scrutiny of bills in New Zealand, Australia and the United Kingdom: Is New Zealand lagging behind its peers?¹

Catherine Rodgers

Introduction

This article considers two key mechanisms for rights scrutiny of bills in four parliaments: the New Zealand (NZ) parliament, the Australian Senate, the Victorian state parliament, and the United Kingdom (UK) parliament. The mechanisms which are discussed are: vetting of bills by the executive and examination of bills by parliamentary committees. Vetting is a process whereby the executive assesses bills to identify any rights issues that arise. In certain circumstances this process results in a report to the parliament on those issues. In the different jurisdictions under discussion different legal tests apply, including around when a report to parliament needs to be made. The Victorian and UK parliaments use both scrutiny mechanisms. The NZ parliament has a vetting requirement only. The Australian Senate does not have a legislative vetting requirement but has a specialist scrutiny committee which examines rights issues in bills.

Both the vetting of bills by executives and rights scrutiny by committees, where these occur in the four jurisdictions, are examined. Questions of the adequacy of rights scrutiny of bills in NZ are then considered. Before doing so two matters of context warrant mention. First, rights scrutiny of bills involves the assessment of proposed legislation — which is intended to become law applying to us all — for issues relating to human rights. The ‘rights’ relevant to the processes under discussion are recognised as fundamental human rights in various international treaties, including the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention). The former was entered into following the horrors of World War II and the formation of the United Nations. Rights scrutiny processes are founded on both the international obligations our governments have agreed to be bound by and the high value we place in protecting these rights in our democratic

societies. Secondly, the constitutional context in which rights scrutiny occurs also needs to be kept in mind. Although the parliaments discussed are in effect largely dominated by an executive, we share a constitutional system based on the concept of three branches of government. Each branch has a different function and importantly power is split between the different branches so that checks are provided on the exercise of power of each by the other branches. For example, it is commonplace in Westminster systems for the exercise of executive powers to make delegated legislation to be subject to scrutiny by specialist parliamentary committees and the exercise of executive powers more generally to be subject to review in the courts. Having an executive-controlled vetting process as our sole mechanism for rights scrutiny of bills in NZ does not sit comfortably with the idea of a system of checks and balances as between the three branches.

Rights scrutiny of bills

In NZ, section 7 of the *New Zealand Bill of Rights Act 1990* (the Bill of Rights) requires the Attorney-General to report to parliament on any provision in a bill that appears to be inconsistent with any of the rights and freedoms contained in the Act.² Generally, the legal test for inconsistency requires, first, to identify whether a right or freedom affirmed in the Act appears to be limited by a provision in a bill, and second, to make an assessment about whether the limit is justifiable under section 5 of the Act.³ Vetting is done by the Ministry of Justice and the Crown Law Office. Rights scrutiny of bills in NZ is, therefore, largely an executive-controlled process. Whether a section 7 report is done in any case, or where a report is done which human rights issues are identified and included, relies on opinions formed by personnel within the executive. Where the result of vetting is that a government bill is considered to be inconsistent with the Bill of Rights, a section 7 report in the name of the Attorney-General is presented to the House with the bill when it is introduced.

Standing Orders recognise the existence of section 7 reports but place no additional requirements on the Attorney or minister in charge of a bill through the legislative process, even where it has been the subject of a section 7 report.⁴ The Cabinet Manual refers to the Attorney's function under section 7 and also requires ministers to confirm, prior to introduction, that bills comply with certain legal principles including the Bill of Rights.⁵ However, ministers are accountable to the Prime Minister for compliance with the Cabinet Manual and not to the House, although the Prime Minister may be accountable to the House in some circumstances.⁶ Section 7 reports are sometimes the subject of debate amongst members during the legislative process, both in the House and in committees. This occurs at the discretion of members.

Australia does not have a bill of rights-type statute at federal level, however, the Senate has a formal mechanism for rights scrutiny of bills in the form of a Standing Committee for the Scrutiny of Bills appointed at the commencement of each

parliament. This committee is tasked under Standing Orders to report on whether bills, by express words or otherwise, transgress five separate heads of scrutiny. These include whether any bill trespasses unduly on personal rights and liberties; or makes rights, liberties, or obligations unduly dependent upon insufficiently defined administrative powers; or makes rights, liberties, or obligations unduly dependent upon non-reviewable decisions.⁷ The rights content of the committee's work therefore differs from that used in the other three jurisdictions under discussion. It reports any concerns about any bill to the Senate in its *Alerts Digest* and seeks a response to its concerns from the relevant minister and reports a second time on the content of the response in a publication called *The Report*. An inquiry into the future direction of the committee was put on hold following an announcement in April 2010 by the government that as part of its Australia's Human Rights Framework policy it would establish a new parliamentary Joint Committee on Human Rights to review legislation against human rights obligations.⁸ This inquiry has lapsed however a second inquiry is now underway.⁹

A submission by the Clerk of the Senate to the first inquiry describes the existing committee's work as following the model of the Regulations and Ordinances Committee which, without the full suite of inquiry powers, assesses delegated legislation against a set of foundation principles. The committee adheres to technical scrutiny of legislation, with cautious language, an avoidance of overt commentary on policy and an apparent reluctance to make recommendations about amendments to legislation.¹⁰ Other submissions indicate some dissatisfaction with the committee's existing mandate. For example, the Australian Human Rights Commission said it considers the Senate Scrutiny of Bills Committee under its current mandate is not able to adequately scrutinise proposed legislation for the Commonwealth's compliance with its human rights obligations and that it is particularly concerned about the lack of clarity as to what rights and liberties should be examined by the Committee.¹¹

Victoria has both a vetting requirement and a committee scrutiny process in relation to rights issues in bills. Under section 28 of the Charter of Human Rights and Responsibilities Act 2006 (Victorian Charter) a member of parliament who introduces a bill must lay before the house a statement of compatibility before giving his or her second reading speech on the bill. A statement of compatibility must state whether, in the member's opinion, the bill is compatible with human rights and if so, how it is compatible; and if, in the member's opinion, any part of the bill is incompatible with human rights, the nature and extent of the incompatibility. The Scrutiny of Acts and Regulations Committee is a joint house committee and reports to both Houses of parliament under eight separate heads of scrutiny.¹² These include whether any bill trespasses unduly on rights or freedoms; makes rights, freedoms, or obligations dependent upon insufficiently defined administrative powers; and makes rights, freedoms, or obligations dependent upon non-reviewable decisions. Since 1 January 2007, under section 30 of the Charter, the committee is required to report to parliament on whether any bill is incompatible with the human rights listed in the Charter.¹³ The committee reports

an ‘initial adverse comment’ to parliament in a report called the *Alert Digest*. The committee then seeks a response to its concerns from the relevant minister which is published in the next *Alert Digest*.¹⁴

As with Victoria, the UK has both a vetting requirement and a committee scrutiny process in relation to rights issues in bills. The Human Rights Act 1998 (Human Rights Act) incorporates the European Convention into the United Kingdom’s domestic law and requires ministers to report to parliament, upon introduction of a bill, concerning any human rights implications that arise. The vetting mechanism is based on NZ’s section 7 of the Bill of Rights, although section 19 of the Human Rights Act goes much further, and has the effect that the minister responsible for the bill assumes individual responsibility for compliance with Convention rights.¹⁵ A minister is required to make one of two statements, either: in the minister’s view the provisions of the bill are compatible with Convention rights; or where this is not the minister’s view, a statement that although the minister cannot make a statement of compatibility, the government wishes to proceed with it.¹⁶ The Joint Committee on Human Rights has the role of scrutinising bills.¹⁷ In the early years of operation the committee considered one of its key duties to be the assessment of whether section 19 statements had been properly made.¹⁸ More recently, in 2006, it has operated a new sifting and scrutiny process involving assessment of all government bills on publication to determine whether their provisions meet a raised threshold of human rights significance, with the aim of the committee considering each bill within two weeks of its publication.¹⁹

Issues arising from the vetting process in NZ

In NZ the vetting of bills by the executive comprises our sole formal rights scrutiny mechanism. Three issues arise from the way in which the vetting process operates: the executive-controlled nature of the process and the impact this has in effect on the amount of information parliament has about rights issues in bills; the contestable nature of human rights assessments; and the application of a high threshold to the apparent inconsistency test to determine when a section 7 report is completed.

An executive-controlled process: shortly after the Bill of Rights was enacted, Rishworth stated that the biggest potential effect of the Bill of Rights would be on executive action — that it would serve as a constraint on the exercise of public power.²⁰ More directly relevant to the vetting of bills process, Palmer and Palmer say that vetting by the executive requires earnest and careful analysis to be carried out in government before legislation is introduced, to ensure that it does not breach any of the principles enacted in the Bill of Rights.²¹ Joseph says that the prospect of an adverse section 7 report operates as a disincentive to infringing legislation and that many government bills are modified before their introduction following advice received from the Crown agencies which vet bills.²² A set of guidelines published by the Ministry of Justice advises the public sector that where rights affirmed by the Bill of Rights are engaged by any policy proposal — including contained in a

legislative proposal — a detailed assessment of that proposal must be undertaken, to determine whether it can be justified under section 5 of the Bill of Rights.²³ There was, therefore, some expectation that vetting by the executive in NZ would provide comprehensive and robust assessments of whether rights affirmed by the Bill of Rights are limited by any bill. But is this happening? Joseph says the reporting procedure has not had the deterrent effect that was hoped.²⁴ One problem with answering this question is that much of this work occurs within the executive and detailed information about the process and issues considered in any case is not readily available for evaluation, including for the reason that some of this information is withheld from public view on the basis of legal professional privilege.

There are three possible scenarios in the vetting process. First, the executive makes an assessment that a bill contains no limits on rights (the first step in the legal test for inconsistency under the Bill of Rights). No section 7 report is completed. Any rights issues which may have been considered and dismissed in-house are not advised to parliament. In 2009 in *Boscawen v Attorney-General* the New Zealand Court of Appeal held that an alleged failure to complete a section 7 report is not justiciable.²⁵ Nor will the House intervene in this circumstance. In 1991 the then Speaker ruled that the question of whether a report is to be made lies with the Attorney-General, not with the House.²⁶ The second possibility is the executive makes an assessment that a bill limits rights but also takes the view that these are justifiable under section 5 (the second step in the legal test for inconsistency). No section 7 report is presented to parliament. The result is a so-called “positive vet”. Positive vets were initially withheld from public view on the basis of legal professional privilege but since 2003 have been published on the Ministry of Justice website. The third possibility is the executive makes an assessment that a bill limits rights but also takes the view these are not justifiable under section 5. A section 7 report is completed and presented to parliament. Section 7 reports are available on parliament’s website and are provided to select committees considering bills.

The vetting process operates to, in effect, limit the amount of information about rights issues in bills which is formally made available to parliament by the executive. Only in the third scenario does this occur. Approximately 60 section 7 reports have been presented to the House since 1990.²⁷ This is a small proportion of the bills passed by the House in this period. As well, wider information about the consideration of rights issues in bills by the executive, short of positive vets and section 7 reports, does not appear to be readily available. Butler, writing as a Crown Counsel in 2000, said at that time the two agencies engaged in the Bill of Rights vetting process had adopted a policy of refusing access to the documentation surrounding the vetting process and the (now) Ministry of Justice invoked legal professional privilege to protect disclosure of vetting information under the Official Information Act.²⁸ He was referring specifically to the withholding of ‘positive vets’ which since 2003 have been published. The Ministry of Justice’s current approach stated on its website is:²⁹

The Attorney-General retains legal professional privilege in respect of unpublished advice written before January 2003, as well as unpublished advice written since January 2003 on Bills on which the Attorney-General has tabled a section 7 report in the House of Representatives. The advice is not subject to the Official Information Act 1982; however, the Attorney-General will consider requests for the release of such advice on a case by case basis.

Legal professional privilege was claimed in relation to vetting information in the *Child Poverty Action Group v Attorney-General* case in 2008.³⁰ The Attorney-General, as defendant, claimed legal professional privilege to prevent disclosure through the discovery process of vetting information concerning a welfare policy which had been enacted in legislation and which was the subject of the proceedings. The Human Rights Review Tribunal agreed that the material was protected from disclosure through the discovery process on the ground of legal professional privilege.³¹ This was the approach taken initially in the UK under the Human Rights Act. In 2002 Lester, described the executive in the UK as being initially concerned to protect the legal privilege usually accorded to the advice of law officers and therefore being reluctant to give reasons for a certificate of compatibility required to be presented to parliament under the Human Rights Act.³² It is accepted that there is some value in protecting internal legal advice with privilege, including promoting free and frank advice within the executive. However, the vetting process is also the mechanism by which the Attorney-General performs his or her function under section 7 of the Bill of Rights, which in the view of the Court of Appeal in *Boscawen* is a parliamentary process. Joseph says one of purposes of section 7 is to ensure that parliament does not legislate in ignorance of the Bill of Rights.³³ At present, it is fair to say only that parliament is not legislating in ignorance of the executive's conclusions in relation to what human rights issues are significant, and its application of the relevant tests, in any case.

In 2000, Butler recognised that the lack of disclosure of vetting information raised questions about the integrity of the system and perhaps suggested that not all vets were sufficiently robust to warrant disclosure and public scrutiny.³⁴ Geiringer says that in the absence of formal mechanisms for parliamentary scrutiny, the adequacy of scrutiny in any particular case is dependent upon three factors, including the availability and quality of the advice received by the Attorney-General under section 7.³⁵ The NZ executive may be satisfied with the current vetting process in terms of its own requirements, however, a lack of transparency means there is no way of independently evaluating the quality of the process which parliament is relying on to inform it about human rights issues in bills.

Greater transparency around rights issues engaged by bills operates in the other three jurisdictions. For example, in Victoria and the UK, a different legal test determines what information is made available by the executive to parliament. Here section 7 reports are presented to parliament where the Attorney is of the view that a bill contains an apparent inconsistency with rights. In Victoria and the UK ministers must make a statement of compatibility to the parliament in relation to

every bill introduced to parliament. In addition, both jurisdictions impose additional information requirements in relation to these compatibility statements. In Victoria, section 28(3) of the Charter requires the relevant minister to give reasons why a bill is considered to be compatible with human rights and where any part of the bill is considered to be incompatible, the nature and extent of the incompatibility. Currently in the UK, ministers are advised in the Cabinet Office *Guide to Making Legislation* that the government has made a commitment to provide more detailed information about the most significant human rights issues in government bills in its explanatory notes. The guide says the assessment of the bill's impact on Convention rights should be as detailed as possible setting out any relevant case law and presenting the government's reasons for concluding that the provisions in the bill are Convention compatible. The purpose of the explanatory notes is stated as including to assist parliament.³⁶ In New Zealand the vetting process and the apparent inconsistency test in section 7 result in comparatively limited information about rights issues in bills being made available to our parliament.

Contestable assessment: it is important to remember that, in any case, a section 7 report is a legal opinion on the application of rights principles to a particular policy scenario. In all four of the jurisdictions under discussion, this area of law involves consideration of contested thresholds and complex concepts such as reasonableness and proportionality.

The appellants in *Boscawen* took a different view to the Attorney in relation to the need for a section 7 report on the Electoral Finance Bill. Contrary to the Crown view, in their view the bill clearly raised issues around free speech. More recently, Price described the vetting system in NZ as invariably giving bills that raise free speech issues a green light with no real attempt to test the restrictions for their justifiability.³⁷ And more recently Geddis raised concerns about the absence of a section 7 report in relation to the emergency legislation passed in response to the Canterbury earthquake in September 2010.³⁸ In *Boscawen*, the Court of Appeal said of the appellant's approach that it failed to acknowledge that opinions can legitimately vary on human rights issues, particularly on the issue of whether any limitations on rights are justified in a free and democratic society, and on assessing the appropriate balance between rights and other values where these may be apparently in conflict.³⁹ In that case this principle operated in the Crown's favour, however, it also supports the making available of wider vetting information to parliament, so that possible rights issues raised by bills — including those which have been dismissed in-house by the executive — can be debated by legislators.

Apparent inconsistency test in section 7: one key contestable issue relating to the vetting process arises in section 7 itself. The section requires the Attorney to bring to the attention of the House any provision in a bill which *appears to be inconsistent with* specified rights. Butler and Butler say that successive Attorneys-General in New Zealand have taken the view that a section 7 report is required only where the introduction copy of the bill (in his or her view) *is* inconsistent with the Bill of Rights and not *may be* inconsistent.⁴⁰

Fitzgerald agrees that the Attorney-General has adopted a high threshold definition for section 7 reports.⁴¹ He says that the executive is completing both steps of the legal test or analysis for inconsistency under the Bill of Rights and rather should be drawing to the attention of the House rights issues which trigger the first step of the test — whether a right appears to be limited by a provision in a bill — so that the House can determine the second step of the test — whether the limitation is justified (under section 5).⁴² Applying a low threshold test (or in other words splitting the two steps of the legal test in the Act between the executive and parliament) would, he suggests, mean that scrutiny of the provisions and the application of section 5 would occur in public with an opportunity for public input at the select committee stage. In such a process the view of the executive would be merely one factor in the equation, rather than the determinant.⁴³ The Butlers accept that it is arguable that the phrase *inconsistent with* in section 7 requires the Attorney to report to parliament when a bill discloses a prima facie interference with a right (the first step of the test).⁴⁴ This threshold issue directly impacts on the amount of information which parliament obtains on a formal basis about rights issues in bills. If Fitzgerald's approach had been taken historically, all the positive vets would have been the subject of section 7 reports tabled in parliament. The apparent inconsistency test, including the way it is being applied, results in only a small proportion of bills being the subject of a report to parliament or in other words the subject of formal advice from the executive to parliament about rights issues in bills.

By contrast, in both Victoria and the UK detailed information is required to be provided by the executive relating to the compatibility of *all* bills with specified rights. Responsibility is placed on the sponsoring minister to confirm in his or her statement to parliament that a bill is compatible with human rights. Lester sees the requirement in the United Kingdom for a minister to personally take responsibility for the statement of compatibility as an important aspect of the process in the United Kingdom.⁴⁵ There is little doubt that these parliaments are better informed about a wider range of human rights issues in bills and that the NZ parliament could be better informed if the executive applied a lower threshold to the section 7 obligation.

Rights scrutiny by select committees

NZ does not have a specialist committee considering rights issues in bills, nor is there any requirement placed on existing select committees when examining bills to consider or reach conclusions on human rights issues, including assessments under the Bill of Rights. In contrast with Australia generally, most bills are subject to detailed select committee scrutiny here, which includes consideration of policy matters. When doing so a select committee can consider a section 7 report which has been made in relation to any bill before it. Select committees are free to come to a different view than the Attorney-General.⁴⁶ However, in NZ, even where a section 7 report is done, there is no obligation on select committees to seek further information about, or to form an independent view on, the issues raised in it. Geiringer describes the adequacy of rights scrutiny as being dependent on the skills

and predilections of particular members of parliament.⁴⁷ Further, she says, that select committee reports and parliamentary debates provide little evidence of systematic and comprehensive parliamentary scrutiny of the Bill of Rights implications of legislation.⁴⁸

The option of greater select committee involvement in rights scrutiny has been considered in NZ. Establishment of a specialist select committee to undertake rights scrutiny of bills was recommended more than two decades ago by the Justice and Law Reform Committee when it reported back to the House on the *White Paper on a Bill of Rights for New Zealand*⁴⁹ but the recommendation was not adopted. In 2003, the then Clerk of the House, David McGee, recommended that Standing Orders be amended to require select committees to report on whether provisions in bills appear to limit the rights and freedoms contained in the Bill of Rights, and if so, to report on whether those provisions can be demonstrably justified in a free and democratic society (under section 5).⁵⁰ McGee suggested that this would supplement the Attorney-General's reporting function under section 7 and importantly increase parliament's level of understanding about the rights implications of bills.⁵¹ The Standing Orders Committee rejected this recommendation.⁵² In 2009 the Regulatory Responsibility Taskforce recommended that bills be scrutinised for compatibility with specified principles of responsible regulation, including a 'liberties' principle.⁵³ The Taskforce also recommended that select committees be required to address compatibility of bills with the principles; and that consideration be given as well to the options of establishing a specialist select committee to recommend amendments to bills to address any incompatibility, or for the Regulations Review Committee to scrutinise bills against the principles.⁵⁴ The work of the Taskforce has resulted in the Regulatory Standards Bill which is currently before the House. At the same time the Taskforce reported, Knight suggested it was perhaps time that NZ considered adopting a specialist Bill of Rights vetting select committee following what he considered to be an inappropriate adoption of the views of the Crown Law Office or Attorney in a select committee report on the Land Transport (Enforcement Powers) Bill.⁵⁵

The idea of a second level of scrutiny of rights issues by a parliamentary committee clearly has some support in New Zealand. This could be done by way of establishing a new specialist human rights committee or by imposing rights scrutiny requirements on existing select committees. Such reforms would not require legislation or amendment to the Bill of Rights but could be achieved through Standing Orders, as in the Australian Senate. Evans and Evans say that such committees give members of parliament a chance to become better informed about rights, and allow for a more focused dialogue about rights between the executive and the legislature.⁵⁶

Tolley says that the work of the Joint Committee in the UK has had little effect, however, he points to one example of the value of the committee's work being the debate in parliament on the Counter-Terrorism Bill in 2008.⁵⁷ He says the House appeared to have been well informed by the committee's work, Hansard contained several explicit references to the committee's report in the debate, and members of

the committee rose to speak against the bill. He concludes that the committee clearly had some impact on the debate and vote in the Commons.⁵⁸

A parliamentary rights scrutiny committee may not necessarily provide a silver bullet, however an important consequence is that the consideration of contested thresholds and concepts in an area of high public interest is done independently of the executive and is more transparent. This contrasts with the vetting system as it currently operates here. Transparency is a value in and of itself, particularly in an area concerning fundamental rights and where the application of the relevant legal tests can be finely balanced. To some, for example Fitzgerald, a key benefit of committee scrutiny of rights issues is that it is legislators who make the final determination about human rights issues in proposed legislation.⁵⁹

Conclusion

NZ does not have a rights scrutiny of bills process operating independently of the executive as seen in the other parliaments discussed. Assessments of contestable concepts are made in-house by the executive in a largely non-transparent process. The apparent inconsistency test in section 7 and the high threshold which has been applied to it results in comparatively limited information being formally made available to our parliament when it legislates. Vetting is an important process. It is desirable for executives to give consideration to human rights issues during the policy making process, including whether limits on fundamental rights in proposed legislation are necessary and justifiable. However, an executive-controlled vetting process cannot also provide adequate human rights scrutiny for the legislative process. The provision of limited information to parliament in NZ is one issue. A second issue relates to parliamentary process: even where the Attorney has formed the view that an encroachment on rights is not justified under section 5 of the Bill of Rights there is no provision for on-going dialogue with the executive as part of the legislative process. Where a section 7 report is presented to the House both the Attorney and the responsible minister are free to not address any human rights issues raised in the report further. As well, select committees have no obligation to consider rights issues, even when a section 7 report has been done.

By contrast, in both Victoria and the UK, ministers have a greater responsibility to provide parliament with detailed information about rights issues arising in bills. As well, in both jurisdictions and in the Australian Senate ministers must engage in dialogue about rights issues in bills throughout the legislative process. Parliamentary debate is better informed and independent assessments, including of justification of infringements on rights, are made by parliamentarians. The NZ parliament needs to take steps to require more information from the executive about rights issues in bills so that ultimately legislators can make the call about the necessity for, and justifiability of, limits on rights in legislation. Consideration also needs to be given to a parliament-controlled scrutiny mechanism separate from executive vetting as a means of contesting conclusions reached by the executive. Two alternative approaches are the specialist select committee approach used in the

other three jurisdictions discussed, or the McGee approach whereby existing select committees would be required to consider rights issues and report to parliament on conclusions reached by them, independently of any executive advice on these issues. A greater degree of scrutiny of rights issues by parliament could be achieved by changes to Standing Orders, legislation is not required.

When making law parliaments sometimes impose limits on fundamental rights and freedoms. This requires careful consideration of the claimed necessity and justifications for doing so. In order to make assessments about these matters parliaments need comprehensive and robust information as well as a means of engaging with the executive about these issues during the legislative process. At present, in NZ, there is good reason to consider that we are lagging behind some of our peers in this important area. ▲

Endnotes

¹ Winner of the ANZACATT Parliamentary Law, Practice and Procedure Program Prize 2010

² Reports relating to government bills must accompany the bill upon introduction. Reports relating to non-government bills must be completed as soon as practicable after their introduction.

³ Justifiable limits under section 5 of the Bill of Rights are defined as ‘reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. Although note there is a view that the section 5 step does not apply to some rights, such as those with internal qualifiers.

⁴ Standing Orders of the House of Representatives (New Zealand): SO 261.

⁵ Cabinet Manual (2010) at paras 7.60–7.62 at <http://cabinetmanual.cabinetoffice.govt.nz/node/50#7.60>. Recently, the New Zealand Standing Orders Committee has recommended to the Government that Cabinet guidelines be amended to require analysis of Bill of Rights and other constitutional matters be included in explanatory material supporting the introduction of bills, and to require Bills of Rights reporting on substantive Supplementary Order Papers http://www.parliament.nz/NR/rdonlyres/A1275CB0-5B78-4DBF-AA31-7EAC60C9FF89/202306/DBSCH_SCR_5302_ReviewoftheStandingOrdersI18B_8589_pdf. A response from the Government is expected following the opening of Parliament following the General Election in November 2011.

⁶ See Speaker’s ruling 7 December 2010 at http://ourhouse.parliament.nz/en-NZ/PB/Debates/Debates/3/3/f/49HansD_20101207_00000013-Speaker-s-Rulings-Questions-for-Oral-Answer.htm.

⁷ Standing Orders of the Australian Senate: SO 24.

⁸ Summary of interim report 12 May 2010 at http://www.aph.gov.au/senate/committee/scrutiny/future_direction_2010/interim_report/index.htm.

- ⁹ See http://www.aph.gov.au/Senate/committee/scrutiny/future_direction_2011/index.htm. The reporting date for the Inquiry is 30 November 2011.
- ¹⁰ Submission by the Clerk of the Senate 6 April 2010 at http://www.aph.gov.au/Senate/committee/scrutiny/future_direction_2010/submissions/sub20.pdf.
- ¹¹ Submission by Australian Human Rights Commission 19 March 2010 at http://www.aph.gov.au/senate/committee/scrutiny/future_direction_2010/submissions/sub11.pdf.
- ¹² Parliamentary Committees Act 2003 (Vic): s 17(a).
- ¹³ Note that the Victorian Charter uses the concepts of both compatibility and incompatibility. The vetting requirement refers to both. The reporting requirement for the Scrutiny of Acts and Regulations Committee refers to the latter only.
- ¹⁴ Scrutiny of Acts and Regulations Committee, Practice Note 1 at 33 at http://www.parliament.vic.gov.au/images/stories/committees/sarc/annual_reports/Annual_Review_2009.pdf.
- ¹⁵ Anthony Lester QC 'Parliamentary Scrutiny of Legislation Under The Human Rights Act 1998' (2002) 33 VUWLR 1 at 3.
- ¹⁶ Lester above at 3.
- ¹⁷ Standing Orders of the House of Lords: SO 152B.
- ¹⁸ Lester above at 8.
- ¹⁹ Joint Committee on Human Rights *The Committee's Future Working Practices* (July 2006) at 25 at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/239/239.pdf>.
- ²⁰ Paul Rishworth "The potential of the New Zealand Bill of Rights" (1990) NZLJ 68 at 71.
- ²¹ Geoffrey Palmer and Matthew Palmer *Bridled Power New Zealand's Constitution and Government* (Oxford, 4th ed, 2004) at 324.
- ²² Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, 2007) at para 14.6.8.
- ²³ Ministry of Justice *The Non-discrimination Standards for Government and the Public Sector Guidelines on how to apply the standards and who is covered* (2002). Note the test has now been refined in *R v Hansen* [2007] 3 NZLR 1 (NZSC).
- ²⁴ Joseph above at para 27.4.7.
- ²⁵ *Boscawen v Attorney-General* [2009] 2 NZLR 229 (NZCA). Two of the three appellants were members of parliament who were of the view that a section 7 report should have been completed in respect of the Electoral Finance Bill, which they said contained restrictions on the right to freedom of expression and the right to vote, which were not demonstrably justified. The Court referred to the Attorney's reliance on advice from officials in Crown agencies when undertaking the section 7 reporting role, which it said indicated an executive role was being undertaken; and this, it said, was supported by the setting of rules around the performance of the role in the Cabinet Manual.²⁵ However, the Court concluded that the Attorney's reporting role was part of the legislative process and therefore covered by the principle of comity.²⁵ The Court would not therefore order a report be completed or even express a view about the matters in issue. Note there was one caveat being the suggestion the Court might consider such a challenge if the allegation was that the Attorney-General had not exercised the role in good faith.
- ²⁶ Speakers Rulings 1867-2008 inclusive (2008) at 99/4.

- ²⁷ In November 2010 the then Minister of Justice Simon Power stated that as at November 2010, 57 section 7 reports had been done on bills since 1990 in ‘Speech to Bill of Rights Act Symposium’ at <<http://www.beehive.govt.nz/speech/speech-bill-rights-act-symposium>>. A further 1 or 4 other reports have been presented to the House depending on whether the minister’s figures included those done in November 2010 or not see <<http://ourhouse.parliament.nz/en-NZ/PB/Presented/Papers/Default.htm>>.
- ²⁸ Andrew Butler ‘Strengthening the Bill of Rights’ (2000) 31 VUWLR 129 at 145.
- ²⁹ See comments on *Advice provided by the Ministry of Justice and the Crown Law Office to the Attorney-General on the consistency of Bills with the Bill of Rights Act 1990* at <<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>>.
- ³⁰ *Child Poverty Action Group Incorporated v Attorney-General* [2008] NZHRRT 31 (16 December 2008) at <<http://www.nzlii.org/nz/cases/NZHRRT/2008/31.html>>. These proceedings were taken under Part 1A of New Zealand’s Human Rights Act 1993 which allows challenges in the courts to legislation which is claimed to be discriminatory. The legislative provisions under challenge were s MD8(a) and s MD9(4) of the Income Tax Act 2007 which provide for payment a certain tax credit which the plaintiff alleged discriminated against one group of children on the basis of their parents’ employment status. Note that the interlocutory decision by the Human Rights Review Tribunal to uphold the claim to legal professional privilege in relation to the vetting documents is not mentioned in this case report but is in the knowledge of the writer who was counsel for the plaintiff in the proceedings.
- ³¹ Note that the interlocutory decision by the Human Rights Review Tribunal to uphold the claim to legal professional privilege in relation to the vetting documents is not mentioned in the case report cited above.
- ³² Lester above at 20.
- ³³ Joseph above at para 27.4.7(1).
- ³⁴ Butler above at 145. Although note he was talking only about the withholding of positive vets at that time.
- ³⁵ Claudia Geiringer ‘The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament’s Power to Legislate?’ (2007) 11 Otago Law Review 389 at 400.
- ³⁶ United Kingdom Cabinet Office *Guide to Making Legislation* at <http://www.cabinetoffice.gov.uk/sites/default/files/resources/Guide-to-Making-Legislation.pdf> at paras 11.63, 12.27 & 12.28.
- ³⁷ Steven Price “Officials drop the BORA on 92A” (2009) Media Law Journal at <<http://www.medialawjournal.co.nz/?p=220>>.
- ³⁸ Andrew Geddis CERRA vs NZBORA or when acronyms attack 25 September 2010 at <<http://pundit.co.nz/content/cerra-vs-nzbora-or-when-acronyms-attack>>.
- ³⁹ See *Boscawen v Attorney-General* above at para [18].
- ⁴⁰ Andrew and Petra Butler *The New Zealand Bill of Rights Act a commentary* (LexisNexis, 2005) at para 8.6.1.
- ⁴¹ Paul Fitzgerald ‘Section 7 of the New Zealand Bill of Rights Act 1990: A very practical power or a well-intentioned nonsense’ (1992) 22 VUWLR 135 at 138.
- ⁴² Fitzgerald above at 138-139.
- ⁴³ Fitzgerald above at 139.

⁴⁴ Butlers above at para 8.7.

⁴⁵ Lester above at 3.

⁴⁶ David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, 2005) at 356.

⁴⁷ Geiringer above at 400.

⁴⁸ Geiringer above at 400.

⁴⁹ Justice and Law Reform Committee *Final Report on a White paper on a Bill of Rights for New Zealand* (1987-1990) 17 AJHR I.8C at 11.

⁵⁰ Submission of the Clerk of the House of Representatives to the Standing Orders Committee for its Review of Standing Orders (May 2003) at 63.

⁵¹ Submission of the Clerk of the House above.

⁵² Report of the Standing Orders Committee *Review of Standing Orders* (December 2003) I18.B, 59.

⁵³ Report of the Regulatory Responsibility Taskforce (September 2009) at para 4.49 at <<http://www.treasury.govt.nz/economy/regulation/rrb/taskforcereport/rrt-report-sep09.pdf>>. Note the 'liberties' which would be the subject of scrutiny are more limited than those which apply to any of the jurisdictions under discussion, including under the Bill of Rights, therefore this recommendation does not appear to necessarily be intended to achieve a scrutiny role similar to that currently undertaken in these including in the Australian Senate.

⁵⁴ Report of the Regulatory Responsibility Taskforce above at paras 5.7 and 5.8.

⁵⁵ Dean Knight 'Vetting of Bills — whose responsibility?' (2009) *Laws179 Elephants and the Law* at <http://www.laws179.co.nz/2009_09_01_archive.html>.

⁵⁶ Carolyn Evans and Simon Evans 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' (2006) *Public Law* 785 at 786.

⁵⁷ Michael Tolley 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 *Australian Journal of Political Science* 41.

⁵⁸ Tolley above at 53.

⁵⁹ Fitzgerald above at 139.

Carly Sheen is Acting Committee Director, NSW Legislative Assembly

Anti-corruption agencies: Impact on the privileges and immunities of parliament¹

Carly Sheen

Introduction

Until recently, only three Australian parliaments — NSW, Queensland and Western Australia — had legislated for the creation of specialist anti-corruption agencies. However, Tasmania has now established an Integrity Commission and Parliamentary Standards Commissioner, the Victorian government has indicated its support for the establishment of a Victorian Anti-Corruption Commission, the South Australian government has initiated a review of its anti-corruption institutions², and the federal government has signed a ‘confidence and supply’ agreement with independent MPs and the Greens committing to the establishment of a Parliamentary Integrity Commissioner.³ The term ‘parliamentary privilege’ refers to ‘the powers and immunities possessed by individual Houses of Parliament, their members and other participants in parliamentary proceedings, without which they could not perform their functions’.⁴ One of the most important of the privileges of Parliament is ‘freedom of speech’, which is enshrined in Article 9 of the *Bill of Rights 1689*. It states:

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

In those jurisdictions with specialist anti-corruption agencies, the legislation governing such agencies in some instances includes specific provisions which seek to protect parliamentary privilege. However, in practice issues have arisen regarding the extent to which such agencies can investigate conduct by MPs that is connected to the proceedings of parliament and would otherwise fall within the sole jurisdiction of parliament. This uncertainty in jurisdiction periodically manifests in high profile corruption investigations in which the relationship between parliament and the anti-corruption agency is re-examined. This article explores some of these investigations, including, for example: the seizure of potentially privileged material by the Independent Commission Against Corruption in NSW; the investigation by the Queensland Crime and Misconduct Commission of statements made by a minister to a parliamentary Committee; and investigations and reports by the Western Australian Corruption and Crime Commission on behalf of the

Parliamentary Procedures and Privileges Committee. Anti-corruption agencies in NSW, Queensland and Western Australia have extensive covert and coercive investigative powers and a broad mandate to investigate and expose public sector corruption. For instance, the ICAC can utilise telephone intercepts, assumed identities, and abrogate the privilege against self incrimination. There is a risk that the establishment of a powerful investigative agency with jurisdiction over MPs can weaken the traditional role of parliament of being the sole arbiter of conduct which occurs in the context of the proceedings of parliament. However, an examination of the incidents involving conflict or questioning of jurisdiction reveals that much depends on the legislative provisions protecting parliamentary privilege and the force of the parliament in confidently and consistently asserting its jurisdiction.

What follows focuses solely on the impact of anti-corruption agencies with jurisdiction over MPs on parliamentary privilege, primarily in the context of Article 9 of the *Bill of Rights*.

The NSW Independent Commission Against Corruption (ICAC)

The ICAC is charged with investigating corrupt conduct by public officials, including MPs. ‘Corrupt conduct’ occurs when a public official improperly uses, or tries to improperly use, the knowledge, power or resources of their position for personal gain or the advantage of others, a public official acts dishonestly or unfairly, or breaches public trust, a member of the public influences, or tries to influence, a public official to use his or her position in a way that is dishonest, biased or breaches public trust. However, conduct does not amount to corrupt conduct unless it could constitute or involve a criminal offence, or a disciplinary offence, or reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or, in the case of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.⁵ Section 122 of the Independent Commission Against Corruption Act 1988 (ICAC Act) states:

Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.⁶

Uncertainty surrounding the powers of the ICAC and parliamentary privilege has centred on a conflict between ICAC’s role to ensure the investigation of corrupt conduct, and the desire by Parliament to protect Article 9 immunity. The main issues to emerge regarding parliamentary privilege are as follows.

Regulation of Secondary Employment for Members of the NSW Legislative Assembly (2003): in 2002, the Legislative Assembly requested that ICAC investigate the regulation of secondary employment by its members, specifically the conduct of the Leader of the Opposition in his role as a ‘public affairs’ consultant ‘and allegations that he had asked questions in parliament that furthered the interests of his employer’.⁷ This investigation raised the issue of whether the ICAC was able to investigate the conduct referred to in this particular instance. It also

raised the broader question of who should investigate the conduct of members involving privilege. ICAC made a number of recommendations relating to secondary employment in general, but felt that it was unable to comment on the conduct of the Leader of the Opposition as it could not 'use its statutory investigative powers as [it]... did not have the statutory authority to investigate matters where parliamentary privilege applies.'⁸ The Commissioner explained that 'the jurisdiction of the ICAC did not extend to questioning the motive, intention or good faith of anything forming part of the proceedings in Parliament, or questioning or... drawing inferences from anything forming part of Parliamentary proceedings'.⁹ In its report, ICAC put forward two options to allow for the investigation of corrupt conduct which would involve questioning or relying upon proceedings in parliament:

Option 1: Amendment to the Independent Commission Against Corruption Act 1988 to allow the Parliament to waive parliamentary privilege for specific matters which are referred to the ICAC by resolution of the House (although such an amendment would most likely only extend to those Members who choose to give evidence to the ICAC on a voluntary basis).

Option 2: The appointment of an officer of the Parliament on a case-by-case basis to investigate particular matters (7 provisions are outlined which would safeguard the independence of the investigating official).

In the cases where the conduct of the investigation by the official, or the findings of the official are contested, that the House consider the appointment of an investigatory panel, similar to that of the British House of Commons.

The Assembly Committee on Parliamentary Privilege and Ethics considered the report, and made the following response:

..., the Committee recommends that s122 of the Act not be amended, and that the House consider options for investigating matters coming before the ICAC which involve parliamentary privilege on a case by case basis.

The Committee did not support option 1, acknowledging that the issue of waiver of privilege was contentious and would impact on the original intent of the parliament in legislating to protect Article 9 of the *Bill of Rights*.¹⁰ The issue of who should investigate allegations of misconduct and corruption related to the proceedings of parliament was revisited in a government initiated independent review of the ICAC Act in 2005, which recommended:

That consideration be given to the establishment of a Parliamentary investigator or Parliamentary Committee to investigate minor matters involving Members of Parliament so as to permit ICAC to focus on serious and systemic allegations of corruption or to investigate allegations of corruption that ICAC is unable to investigate because of Parliamentary privilege as preserved by section 122 of the Act.¹¹

This proposal was supported by ICAC, but was not supported by the Legislative Assembly Privileges and Ethics Committee.¹² The issue of a parliamentary mechanism to investigate allegations of corrupt conduct which involve questioning conduct relating to the proceedings of parliament has not yet been resolved. The ICAC's investigations of MPs over the past ten years have focused mainly on the

misuse of parliamentary entitlements and resources,¹³ rather than investigations which are likely to raise substantive privilege issues, such as bribery or the use of confidential information.¹⁴ The terms of reference for both the Legislative Assembly and Legislative Council privileges committees allow them to consider and report upon any matters relating to privilege which referred to them by the House. Theoretically, the parliament and its committees have many of the investigative powers of a standing royal commission, such as the power to call for documents and compel witnesses. However, the Assembly committee has never conducted an inquiry into conduct of a member, and the Council committee has not conducted such an investigation in the past decade.¹⁵ It would be unsurprising if there was resistance from the ICAC, the public and media, to a committee comprising MPs investigating 'one of their own'. There is also potential for political motivations and real or perceived bias to hinder such investigations.

The ICAC is a well-established part of the 'justice' landscape in NSW and a culture and expectation has built up that public officials' conduct will be investigated by an external, independent agency. The absence of a Parliamentary Commissioner or some other parliamentary mechanism (aside from the Privileges Committees of both Houses) to deal with conduct relating to the proceedings of Parliament is somewhat of a 'sleeping issue'. It is foreseeable that unless such a mechanism is introduced, a high profile investigation may lead to significant public and political pressure for privilege to be 'waived' and ICAC's jurisdiction to be expanded.

Alleged misuse of allowances and resources by the Hon Peter Breen MLC (2004): following the execution by the ICAC of a warrant on Legislative Council MP, Peter Breen's parliamentary office, concerns were raised that some privileged material may have been seized.¹⁶ The matter was referred to Council's Standing Committee on Parliamentary Privilege and Ethics, which found that 'proceedings in Parliament will inevitably be hindered, impeded or impaired if documents forming part of proceedings in Parliament are vulnerable to compulsory seizure.'¹⁷ This view was contrary to that of ICAC, which had submitted that 'it is only the subsequent use of seized material which may amount to an impeaching or questioning, and not the seizure itself.'¹⁸ The Committee held a subsequent inquiry to develop a general protocol for the execution of search warrants on members' offices. It recommended the following three step test for determining whether or not a member's documents fall within the scope of proceedings in parliament and are therefore protected by parliamentary privilege:

Were the documents brought into existence for the purposes of or incidental to the transacting of business in a House or a committee?

- ☐ YES → falls within 'proceedings in Parliament'.
- ☐ NO → move to question 2.

Have the documents been subsequently used for the purposes of or incidental to the transacting of business in a House or a committee?

- ☐ YES → falls within 'proceedings in Parliament'.
- ☐ NO → move to question 3.

Have the documents been retained for the purposes of or incidental to the transacting of business in a House or a committee?

- ☐ YES → falls within ‘proceedings in Parliament’.
- ☐ NO → does not fall within ‘proceedings in Parliament’.¹⁹

The ICAC subsequently adopted this protocol, but with some differences in relation to the determination of claims of parliamentary privilege. In its examination of the ICAC protocol, as part of its later inquiry into entering into a Memorandum of Understanding with the ICAC, the Committee noted some discrepancies. For instance, the ICAC protocol ‘did not refer to the criteria for determining claims of privilege, whereas the Committee’s had included a definition of ‘proceedings in Parliament’ consistent with s.16(2) of the *Parliamentary Privileges Act 1987* (Cth), along with a test for determining whether documents are protected by privilege’. In evidence to the Committee, the ICAC advised that, it ‘did not agree that retention of a document for the purposes cited by the Committee is within the scope of ‘proceedings in Parliament’ and, therefore, may render a document immune from seizure.’ The ICAC felt that the test could ‘operate so as to prevent the seizure of any document, as a member could claim they intended to use a document at some future time, for or incidental to, the transacting of relevant business in the House.’²⁰ The ICAC protocol also did not make reference to procedures for disputed claims of privilege. In evidence to the Committee, the ICAC indicated that:

In the event the issue of parliamentary privilege arises in any future operation the Commission would need to determine, on a case by case basis, whether it accepted such a determination and if not whether it should seek judicial review of any such decision.²¹

The Committee disagreed and referred to the ‘broader, well-established principle that it is for the courts to determine the existence of a privilege but it is solely for the House to determine the manner of the exercise of a privilege.’ The Committee stated that in the event of judicial review it would expect that the ‘House would vigorously assert this principle’.²² However, the Committee did not consider that this disagreement over jurisdiction should prevent the Parliament from agreeing on the ‘issue of the procedures which should be followed by investigating officers to ensure that material subject to parliamentary privilege is not seized under a warrant.’ Hence, while the ICAC and the Houses of the NSW Parliament have entered into a Memorandum of Understanding on the execution of search warrants, differences of interpretation still remain. Also, the Memorandum of Understanding does not cover the ICAC’s use of telecommunications intercepts as part of its investigations. In this instance, it could not be argued that parliamentary privilege has been diluted by the ICAC investigation. Rather, the Parliament made a strong defence of parliamentary privilege and Article 9 and ‘vigorously asserted its right to ‘determine the manner of exercise of privilege’.

The Queensland Crime and Misconduct Commission (CMC)

The CMC investigates crime and official misconduct. ‘Official misconduct’ is ‘any conduct by a public official, related to the official’s duties, that is dishonest or lacks

impartiality, involves a breach of trust, or is a misuse of officially obtained information.’ For the conduct of an MP to ‘constitute official misconduct, the conduct must be capable of amounting to a criminal offence’.²³ While there is a Code of Conduct for members of the Queensland Assembly, it has no separate legal status and breaches are not subject to investigation by the CMC unless they also constitute a criminal offence. Queensland differs from other jurisdictions in that there is no express provision in the *Crime and Misconduct Act 2001* protecting parliamentary privilege. Rather there are procedures for claims of privilege, which in misconduct investigations include claims of parliamentary privilege.²⁴ For instance, a person who fails to comply with a notice does not commit an offence if the information or document is subject to privilege²⁵ and a person at a hearing is entitled to refuse to answer a question on the grounds of parliamentary privilege.²⁶ If a claim of privilege is made, the commission officer is required to consider the claim. If the notice to produce or requirement to answer a question is not withdrawn by the CMC, the person may apply to, or be required to attend before, the Supreme Court to establish the claim.²⁷

The relationship between the CMC and parliament in relation to the investigation of conduct by MPs has, at times, been fraught. For instance, the Members’ Ethics and Parliamentary Privileges Committee (MEPPC) has investigated Criminal Justice Commission (predecessor to the CMC) for contempt. Criminal Code provisions (since repealed) criminalised behaviour relating to proceedings of parliament and which would have otherwise been dealt with as contempt of parliament or breach of privilege. This created uncertainty as to the respective jurisdictions of the CMC and the parliament. While an examination of CMC investigations under the Criminal Code provision is largely academic, given that they have since been repealed, these investigations are still relevant in terms of analysing possible areas of contention between parliaments and anti-corruption agencies.

Report on a matter of privilege: Alleged contempt by the Criminal Justice Commission (1996): this inquiry related to ‘an alleged investigation of Mr Grice [MP] by the Criminal Justice Commission following a speech in the Legislative Assembly’ in which he had ‘made allegations concerning the unauthorised release by an officer of the CJC of highly confidential CJC information’.²⁸ Mr Grice made a number of allegations about the propriety of the CJC’s investigation, and requested that the MEPPC consider:

... that it is the very subject of my allegations in Parliament, the Criminal Justice Commission, which secretly launches an investigation into my behaviour, and further, that the member of the Commission’s staff whom I name in Parliament, according to the *Courier Mail*, is authorised by the Chairman of the Criminal Justice Commission to have the benefit of the evidence obtained “to help defend himself”. ... Any reasonable observer could only conclude that the action of the Criminal Justice Commission in secretly launching this investigation was using its not insubstantial powers in a manner that was likely to attempt to intimidate a Member of this House and obstruct a Member of this House in the discharge of his duty.

He also claimed that the actions of the Criminal Justice Commission were a 'fundamental attack on the right of a Member... to speak freely and without fear of prosecution'.²⁹ The MEPPC considered whether the CJC's conduct could constitute contempt either in terms of 'the deliberate molestation of a member or a member's source of information' or the 'questioning or impeaching of statements made by a member in the Legislative Assembly'. While the MEPPC found that in this instance there was insufficient evidence on either count, it did state that such conduct could constitute a contempt of parliament. In identifying that an investigation of a member of parliament following statements made in parliament may 'in certain circumstances constitute a breach of privilege enshrined by Article 9 and a contempt of parliament' the MEPPC stated:

...if the investigating body is carrying out a legitimate and lawful investigation into the substance of matters raised in Parliament, it is doubtful that that alone could ever constitute a contempt of Parliament. On the other hand, it may be a contempt if the evidence suggests that at least one purpose of the investigation was really directed towards trying to punish the member (or perhaps an informant) for the statement made in Parliament... Put simply, if it can be shown that the investigating body was trying to interfere with a proceeding in parliament or attempting to punish someone by whatever means for statements made in parliament, there may be an issue of privilege.³⁰

This inquiry by the MEPPC would seem to indicate that parliament possesses adequate mechanisms to deal with actions by an anti-corruption agency which infringe on parliamentary privilege. While it is possible that an anti-corruption agency might seek to hinder the proceedings of parliament or intimidate an MP, there are potential sanctions for such action in the form of investigation by parliament or a parliamentary committee for possible contempt of parliament or breach of privilege. It is also open for parliament, as legislator and through its oversight of anti-corruption agencies, to amend powers and jurisdiction of anti-corruption agencies where it considers necessary.

Investigation of matters relating to the conduct of the Hon Ken Hayward MP (2003): in 2003 the CMC conducted an investigation into allegations that the Hon Ken Hayward MP 'may have acted improperly in relation to various transactions between government agencies and business entities with which he may have been directly or indirectly linked.' Among other things, concern were raised about Mr Hayward making speeches in parliament 'on issues said to be of relevance to the interests of businesses and companies with which he was connected, without declaring those interests to the parliament.'³¹ Section 59(1) of the Criminal Code (since repealed) provided:

Any person who, being a member of the Legislative Assembly, asks for, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself or any other person upon any understanding that the person's vote, opinion, judgment, or action, in the Legislative Assembly, or in any committee thereof, shall be influenced thereby, or shall be given in any particular manner or in favour of any particular side of any question or matter, is guilty of a

crime, and is liable to imprisonment for 7 years, and is disqualified from sitting or voting as a member of the Legislative Assembly for 7 years.

The CMC considered that the allegations about Mr Hayward's conduct in relation to parliament, such as 'failures to declare relevant interests in the Register of Members' interests or when making speeches to the parliament, did not involve matters which could amount to official misconduct; the conduct in question could not, even if proved, amount to a criminal offence (which is necessary before the conduct of an elected official, such as a member of parliament, can amount to official misconduct).'³² While finding no evidence that Mr Hayward had engaged in such conduct, the CMC report made the following observations about the operation of the Code and parliamentary privilege:

Matters such as alleged breaches of SOs[Standing Orders] or the requirements to disclose relevant interests in the Register would ordinarily not amount to conduct capable of constituting official misconduct, such as would fall within the CMC's investigative jurisdiction, because such conduct could not by itself amount to a criminal offence. The CMC recognises that such issues relate to proceedings of parliament which are matters for the parliament alone to adjudicate upon, through the processes it has established, if issues or complaints arise.³³

The CMC stated that it had examined issues concerning parliamentary 'standards' and obligations in the context of 'their relevance to the concerns which were assessed as being capable of amounting to official misconduct.' The CMC also stated that it was 'mindful that evidence of any conscious failure to declare certain interests, as required by the parliament, may be a relevant factual circumstance if other evidence existed to support a view that Mr Hayward had at the material time engaged in official misconduct.' In regard to the jurisdiction of the MEPCC, the CMC report referred to section 92 of the *Parliament of Queensland Act 2001*, which provides, amongst other things, 'that a complaint about a member not complying with the Code may be considered only by the Legislative Assembly or the MEPCC.' However, the CMC contended that this exclusionary provision would not apply to an entity such as the CMC, if that entity may under a law (such as the Act) consider an issue and the issue that is considered involves the commission or claimed or suspected commission of a criminal offence.³⁴

Allegations concerning the Honourable Gordon Nuttall MP (2005): in 2005 the issue of whether the CMC could conduct investigations which involve 'impeaching or questioning' parliamentary proceedings, and which also involve specific offences under the Criminal Code, was revisited. Following evidence given by the then Minister for Health, the Hon Gordon Nuttall MP, before a parliamentary estimates committee, the Leader of the Opposition made allegations to the police that the Minister had contravened section 57 of the Criminal Code. The police then referred the matter to the CMC. The matter was also referred to the MEPPC, which indicated that, in keeping with its established procedures for matters that may be a contempt and, and a criminal offence, it would 'take no action with the reference until it was established that other authorities were not taking action in respect of the matter.'³⁵ Under s47(1) of the *Parliament of Queensland Act* a person may be

proceeded against for the contempt or for the offence against the other Act, but the person is not liable to be punished twice for the same conduct. Section 57 (since repealed) stated:

False evidence before Parliament

Any person who in the course of an examination before the Legislative Assembly, or before a committee of the Legislative Assembly, knowingly gives a false answer to any lawful and relevant question put to the person in the course of the examination is guilty of a crime, and is liable for imprisonment for 7 years...

The CMC investigation raised important issues about the role and jurisdiction of the CMC and the Queensland parliament, including whether an investigation regarding an offence under section 57 breaches the law with respect to parliamentary privilege and how such an investigation would be reported — directly to the Director of Public Prosecutions (as provided under the CMC Act) or to the Attorney-General for consideration by Parliament (as provided under the *Parliament of Queensland Act*)?³⁶ Both the CMC and the Clerk of the Parliament, on behalf of the Speaker, sought legal advice on the interaction of section 57 of the Criminal Code and freedom of speech under Article 9. Counsel for the CMC found that parliamentary privilege wouldn't prevent an investigation, but it would prevent the CMC from using coercive powers to question the member. Counsel for the Clerk advised that while it would be open for the CMC to report to either the Director of Public Prosecutions or the Attorney-General, in this instance the Attorney-General would not be an 'appropriate' prosecution authority, given the 'highly contentious party political' issues at stake.³⁷ However, the CMC relied on its own legal advice that it should report on its investigation direct to the Attorney-General for the consideration of parliament.³⁸ In its report, the CMC advised that two options were open to parliament:

Parliament may direct the Attorney General to prosecute the minister for the offence created by section 57 of the Criminal Code. Alternatively, if Parliament concludes that the more appropriate course is to deal with the matter as a contempt of parliament, it may direct that the matter be dealt with in accordance with Part 2 of Chapter 3 of the Parliament of Queensland Act.³⁹

The Attorney-General tabled the report, and two days later, in a special sitting of the House, the Premier moved a motion that the MP's conduct be dealt with as contempt of parliament, and that the MPs resignation as a minister and apology to the parliament be accepted as the appropriate penalty.⁴⁰ After nearly six hours of heated debate, the government used its majority to pass the Premier's motion.⁴¹

The provisions in the Criminal Code concerning parliament — Section 56 (Disturbing the Legislature), 57 (False evidence before Parliament) or 58 (Witnesses refusing to attend or give evidence before Parliament or parliamentary committee) - were later repealed in 2006.⁴² The sole jurisdiction to investigate and punish such conduct was returned to the parliament. At first glance, such a result might seem to be a 'win' for parliament in asserting its authority as the sole arbiter

of conduct connected to its proceedings. However, as the parliamentary debates⁴³ and media reports⁴⁴ surrounding these developments reveal, this assertion of parliamentary authority was at the expense of damaging the reputation of the parliament, its members and parliamentary privilege itself. Such actions by parliament gave rise to perceptions of the parliament applying 'one set of standards for the Public Service and a different, lower set of standards for itself'⁴⁵ of 'Caesar judging Caesar'⁴⁶, and of bias and undue political influence in the investigation of misconduct by members. In this instance, the highly political response of the government to the CMC inquiry exposed the parliament to the perception that privilege is something to be used to protect parliamentarians at the expense of justice and standards. It also resulted in the repeal of powerful criminal sanctions which could be used by parliament to punish for contempt and breach of privilege, thus weakening the position of parliament in its protection of the integrity of its proceedings.

The Western Australian Corruption and Crime Commission (CCC)

The CCC investigates, amongst other things, misconduct and corruption. Its website summarised misconduct as occurring 'when a public officer abuses their authority for personal gain, causes detriment to another person, or acts contrary to the public interest', with corruption as 'the most serious form of misconduct'.⁴⁷ A public officer includes a member of the Western Australian parliament.⁴⁸ Section 4(2) of the Corruption and Crime Commission Act 2003 (WA) states that:

Nothing in this Act affects, or is intended to affect, the operation of the Parliamentary Privileges Act 1891 or the Parliamentary Papers Act 1891 and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable exclusively by a House of Parliament, unless that House so resolves.⁴⁹

The section is curiously worded, in that it protects the operation of privilege, except in those circumstances in which a House of Parliament so resolves. The rationale for this exception is explained in the debates on the introduction of the legislation, which indicated that it was felt that such a provision was needed to 'accommodate the fact that some matters would not be exclusively determined by the House as a result of the proposed section 27B(3)'.⁵⁰

Section 27A and 27B of the *Corruption and Crime Commission Act 2003* (WA) require that if an allegation of misconduct, not being serious misconduct, is made against an MP, the matter must be referred by the CCC to the Presiding Officer, who must then refer it to the Procedure and Privileges Committee of the House concerned. If the Procedure and Privileges Committee decides that the matter warrants investigation, it must direct the CCC to investigate on the Committee's behalf. The definition of 'misconduct' includes certain types of conduct which constitute, or could constitute, an offence against 'any written law', including the

Parliamentary Privileges Act 1981 (WA).⁵¹ Section 27B(3) provides that for the purposes of conducting such an inquiry, the Commission:

- a) has the powers, privileges, rights and immunities of a committee under the *Parliamentary Privileges Act 1891*;
- b) is to refer a matter, including an objection made under section 7 of the *Parliamentary Privileges Act 1891*, to the presiding officer for decision in a case where a committee is required to obtain a decision of the House;
- c) may order without summons a member or officer of either House to appear and give evidence or produce documents;
- d) may be assisted by parliamentary and Commission officers;
- e) cannot delegate the performance of a function that cannot be delegated by a committee of a House;
- f) is to report to the presiding officer and the Privileges Committee when so requested or at predetermined intervals or both.⁵²

The CCC has significant autonomy in the conduct of such an inquiry. In addition to its normal powers to make recommendations for prosecution or disciplinary or other action, the CCC can ‘recommend that a member be expelled or an officer be removed under section 35 of the *Constitution Act 1889*’. The CCC also has control over the content of the final report, as the presiding officer must present such a report from the CCC to the House, ‘in the form in which it is received’, on the sitting day next following its receipt.’ This has created a system where, ‘technically, the reports [are] undertaken for the PPC [Procedure and Privileges Committee] but for all practical purposes, they are reports of the CCC with no input from the PPC.’⁵³ Such an investigation may call into question privileged material, which has prompted calls for amendment to bring such conduct within the sole jurisdiction of the parliament. As part of a Review of the CCC Act published in 2008, the Acting Clerk of the Western Australian Legislative Council submitted that ‘offences under the *Parliamentary Privileges Act* should not constitute misconduct under the Act’, but rather that ‘all of the subject matter of section 8 of the *Parliamentary Privileges Act* falls properly within the sole jurisdiction of the Parliament.’ The review concluded that ‘if Parliament now wishes to amend the Act to exclude offences under the *Parliamentary Privileges Act*, it would be necessary to do so expressly.’ To date, there have been no such legislative amendments. For investigations other than those conducted under s27A and B, the CCC is not permitted to ‘go behind parliamentary privilege’.⁵⁴

Report: Select Committee of Privilege on a matter arising in the Standing Committee on Estimates and Financial Operations (2007): as part of its investigations into lobbying and public sector misconduct, the CCC identified a ‘possible breach of parliamentary privilege in relation to alleged disclosures of deliberations of the [Standing Committee on Estimates and Financial Operations].’ The CCC requested access to committee records, committee members and committee staff for the purposes of its investigations.⁵⁵ As a result, the Legislative Council established a Select Committee on Privilege to consider the matter.⁵⁶ Although this committee conducted the inquiry, it was greatly assisted by the

evidence of the CCC, including ‘transcripts of telephone intercepts, chronologies, email, diaries and other evidence in its possession that it had acquired over a number of private hearings.’⁵⁷ During the course of the inquiry, the CCC demonstrated its willingness to become involved in investigations of ‘what were effectively internal disciplinary breaches committed by Members of Parliament’.⁵⁸ Although in this instance the CCC and the Parliament worked together to investigate misconduct by MPs, the significant powers of the CCC regarding MPs also prompted the Select Committee to comment that there is a ‘very real risk that if the Parliament itself does not deal satisfactorily with breaches of its privileges, then the CCC, with its extensive powers, will take up the shortfall.’ The Select Committee found that this is especially so, as sections 27A and 27B mean that ‘the Western Australian Parliament no longer has the option of following the lead of so many other parliaments that have set very high thresholds of breaches of privilege and contempts before they will establish committees of privilege to consider them’.⁵⁹

Response to matters raised in Corruption and Crime Commission Reports referred under 27A of the CCC Act (2008): in 2008, the newly constituted Procedure and Privileges Committee (PPC) tabled a report responding to the recommendations made by the CCC as a result of two referrals from the previous PPC. As a result of an investigation under section 27B on behalf of the PPC, the CCC had recommended that:

... consideration be given to formulating a procedure for the disclosure of approaches made to committee members by those wishing the member to take a particular position in respect of a matter which is before the committee or may come before it for consideration or a decision. Such disclosure would assist in ensuring that the significant powers of committees are not improperly used for the purpose of advancing private interests. Disclosure requirements should include the name of the person who made the approach, the interest that they represented and the position that they advocated. It would be desirable if such disclosures were made at the commencement of each meeting and recorded in the minutes.

The PPC responded that the ‘CCC had not fully considered the effect that disclosing and minuting such lobbying might have on the ability of a member to perform his or her functions as a member of Parliament or a member of a committee.’ The PPC stated that it is the nature of politics and parliament that members are regularly subject to lobbying, and it is for members to decide ‘whether they wish to take a particular position on behalf of their constituents, whether presented to them by a lobbyist or any other person’. It was felt that disclosure of approaches by lobbyists would act as a deterrent ‘for members seeking a wide range of opinion on an issue.’⁶⁰ The CCC had also recommended that:

... consideration be given to formulating guidelines for the drafting of motions by Members, specifically that Members should be cautious about accepting the assistance of lobbyists in this regard, given that the interest of the lobbyist or their client may not be revealed or be readily apparent. Members should exercise care in ensuring that they do not become either the willing or unwilling instrument for advancing private interests. Members should also consider whether if assistance in drafting a motion is received it may be appropriate to disclose that fact.

The Committee responded that it was for the members themselves to judge whether obtaining assistance in drafting motions was appropriate.

Although the Western Australian Parliament has devolved a significant portion of its jurisdiction to investigate the conduct of its members for contempt of parliament and breach of privilege, it still retains a discretion regarding the adoption of the CCC's recommendations. To date, none of the recommendations in the initial CCC report have been implemented. However, the PPC's criticisms of the CCC's report in this instance show that the situation under section 27B where the PCC is required to refer a matter to the CCC is unsatisfactory. The CCC's original report contained overly prescriptive recommendations that demonstrated little understanding of the parliamentary environment and processes, and there may be some instances where such issues are best left to the parliament and its committees.

Conclusion

In those states with established specialist anti-corruption agencies, some of the most dramatic recent conflicts around parliament privilege have occurred in the context of an investigation by an anti-corruption agency. There seems to be an uneasy relationship between parliaments and anti-corruption agencies relating to jurisdiction over the investigation of the conduct of MPs. Anti-corruption agencies with extensive covert and coercive powers and a broad mandate to investigate and expose corruption are formidable rivals to parliament's traditional sole jurisdiction over the proceedings of parliament. Different jurisdictions face different issues, which in a large part are dependent on the provisions relating to parliamentary privilege in the legislation governing the various anti-corruption agencies. Much also depends on the extent to which parliament is willing and able to assert its authority. ▲

Endnotes

¹ This paper was written for the ANZACATT Parliamentary Law, Practice and Procedure Program 2010

² See South Australian Attorney-General's Department, A review of Public Integrity Institutions in South Australia and an integrated model for the future, 2010.

³ See Clause 4.3(b) of the 'The Australian Greens and Australian Labor Party - Agreement' and Clause 18 of Annex A, 'The Australian Labor Party & the Independent Members (Mr Tony Windsor and Mr Rob Oakeshott).

⁴ NSW Parliament, Standing Committee on Parliamentary Privilege, 'Parliamentary privilege and the seizure of documents by ICAC', Report 25 — December 2003, p. 4.

⁵ Section 8, *Independent Commission Against Corruption Act 1988*.

⁶ *ibid*, Section 122.

⁷ NSW Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, Regulation of Secondary Employment for Members of the NSW Legislative Assembly, September 2004, p. 1.

- ⁸ Paper presented by the Hon John Price MP, Deputy Speaker of the NSW Legislative Assembly, *Codes, Regulations and Guidelines: The elusive balance between external accountability and Parliament's powers, privileges and immunities*, 35th Conference of Presiding Officers and Clerks, Melbourne, July 2004, p. 4.
- ⁹ *ibid*, p. 4.
- ¹⁰ NSW Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, Regulation of Secondary Employment for Members of the NSW Legislative Assembly, *ibid*, pp. 29–31.
- ¹¹ B. McClintock SC, Independent Review of the *Independent Commission Against Corruption Act 1988*, Final Report, January 2005, p. xiii.
- ¹² *ibid*, p. 76.
- ¹³ ANZACATT Professional Development Seminar, ACT, 2010, Workshop C, Do extra parliamentary watchdogs help or hinder parliament?, pp.12–17. Also see the two most recent ICAC reports relating to the conduct of Members of Parliament — Operation Corinth (July 2010) and Operation Syracuse (December 2010) at www.icac.nsw.gov.au.
- ¹⁴ For instance 'Parliamentary privilege may restrict investigations into substantial breaches of the code of conduct, particularly in relation to clause 2 of the code concerning bribery and clause 5 of the code concerning use of confidential information.' See B. McClintock SC, Independent Review of the Independent Commission Against Corruption Act 1988, Final Report, January 2005, p. 82.
- ¹⁵ However, the Legislative Council Committee on Parliamentary Privilege and Ethics conducted the following investigations in the late 1990s: Report on Inquiry into the conduct of the Honourable Franca Arena MLC, Report No.6, June 1998; Report on Special Report from General Purposes Standing Committee No.2 Concerning a Possible Contempt, Report No.9. November 1998; Report on Inquiry into Statements made by Mr Gallacher and Mr Hannaford, Report No.11, November 1999.
- ¹⁶ NSW Legislative Council Privileges Committee, *Protocol for execution of search warrants on members' offices*, Report 33, February 2006, p. 1.
- ¹⁷ NSW Legislative Council Privileges Committee, *Parliamentary privilege and seizure of documents by ICAC*, Report 25, December 2003, p. ix.
- ¹⁸ NSW Legislative Council Privileges Committee, Report 33, *op. cit.*, p. 1.
- ¹⁹ *ibid*, p. 16.
- ²⁰ NSW Joint Standing Committee on the Independent Commission Against Corruption, Review of the 2007–2008 Annual Report of the Independent Commission Against Corruption, Report 9/54, p. 12.
- ²¹ NSW Legislative Council Privileges Committee, A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices, Report 47, November 2009, p. 20.
- ²² *ibid*, p. 21.
- ²³ See CMC website <http://www.cmc.qld.gov.au/asp/index.asp?pgid=10698&cid=5266&id=128>
- ²⁴ *Privilege*, in relation to an answer, information, communication or document, or thing means — (b) in the context of a misconduct investigation (iii) parliamentary privilege; (c) in relation to a confiscation related investigation- (iii) parliamentary privilege. However, parliamentary privilege is not included in the definition of privileges in the context of a crime investigation or witness protection function. Schedule 2, Dictionary, *Crime and Misconduct Act 2001* (Qld).

²⁵ *ibid*, Section 75(5)(a).

²⁶ *ibid*, Section 192(2A)(c).

²⁷ *ibid*, Section 80 and 196.

²⁸ Queensland Parliament, Members' Ethics and Parliamentary Privileges Committee, Report No 10, Report on a Matter of Privilege: Alleged Contempt by the Criminal Justice Commission — Matter referred to the committee on 3 December 1996, Chairman's Foreword.

²⁹ Queensland Parliament, Members' Ethics and Parliamentary Privileges Committee, Report No 10, Report on a Matter of Privilege: Alleged Contempt by the Criminal Justice Commission — Matter referred to the committee on 3 December 1996, pp. 6–7.

³⁰ Queensland Parliament, Members' Ethics and Parliamentary Privileges Committee, Report No 10, *ibid*, p. 23.

³¹ Crime and Misconduct Commission, An investigation into matters relating to the conduct of the Hon Ken Hayward MP, November 2003, p. xiii.

³² *ibid*, p. xiv.

³³ *ibid*, p. 16.

³⁴ *ibid*, p. 17.

³⁵ Queensland Parliament Members' Ethics and Parliamentary Privileges Committee, Report No.72, Matter of Privilege Referred by the Speaker on 24 August 2005 Relating to the Alleged Misleading of Estimates Committee D, p. 2.

³⁶ Section 49(2)(a) of the CMC Act provides that the CMC can report on the investigation to 'the directed of public prosecutions, or other appropriate prosecuting authority, for the purposes of any prosecution proceedings the director or the authority considers warranted.' Section 47(2) of the *Parliament of Queensland Act* provides that 'The Assembly may, by resolution, direct the Attorney General to prosecute the person for an offence against the other Act'.

³⁷ Queensland Crime and Misconduct Commission, *Allegations concerning the Honourable Gordon Nuttall MP: Report of a CMC Investigation*, December 2005, Appendix 5, Mr Hugh Fraser QC, pp. 28–9.

³⁸ *ibid*, p. 3.

³⁹ *ibid*, p. 1.

⁴⁰ Hon PD Beattie, Hansard, 9 December 2005.

⁴¹ Queensland Parliament Hansard, 9 December 2005.

⁴² *Criminal Code Amendment Act 2006*

⁴³ See for instance the comments by, among others, the Leader of the Opposition, Queensland Parliament Hansard, 9 December 2005.

⁴⁴ See for instance: 'Nuttall legacy lingers in abuse of privilege', *Courier Mail*, 13 June 2010; and 'Amendment protects MPs' parliamentary privilege' ABC News, 9 May 2006.

⁴⁵ Queensland Parliament Hansard, Dr Flegg, Member for Moggill, 9 December 2005, p.4737.

⁴⁶ Queensland Parliament Hansard, Ms Pratt, Member for Nanango, 9 December 2005, p.4734.

⁴⁷ See CCC website - <http://www.ccc.wa.gov.au/AboutCCC/Pages/default.aspx>.

⁴⁸ Section 3 of the *Corruption and Crime Commission Act 2003* (WA), which refers to section 1 of the *Criminal Code 1913*.

- ⁴⁹ Section 4(2), *Corruption and Crime Commission Act 2003* (WA).
- ⁵⁰ WA Parliamentary Debates, Legislative Council, 11 December 2003, pp. 14765–66.
- ⁵¹ Section 4(d), *Corruption and Crime Commission Act 2003* (WA).
- ⁵² Ibid, Section 27B(3).
- ⁵³ WA Parliament, Procedure and Privileges Committee, Procedure and Privileges Committee's response to matters raised in Corruption and Crime Commission Reports referred under 27A of the CCC Act, Report No.1 2008, p.1.
- ⁵⁴ http://www.department.dotag.wa.gov.au/_files/CCC_Review.pdf para 717.
- ⁵⁵ WA Parliament, Report: Select Committee of Privilege on a matter arising in the Standing Committee on Estimates and Financial Operations, November 2007, p. 43.
- ⁵⁶ WA Legislative Council Hansard, 12 March 2007.
- ⁵⁷ G. Hitchcock, ANZACATT Conference paper, ACT, 2010, p. 20.
- ⁵⁸ P. Grant, ANZACATT Conference paper, Perth, January 2007.
- ⁵⁹ WA Parliament, Report: Select Committee of Privilege on a matter arising in the Standing Committee on Estimates and Financial Operations, November 2007, pp. 19–20.
- ⁶⁰ Western Australian Parliament, Procedure and Privileges Committee, Procedure and Privileges Committee's response to matters raised in Corruption and Crime Commission Reports referred under 27A of the CCC Act, Report No.1 2008, p. 1–2.

Paul Rodan is Adjunct Professor, Swinburne Institute for Social Research,
Swinburne University of Technology

Not quite as expected: Victorian Labor and the Legislative Council 2010

Paul Rodan^{*}

On 27 November 2010, the Victorian Labor government led by John Brumby was defeated by the Liberal/National coalition, a result which, while not a total surprise, was neither predicted nor anticipated for much of the preceding four- year (fixed) term. What was more surprising was the achievement of the coalition in securing a majority in the Legislative Council, a chamber whose 2003 reforms had, implicitly at least, been designed to all but ensure that securing a majority of seats would require a majority of the vote, a circumstance which did not apply in 2010. In the election aftermath, Labor was understandably focussed on the loss of government (by one seat) with minimal attention to the upper house result. However, that result was significant, suggesting that the Labor government's 2003 electoral model may not have served its intentions as effectively as initially thought.

Victoria was the last mainland state to adopt proportional representation (PR) for its upper house elections, a reform which only became possible when the Labor government of Steve Bracks secured a largely unexpected Legislative Council majority following the 2002 landslide election. Prior to this, Labor had only controlled the upper house for a brief period in 1985, a situation which was quickly undone by a by-election loss in a province which had seen a tied vote in the general election.¹ In 1983, the Victorian upper house had been reformed to comprise 22 provinces (each composed of four lower house seats) with each electing two members on a staggered basis (each MLC serving for a period equivalent to two lower house terms).² While earlier malapportionment had given way to a version of 'one-vote-one value' (with a ten per cent tolerance), the distinctive population distribution of metropolitan Melbourne continued to disadvantage the ALP as it stored up majorities in safe western and northern metropolitan provinces while losing to the Liberals where it mattered most. By way of illustration, in the 1999

^{*} The author is grateful to the journal's anonymous referees and to Professor Brian Costar of Swinburne for comments and advice.

election which produced the Bracks minority government, the ALP secured eight upper house positions from 42 per cent of the vote, while the Liberals secured 11 from 40 per cent. The Nationals secured three places from seven per cent.³

Of the three states which had changed their systems to PR earlier, New South Wales (1977) and South Australia (1973) opted to employ a single state-wide electorate model, with the former now electing a chamber of 42 and the latter a house of 22. Western Australia (1987), by contrast, introduced a system of multi-member regions (now six, each electing six members for a total of 36), reflecting the political compromise which a Labor government had to effect with the National Party in that State.⁴ No such necessities applied in New South Wales, where the new upper house arrangements were replacing a nominated, unelected membership, while in South Australia, the weakened negotiating power of the Liberal Party (and its internal division over electoral reform) led to a compromise outcome in which ALP policy on a single state-wide electorate prevailed.⁵

The arguments for PR are well-researched in politics text books and were given a thorough airing in the documentation published by the Victorian government in 2003. Those who read the government case were advised that PR would 'ensure that the number of successful candidates from each party reflects more closely the total vote for that party as a proportion of all votes cast in the election.'⁶ Curiously, the same document claimed that 'combining PR with a system of multi-member electorates will further enhance the opportunity for smaller parties to be represented.'⁷ This was true if compared with the existing system of single-member constituencies, but less true when compared with state-wide electorate systems, whose smaller quotas for election were much more likely to result in the election of minor parties and independents (as had clearly occurred in NSW and SA). In support of this model, the government cited its capacity to deliver 'the highest possible level of representation for country Victoria' and its striking 'a reasonable balance between too low a quota (which may lead to candidates with very little community support being elected, causing instability in the upper house) and too high a quota (which will reduce the opportunity for smaller party and independent representation).'⁸ The reference to country Victoria reflected the origins of the Bracks government in 1999, a minority administration forced to rely on three rural independents for its existence and survival. One of the conditions for that support, readily embraced by Bracks, was the introduction of PR for upper house elections.⁹ While this undertaking could not be honoured in the period of minority government, Bracks did establish a constitution commission in March 2001, whose recommendations (including PR) could be effected when Labor controlled both houses after the 2002 election.

Significantly, the commission observed that an upper house's role in ensuring some version of accountability was 'most effective when neither Government nor Opposition controls the Upper House'.¹⁰ Implicitly then, the most desirable electoral system was one (PR) which would render such control the exception rather than the norm and require a majority of the vote to secure a majority of the seats.

However, while acknowledging that a state-wide electorate would ensure more precise representativeness, the commission rejected such a model, citing concerns about the possible election of candidates with low support but meeting a small quota, plus deference to perceived regional preference for specific geographical representation.¹¹ The commission had provided the government with four models for multi-member electorates within the state, with its own preference being six regions with seven members in each, and a resultant quota of 12.5 per cent. In rejecting this and opting for a system of eight regions each electing five members, the government was endorsing the resultant quota of 16.67 per cent for election. This was clearly at the upper end of the spectrum, leading one parliamentary critic to observe that this made the election of independents extremely difficult and exposed the limitations on Bracks' commitment to representativeness.¹²

While the support of the rural independents (largely elected on platforms of regional resentment of Melbourne domination) was no longer needed after the 2002 election, the Bracks government was keen to retain the uncharacteristically high levels of support which Labor was then enjoying outside the metropolitan area. This motivation was possibly complemented by Labor's desire to avoid the experience of NSW and SA, where the smaller state-wide quotas had seen the election of (*inter alia*) the Shooters and Fishers Party and the fundamentalist Christian Democrats in the former, and Family First and anti-gamblers in the latter. By contrast, the WA system had resulted in the ongoing dominance of the big three parties (Labor, Liberal, National), augmented by several Greens. What was left unsaid, but was probably implicit, was an understanding that no one party or coalition could secure a majority in the upper house without attracting a majority of the vote. Victorian Labor had been tormented for years by the electoral reality that the Liberals, due to the geographical dispersal of party support in the Melbourne metropolitan area, could secure upper house majorities even when they polled far fewer votes than the ALP, as in the period of the John Cain (junior) government, elected in 1982.¹³ Such problems were exacerbated by the reality of staggered elections for the upper house, but this too would be eradicated, as, under the new arrangements, the entire Legislative Council would be elected at the same time as the lower house, and serve a fixed four-year term. The non-electoral changes included the removal of the Council's right to reject supply and the introduction of a dispute resolution procedure for deadlocked bills.

The working assumption that major party domination of the upper house would become atypical was apparent in both Labor and coalition perspectives. Bracks received some credit as the unselfish politician who sacrificed his newfound majority for the greater good,¹⁴ although over the longer term Labor was the apparent beneficiary of a system which, while clearly fairer, now made the historically normal conservative majority more difficult to attain. For its part, the coalition was resigned to the loss of its historical advantage, with the result that some of its members allegedly preferred abolition to the perceived partisan disadvantage of a fairer system.¹⁵ One conservative MLC predicted that a major party would only control the upper house every fifty years.¹⁶

The Victorian Legislative Council had been the bane of Victorian Labor from earliest times, blocking legislation (and even supply) on those rare occasions that the ALP was elected and even when in opposition, its upper house numbers inevitably failed to reflect its electoral support. In reality, prior to 2002, Labor had sometimes been in office, but never in power. It was no wonder that the passage of the upper house reform legislation was seen as such a seminal moment for Victorian Labor, and one of Bracks' most significant achievements.¹⁷ While the system — which took effect from the 2006 election — seemed most likely to result in the election of Labor, Liberal, National and Green MLCs, the received wisdom came unstuck with the totally unexpected success of a candidate from the Democratic Labor Party in the western region, whose ticket secured 2.66 per cent of the primary vote.¹⁸ As Economou points out, this came about courtesy of the group voting ticket (GVT) of the ALP, not from any genuine reincarnation of a party regarded as effectively dead in the 1970s.¹⁹ While it might be argued that the election of candidates with low primary support is an inherent problem with single transferable vote PR, it would seem the case that GVTs have exacerbated the growth of tickets whose ideological incoherence is usually largely unknown to the voters utilizing such tickets.

Despite the Lazarus-like effort of the DLP, reformers could view the 2006 result as a fair match between expectations and outcome, although the Labor Party did best in terms of exceeding its proportional entitlement. With 41.45 per cent of the statewide upper house vote, the ALP secured 47.5 per cent of seats; the Liberals 37.5 per cent of seats with 34.6 per cent of the vote; the Nationals 5 per cent of seats from 4.4 per cent of the vote and the Greens 7.5 per cent of seats from 10.6 per cent of the vote. Importantly in terms of expectations about a reformed upper house, a majority proved unattainable for Labor or the Liberal/Nationals.

Table 1: Victorian Legislative Council Election 2006

Party	% first preferences	Regions won	% Regions won
ALP	41.45	19	47.5
LPA	34.6	15	37.5
NPA	4.4	2	5.0
GRN	10.6	3	7.5
DLP	2.0	1	2.5
Family First	3.85	0	0
Others	3.2	0	0

Data source: Victorian Electoral Commission

What is clear with hindsight is that the large quotas for election had the potential to bring Labor or (more likely, given their virtual monopoly of support on the conservative side) the coalition close to a council majority without achieving a majority of the primary vote (at the expense of the Greens and groups such as Family First), if the votes fell in desirable patterns in the right regions. However, what little post-election commentary ensued focused more on the DLP 'revival' and the flaws in opportunistic party negotiations which attended the preference order in GVTs than on implications for major party representation. This issue, the possibility of 'accidental' small party or independent election, secured some attention as the 2010 election approached, with speculation that perennial 'good governance' candidate Stephen Mayne or the Sex Party's Fiona Patten (both contesting the Northern Metropolitan region) might find their way into parliament via some Byzantine preference deal. In terms of the major parties, the widespread assumption was that neither Labor nor the coalition would secure a majority: hence the additional interest in any potential balance of power role for exotic candidates like Mayne and Patten. At the end of the customarily prolonged count for the upper house, neither Mayne (whose ticket obtained 0.98 per cent of primary votes) nor Patten (3.62 per cent)²⁰ could secure victory, to the probable frustration of media outlets seeking a colourful story. Instead, the 40 positions were shared between the ALP, the Liberal/National coalition and the Greens, an outcome which might have been seen as most likely when the Bracks government opted for a system of (eight) five-member regions, with the formidable quota for election of 16.67 per cent. What was far less likely, and largely unforeseen, was the ability of the coalition to eke out a narrow council majority to mirror its two-seat majority in the lower house.

That the coalition was able to achieve this outcome with 43.15 per cent of the state-wide vote suggests that the Bracks government's version of PR left something to be desired in terms of delivering the stated aim of a close match between votes won and seats won. At the very least, reformers would have envisaged that a substantial level of support would be needed for a major party to secure a majority of seats, yet here was the coalition achieving the necessary numbers with a vote which was closer to 40 per cent than 50. It was all too reminiscent of the old single-member constituency system which had virtually provided a permanent conservative majority.

There is little doubt that the coalition drew maximum benefit from the five by eight system, with its quota of 16.67 per cent, winning three seats in each of five regions and two in each of the other three. Had a single statewide electorate been in place, and assuming an upper house of the same size (40), the same vote (quota of 2.4 per cent) would have delivered a more proportionally sound outcome: the coalition no more than 18 seats, Labor 15, the Greens five, with the rest probably fought out between Family First, the DLP, and the Sex Party. If the ALP government wanted PR without the irritation of political minnows, that goal was achieved in 2010, but at the cost of producing an unanticipated majority for their opponents. With a system which virtually entrenches a realistic contest between three party groups (coalition, ALP, Greens), it may be useful to consider a modification of the two-

party preferred vote (2PP) as utilized in analysing single-member constituency contests in Australia. The 2PP concept, pioneered by Mackerras,²¹ has been criticised,²² but its value lies in its capacity to identify the ultimate level of voting support enjoyed by those parties realistically contesting the major prize (government) or individual seats, something which the primary vote cannot deliver in a system of preferential voting, especially in the commonwealth and those states where preference indication is compulsory.

Table 2: Victorian Legislative Council Election 2010

Party	% first preferences	Regions won	% Regions won
ALP	35.4	16	40.0
LNP*	43.15	21	52.5
GRN	12.0	3	7.5
DLP	2.3	0	0
Family First	2.9	0	0
Sex Party	1.9	0	0
Country Alliance	1.65	0	0
Others	0.7	0	0

Data source: Victorian Electoral Commission

*The Liberal and National Parties ran on a joint ticket in relevant Regions

In this spirit, a rudimentary attempt was made to determine a ‘three-party preferred’ vote (3PP) for the Victorian upper house result of 2010. While others have utilized such a concept, such recent use has mainly been focused on individual seats or groups of seats rather than the state level.²³ Using state-wide figures, the primary votes of the three major groups (coalition, ALP, Greens) were augmented by a preference allocation from the non-elected candidates, based on the group voting tickets which determined the allocation of preferences, the tickets for above the line voting being followed by 96 per cent of voters.²⁴ After this notional distribution to the three groups who secured upper house representation, the coalition had secured 49.6 per cent of the 3PP (for 52.5 per cent of the positions); the ALP 36.4 per cent (for 40.0 per cent of the positions) and the Greens 14.0 per cent (for 7.5 per cent of the positions). In terms of representativeness, the winners were the coalition and Labor and the losers were the Greens, but the conservatives’ numbers took them over the line to an unanticipated majority, an outcome which could be seen as inconsistent with the implicit principles of the Bracks government’s reforms.

Table 3: Victorian Legislative Council Election 2010 and Notional 3PP

Party	% first preferences	3PP %	% seats won
ALP	35.4	36.4	40.0
LNP	43.15	49.6	52.5
GRN	12.0	14.0	7.5
DLP	2.3		
Family First	2.9		
Sex Party	1.9		
Country Alliance	1.65		
Others	0.7		

Data source: Victorian Electoral Commission

It is now possible to conclude that, in choosing the eight/five model with its higher quota, the Bracks government made possible the coalition majority which emerged. Contrary to the conservative pessimist (cited above) who predicted a major party majority as only likely each half century, the possibility of a coalition majority had been foreshadowed in a cogent analysis of the 2003 reforms.²⁵ To some extent, the hybrid model chosen embedded the previous single-member constituency advantage which the Liberals enjoyed with their broader distribution of support within metropolitan Melbourne and their traditional dominance in regional areas. While this inherent advantage was effectively hidden in the 2006 election, which (despite loss of some support) was still a time of Labor electoral superiority, its reality was clearly revealed in 2010.

Moreover, it is clear that while the ‘danger’ of low primary vote candidates securing election was averted in 2010, the risk is ever-present given the role of GVTs and the propensity of the overwhelming majority of voters to utilize above-the-line voting. This was demonstrated by the DLP success in the Victorian upper house in 2006 and for the Senate in 2010, and earlier, by the election of Family First’s Steven Fielding (whose ticket secured 1.88 per cent of the vote, 0.13 of a quota)²⁶ to the Senate in 2004. While there is clearly an improved proportionality between votes and seats compared with the former single-member system, the Bracks reforms have produced two unanticipated outcomes: a party or coalition can win a majority of seats with a minority of the vote; and the larger quota does not guarantee the failure of candidates with extremely low primary vote support.

The Bracks government’s reforms of the upper house electoral system were rightly viewed as removing an element of partisan disadvantage (for Labor) even if conservative opponents chose to depict the changes as conferring partisan advantage on the ALP. That this was not the case was demonstrated initially in 2006 (when Labor lost its majority) and even more clearly in 2010, when the

conservative coalition secured a majority of seats with a minority of the primary vote and without even a majority of the 'three-party preferred' vote amongst those gaining representation in the chamber. While the coalition majority is small and (given the quota) unlikely to go much higher even in a landslide year, the results highlight the problems in combining PR with geographically-drawn multi-member electorates. Given the natural variation between those regions, there is no guarantee of a close match between votes and seats in the overall (state) electorate. In this sense, the Victorian system resembles the Australian Senate, where with six separate state electorates (and two territories), there is no guarantee of 'perfect' proportionality in the overall national result, as evidenced by the coalition securing 52.5 per cent of Senate places in 2004 with 45.1 per cent of the vote.²⁷ But, proportionality is rendered even more problematical with Senate elections given the considerable disparity in state populations, whereas the Victorian upper house regions are based on 'one vote-one value' principles. An examination of upper house results in Western Australian, the other state employing a number of multi-member electorates, also highlights the problem of securing close proportionality, although any comparison is of limited value given the considerable malapportionment in that State's electoral system.²⁸

The election in Victoria of a conservative government, traditionally uninterested in electoral reform, makes change unlikely, especially since it is now apparent that the coalition can secure an upper house majority under the system they railed against. However, the election of candidates with miniscule primary votes, due in large part to GVTs rather than reflecting genuine electoral support, would seem to raise questions of legitimacy. A possible solution worthy of discussion is the establishment of a threshold primary vote percentage for election (for a ticket or non-grouped individual candidate), without which the relevant preferences flow to a 'live' candidate in the count. This feature is part of PR systems in a number of countries, although it is not without its critics.²⁹

While regional independents' support was critical in the emergence and initial survival of the Bracks government, that same dependence was a factor in Labor implementing an upper house electoral model which does not serve representativeness as well as the state-wide systems of New South Wales and South Australia. In the latter, a major party has not secured a majority in the upper house since the introduction of PR; in the former, the last such majority was in 1988. In opting for eight multi-member constituencies with high quotas, the ALP may not have comprehensively shot itself in the foot, but it is possible to conclude that it has damaged several toes. ▲

Endnotes

- ¹ P. Rodan, 1986, 'Political Chronicles: Victoria, January to June 1986', *Australian Journal of Politics and History*, 32(2), pp. 275–6.
- ² P. Rodan, 1986, 'Victorian Labor and the Legislative Council 1982–1985', *Australian Quarterly*, 58 (1), pp. 78–9.
- ³ 1999 figures from Victorian Electoral Commission. 1999. State Election Results <http://www.vec.vic.gov.au/Results/State1999resultsummary.html>
- ⁴ A. Green, 2005, 'WA: A Peculiar Electoral System', *Australia Votes: Western Australia 2005*, p. 1, <http://www.abc.net.au/elections/wa/2005/guide/electoralsystem.htm>
- ⁵ D. Jaensch, 1977, *The Government of South Australia*, St. Lucia: University of Queensland Press, pp. 56–7.
- ⁶ Department of Premier and Cabinet, Victoria, 2003, A stronger, fairer democracy for Victoria, The Constitution (Parliamentary Reform) Bill 2003, p. 12.
- ⁷ *ibid.*, p. 13.
- ⁸ *ibid.*
- ⁹ N. Economou, 2008, 'Changing the Rules to Change the House: Electoral Reform and the 2006 Contest for the Victorian Legislative Council', *Australian Journal of Political Science*, 43(4), p. 640.
- ¹⁰ Constitution Commission Victoria, 2002, *A House for Our Future*, Melbourne, p. 11.
- ¹¹ *ibid.*, p. 29.
- ¹² Victorian Parliamentary Debates, Legislative Council, 25 March 2003, pp. 435–6.
- ¹³ Economou, *op. cit.*, p. 639.
- ¹⁴ P. Strangio, 2004, 'Labor and Reform of the Victorian Legislative Council, 1950–2003', *Labour History*, 86, pp. 48–49; *VPD, LC*, 25 March 2003, p. 454.
- ¹⁵ B. Costar, 2003, 'Accountability or Representation? Victorian Bicameralism', *Bicameralism and Accountability, Lectures in the Senate, Occasional Lecture Series 2000–2003*, Canberra, p. 74.
- ¹⁶ *VPD, LC*, 26 March 2003, p. 544.
- ¹⁷ D. Hayward, 2006, 'Steve Bracks: The quiet achiever', in P. Strangio and B. Costar (eds), *The Victorian Premiers 1856–2006*, Leichardt, NSW: Federation Press, p. 392.
- ¹⁸ 2006 figures from Victorian Electoral Commission. 2006. State Election Results <http://www.vec.vic.gov.au/Results/State2006resultsummary.html>
- ¹⁹ Economou, *op. cit.*, p. 645.
- ²⁰ 2010 figures from Victorian Electoral Commission. 2010. State Election Results <http://www.vec.vic.gov.au/Results/State2010resultsummary.html>
- ²¹ M. Mackerras, 1972, *Australian General Elections*, Sydney: Angus & Robertson, pp. 3–4.
- ²² C. Sharman, 1978, 'Swing and the two-party preferred vote: A Comment on Malcolm Mackerras', *Australian Journal of Political Science*, 13(2).
- ²³ Pollster Gary Morgan used a three-party-preferred-vote in his analysis of four inner Melbourne seats for the 2010 state election, where the contest was effectively between the ALP and the Greens, as did Charles Richardson in relation to the seat of Braddon in the 2006 Tasmanian state election. See Finding 4603 (20 November 2010) at <http://www.roymorgan.com/news/polls> and 'Seat by seat through Tasmania: Braddon', 16 March 2010 at <http://www.crikey.com/au/>

The tool was also used in a detailed analysis of seats with strong Greens support at the 2004 Queensland state election. See P.D. Williams, 2006, 'The Greening of the Queensland electorate?', *Australian Journal of Political Science*, 41(3), pp. 335–6. Much earlier, the concept was employed on a state-wide basis for Victoria, but in that (non-coalition) era, the third player was the Country (National) Party, not the Greens. See T. Colebatch, 'Odds are still against Labor', *The Age*, 17 April, 1975.

- ²⁴ Victorian Electoral Commission, 2011, *Report to the Parliament: the 2010 Victorian State Election*, Melbourne: Government Printer, p. 5. GVTs accessed from <http://www.abc.net.au/elections/vic/2010/guide/gtv.htm>

It should be noted that while Family First and the Christian Party preferenced the LNP (over Labor and the Greens) in all regions and the Sex Party did the same for the Greens (over Labor and the LNP), the DLP and the Country Alliance adopted "split" (LNP/ALP) tickets in some regions, and the calculations reflect that variation. The miniscule others' preferences (0.33%) were distributed equally between the three main players.

- ²⁵ B. Costar and G. Gardiner, 2003, 'From Breaking Governments to a Brake on Government: A New Bicameralism in Victoria', *Australasian Parliamentary Review*, 18(1), pp. 43–44.

- ²⁶ Data from http://www.aec.gov.au/Elections/Federal_Elections/

- ²⁷ B. Costar, 2006, 'The electoral system', in A. Parkin, J. Summers and D. Woodward (eds), *Government, Politics, Power and Policy in Australia*, Frenchs Forest, NSW: Pearson Longman, p. 185.

- ²⁸ One prominent method for measuring proportionality (or lack thereof) of electoral outcomes is the Gallagher (or least squares) index. See http://en.wikipedia.org/wiki/Gallagher_Index. Application of the relevant formula to the 2010 Victorian Legislative Council election produced an index of approximately 8.66, a very modest proportionality result for a PR election.

- ²⁹ See http://en.wikipedia.org/wiki/Election_threshold

For a discussion on thresholds in an Australian Senate context, see H. Coonan, 2000, 'Safeguard or Handbrake on Democracy?', in B. Costar (ed.), *Deadlock or Democracy? The Future of the Senate*, Sydney: University of New South Wales Press, pp. 24–6.

**AUSTRALASIAN STUDY OF PARLIAMENT GROUP
CONFERENCE 2011 —
THE EXECUTIVE VERSUS THE PARLIAMENT:
WHO WINS?**

Parliament and the challenge of executive growth

Sonia Hornery, MP, is Acting Speaker, Legislative Assembly, Parliament of NSW

Is the traditional role of parliament still valid in our society?

Sonia Hornery

The definition of a parliament, according to Claude Forell in *How We Are Governed*, is ‘a representative body having supreme legislative powers within the defined state, territory or area.’ He goes on to say, ‘The purpose of government is to provide a system of order in which people can live.’ As a serving MP, I have witnessed and participated in how government, under the auspices of parliament, can seek to maintain the health and well-being of our citizens. How? Through the structure of the three spheres of government in Australia — federal, state and local — a number of processes have been formed. Therefore each sphere, in its own idiosyncratic way has progressed with society, be it with the times or lagging behind them to bring Australian politics to where it is now.

Let us look at the many variables that have both hindered and helped our political system. First, it is important to note that, within the Australasian region, we have a variety of parliamentary systems, though the countries within the Commonwealth have more similarities with each other than with others. Similarities which fostered many commonalities, creating a sense of understanding. Secondly, the Australian parliamentary system followed the UK customs of an upper and lower house and parliamentary democracy, thus providing a good model. Thirdly, the Australian parliament blended the UK and US models, taking the best aspects from each when crafting the Federation in the 1890s. Finally, the Australian bicameral system ensures the review of legislation in order to satisfy the needs of many diverse groups in society.

The popular election of members of the lower house is similar to the UK in that it (i) represents constituents; (ii) its members represent political parties and uphold party policies; and (iii) it creates and passes legislation. The Senate is a ‘house of review’, where senators are elected via proportional representation, and their role is to review legislation. That is also how we tailor our political system for our society.

For example, each state in Australia varies slightly in its formation. In Queensland, there is no upper house — no house of review. In NSW, where I currently sit on the opposition benches in the Legislative Assembly, the Legislative Council is the house of review. Therefore, NSW has some similarities to our federal counterparts.

Thus, the unique processes that have been tailored for our society are: enabling legislative proposals which may become law; passing amendments to alter existing law; maintaining close links to our electorates by members of parliament allowing their voices to be heard; passing budgets to enable essential services to function; compulsory attendance for Parliament sitting dates ensuring that decisions about the running of the state are made; debating issues when parliament is sitting allowing various perspectives to be considered before a decision is made; representation of our electorate via the Member to allow all electorates, within cities, urban and country areas to have a voice; and, uniting the voices of each member, to build the state.

The present structure vs. serving contemporary Australian Society

So far I have established that governments are a constitutional process for governance and the process of well drafted legislation is integral to the continuing growth of our society. At the same time, much of the visionary work that informs solid legislation is laboured over by committees (made up of elected representatives and assisted by parliamentary officers), does not always guarantee the desired outcome for society. The difficulty for parliaments is to keep ahead of the pace of social change. The speed of social change in a contemporary democracy like Australia is rapidly increasing. Governments are frequently brought down because of their remoteness to the changed values of the people ‘on the streets’, dubbing them inflexible.

The first example, in my electorate of Wallsend, in the Hunter region of NSW, is the story of the Wallsend Aged Care Facility. It is a heartening illustration of the will of the people triumphing over bureaucracy and government decision-making. In November 2009, the then Premier announced the sell-off of 12 aged care facility beds owned by the state government, i.e., Wallsend Aged Care Facility was to be privatised. The community rallied as one in its support of their beloved facility remaining in government hands and together we stopped the injustice. It came at a personal price — I was punished for my stance in standing up for the community, by being demoted as Parliamentary Secretary for Roads. It was a small price to pay. That the community and their MP were able to convince the government to save the facility, demonstrates that the present structure of governance can be sufficiently flexible to serve society, and support community needs.

A second example, also in my electorate, is the proposal to build a mosque in the suburb of Elmore Vale. At Newcastle University, although this education institution has a less culturally diverse population than universities in other cities in Australia, students living and studying in the area are highly visible in the wider

community. Thus, their difference seems to make them targets for social division. Social change in the past decade is due to 1,000 Muslims from a variety of countries studying on the campus and living in and around the university campus. Yet, in Australia — freedom of religious worship is part of our democracy. So when the Newcastle Muslim Association decided to search for land to build a mosque to enable them to practice their faith, they were not greeted with an egalitarian attitude from society. They did find land, centrally located at Elmore Vale, and lodged a development application [DA] with the local government authority — Newcastle City Council (NCC). However, once the community was notified of the proposed DA, an opposition group quickly formed, titled 'Elmore Vale (EV) Cares, in order to block the development on traffic and parking grounds. NCC assessed the DA and made recommendations to a group called the Joint Regional Planning Panel (JRPP). Submissions were invited to the panel. As local MP, I received a small number of submissions. My office summarised the information, and submitted an account of the summary to the JRPP. The 'EV Cares' group also made a submission opposing the approval of the DA. Interestingly, in the first instance, NCC supported the recommendation to approve the DA. However, NCC then requested the JRPP to undertake more investigations into traffic and parking matters and, in the second instance, rejected the recommendation. The outcome of JRPPs deliberations, was a rejection of the DA. This tried and true process has not worked for this application. You may pose the question, was the process valid? Did the JRPP bow to pressure? Why are there not consistent state-wide guidelines for the building of places of worship? Unless these guidelines are clear, consistent and fair, applications of this nature, may continue to cause judgement based on emotion and fear, producing adverse effects on certain sectors or our society.

Thus, in such situations, governments need to become more flexible in order to remain valid. For instance, let us look at population and how it is expanding and diversifying. How do the elected representatives keep an ear tuned into what the millions of people in the community think? How do parliaments embrace changes in social values, attitudes and beliefs? How do we as a government hear the voice of the people? How do governments embrace technology and communicate with people? Technology and the speed of social media is so instant it is having a powerful impact on transparency of messages and the credibility of elected representatives. The ingenuity of technology ensures that in the twenty first century we live in rapidly changing times. Keeping abreast of social changes in contemporary society is a sublime challenge for governments that must be embraced at all levels. I would argue that parliaments are necessary and valid social institutions in the developed and developing states across the world. However, parliaments and their members must consider the greater good and not be swayed by a vocal minority or driven by the media. The challenge for all of us is the ability to embrace communications technology and apply it competently to continue to allow the voices of the people to be heard and to be flexible and acquire 'the gift of prophecy for the future.'

▲

Professor Scott Prasser is Executive Director, Public Policy Institute,
Australian Catholic University

Executive growth and the takeover of Australian parliaments

Scott Prasser

A long term trend across national and state governments in Australia has been the growing number and the growing proportion of parliamentarians serving in executive government roles. In recent years these trends have accelerated. Such trends further threaten the independence of parliament, reduce its capability to scrutinise executive government and undermine Westminster notions of accountability between parliament and the executive and separation of powers. This article identifies the extent of the growth of executive government in Australia, as measured by the number of parliamentarians appointed as ministers and parliamentary secretaries. It further outlines reasons for such growth, analyses the adverse implications of these trends in relation to the parliamentary accountability of executive government and suggests proposals to address this issue.

Defining executive government

For the purpose of this article executive government is defined as comprising all ministerial appointments including the more recent positions of parliamentary secretaries.¹ Parliamentary secretaries, a relatively new phenomenon in Australia (Uhr 2007), are included as being part of executive government as they are appointed by the government to assist ministers in their ministerial roles and perform some ministerial functions. Uhr (2007: 391) described a parliamentary secretary as ‘a junior member of a governing ministry who is not officially a junior minister or member of the ministry as such.’ In some jurisdictions including the Commonwealth and several of the states, parliamentary secretaries are authorised to

¹ Executive government refers to elected officials appointed to the ministry to serve in cabinet or in some jurisdictions as members of the outer ministry or as parliamentary secretaries. Executive government also includes at the Commonwealth level, the Governor-General who is vested with executive power (Section 61 of the Constitution) and who is advised by the Federal Executive Council attended by a small number of ministers (Section 62). State constitutions have similar provisions with governors presiding over executive councils (see Boyce (2007: 195–6).

attend executive council meetings which are the 'legal personality of cabinet' (Boyce 2007: 195). In other jurisdictions such as New South Wales, a parliamentary secretary although receiving a higher remuneration than a backbencher of parliament, is 'not a minister or a member of cabinet, but assists ministers in a number of areas, sometimes deputising on their behalf' (NSW Parliament 2008). Nevertheless, given the functions that parliamentary secretaries perform, their appointment by the prime minister or premier, and their closeness to ministers in assisting in their exercise of departmental responsibilities, they have been included as being members of executive government in this study.

Executive dominance of parliament

While there is often discussion about how executive government dominance is threatening democracy in Westminster systems, the focus is usually on the growth of executive government's powers relative to parliament. Explanations for this dominance have included such executive government's increased organisational capacities and greater centralisation of power within government itself, especially in the hands of prime ministers and premiers and strong party discipline that is seen to make most debates in parliament largely of ritualistic importance. The executive also controls most of parliament's budget. The increasingly perceived politicised nature of the public service and its 'over-responsiveness' to executive government demands, combined with the greatly enlarged ministerial staffs have further increased executive capabilities compared to backbench parliamentarians or oppositions. Although the existence of upper houses in bicameral legislatures has been seen as a possible counterweight to these pressures, especially where the government party is unable to attain a majority, executive government is still able to influence what largely happens in parliament. These different features of growing executive government capacities have enabled it to dominate decision making processes across government, set the policy agenda and manage policy issues, and minimise scrutiny of its activities (Hailsham 1976; Halligan, Miller and Power 2007; Uhr and Wanna 2000).

Although these trends have been exhibited in many different jurisdictions commentators have suggested that executive government dominance has long been more accentuated in Australia at both national and state levels, than in other Westminster democracies such as the United Kingdom. It has been argued that in Australia party discipline is more binding, that Australian parliaments sit less frequently, and that parliamentary committee systems are less extensive or effective, especially at the state level, than elsewhere. While parliaments in Australia have the outward institutional manifestations of Westminster, parliamentary procedures are more heavily weighted in favour of executive government control compared to other Westminster democracies such as the United Kingdom (Crisp 1971: 267; Horne 1964: 178; Reid 1964: 92; Reid 1971: 506; Uhr and Wanna 2000: 10). Further, ministerial dominance has been enhanced even more in Australia by the very large increases in federal and state ministerial staff that have occurred during the last two decades compared to their counterparts in other Westminster democracies (Maley 2000).

While these different factors explain how executive government has come to dominate the legislature in Australia this article suggests that another contributing influence that has been largely overlooked has been the growth in the number of parliamentarians now serving in executive government roles as ministers and parliamentary secretaries. It is not just the growth in the numbers of parliamentarians serving in executive government roles that is the issue, but the growing proportion of parliamentarians overall in these positions that is really significant in undermining the independence and capacities of parliament.

Trends in the growth of executive government

Tables 1–3 outline trends across federal, state and territory governments of the increasing number of ministers and parliamentary secretaries and their proportion of parliament.

Commonwealth government trends

When Australia federated in 1901 Section 65 of the Commonwealth Constitution prescribed that ‘Until Parliament otherwise provides, the Ministers of State shall not exceed seven in number.’ The first Commonwealth government under Prime Minister Barton (1901–1903) adhered to this limit, though it had an additional two ministers who were unpaid. There were no parliamentary secretaries or assistant ministers. This first federal ministry represented just 8.1% of parliament if all nine ministers are accepted.² Subsequent ministries included ‘honorary’ ministers. This limitation was soon overturned by the subsequent regular passing of the *Ministers of State Act* that has allowed the appointment of additional ministers.

Since federation there has been a gradual increase in the number of ministers although this has not always meant an increasing proportion of parliament serving in executive government. Forty years after federation at the beginning of the Second World War the number of ministers rose to 16 and their proportion of parliament was 14.4%. This increased to 19 ministers representing 17.1% of parliament under the post World War Two Chifley Labor Government.

Menzies (Coalition) began his second prime ministership (1949–1966) with 19 ministers and their proportion of the Commonwealth Parliament was 10.3%. This decline in the proportion of ministers of parliament reflected the large expansion of the House of Representatives and the Senate at this time. By the end of Menzies’ term as prime minister, ministerial numbers had increased to 25 and their overall proportion of parliament had risen to 13.6%.

² These percentages and all subsequent calculations are based on the number of ministers and parliamentary secretaries as a proportion of the total number of members of both houses of parliament.

Table 1: Trends in federal executive government 1901–2011

Government	Number of ministers and parliamentary secretaries/assistant ministers	Size of parliament (upper and lower houses)	Proportion of parliamentarians in executive government roles
1901(Barton Govt Non Labor)	9	111	8.1%
1940 (Menzies Govt Coalition)	16	111	14.4%
1946 (Chifley–ALP)	19	111	17.1%
1950 (Menzies Coalition)	19	183	10.3%
1966 (Menzies Govt Coalition)	25	184	13.6%
1972 (McMahon Govt Coalition)	33 ^a	185	17.8%
1973 (Whitlam Govt– ALP)	27	185	14.6%
1974 (Whitlam Govt–ALP)	27	187	14.4%
1975–77 (2 nd Fraser Coalition Govt)	24	191	12.5%
1977–80 (3 rd Fraser Coalition Govt reconstituted Dec 1979)	27	189	14.3%
1980–83 (4 th Fraser Coalition Govt– Nov 1980)	26	189	13.7%
1983 (1 st Hawke Govt ALP) ^b	26	189	14.2%
1987 (3 rd Hawke Govt –ALP)	30	224	13.3%
1996 (2 nd Keating Govt–ALP)	40	223	17.8%
1996 (1 st Howard Govt – Coalition)	38	224	16.9%
2007 (4 th Howard Govt – Coalition)	42	226	18.5%
2007 (Rudd – ALP)	42	226	18.5%
2010 (1 st Gillard Govt – ALP)	42	226	18.5%
2011 (2 nd Gillard Govt – ALP)	42	226	18.5%

Notes: ^a Includes 27 ministers and 6 assistant ministers

^b The 1984 *Commonwealth Year Book* lists only 26 ministers, but overlooked that Mick Young, Special Minister of State was stood aside while under investigation. Kim Beazley took on this role temporarily while also retaining his other ministerial post.

Sources: *Commonwealth Year Books 1907–2007; Commonwealth Parliamentary Handbook 2007; C.A. Hughes, A Handbook of Australian Government and Politics various editions; Commonwealth Parliament website.*

During the 1950s Menzies, like several of his predecessors, attempted to relieve cabinet ministers of some of their less important duties by introducing assistant ministers, ministers without portfolio and also parliamentary undersecretaries. These efforts floundered. Such appointments were deemed to be in contradiction of Section 44 (iv) of the Constitution in relation to offices of profit under the Crown (Crisp 1971: 383–89). Subsequently, Menzies gave selected junior ministers an additional role of assisting a more senior minister. This overcame previous objections to parliamentary secretaries that they had no formal ministerial post.

Coalition governments after Menzies increased ministerial numbers incrementally. By the McMahon Government (1971–72), the last Coalition government before the election of the Whitlam Labor Government in December 1972, the size of the ministry and the proportion of parliamentarians serving in executive government increased substantially to 33, representing 17.8% of the Commonwealth Parliament — the greatest proportion since federation. This number included 27 ministers with direct departmental portfolios and six assistant ministers. As the Commonwealth Year Book (1972: 64) recorded, assistant ministers ‘do not administer departments of state, but are designated to assist a minister in the discharge of his duties’ and are ‘sworn as Executive Councillors,’ and are deemed to be serving in executive government for the purpose of this paper.

The election of the Whitlam Government (1972–75) saw the number of ministers with direct departmental responsibilities remain at 27 as with the previous Coalition administration, but the McMahon Government’s experiment with assistant ministers was not continued. As the overall size of parliament increased with the appointment of additional senators and two more seats in the House of Representatives in 1974, this resulted in the proportion of members serving in executive government under the second Whitlam Government (1974–75) falling to 14.1% of parliament.

The incoming Fraser Coalition Government (1975–83) promised to reduce the size of government and number of departments. Initially, after the 1975 election in the second Fraser Government 24 ministers were appointed, a slight decline over the Whitlam Government’s 27. This reduced the proportion of parliamentary members in executive government to 12.5%. However, during the third Fraser Government (December 1977–November 1980) a reconstituted ministry was announced in December 1979 and continued to November 1980. This increased the number of ministers to 27 ministers or 14.3% of parliament. Though similar to the level of the last Whitlam Government it was in a smaller parliament (reduction from 191 to 189 in time for the 1980 election). For his fourth government (November 1980–March 1983) Fraser appointed 26 ministers which represented 13.7% of parliament — a marginal decline over the previous ministry.

It was to be under the successive Hawke and Keating Labor governments (1983–1996) that ministerial numbers and their proportion of parliament showed marked increases. Under Prime Minister Hawke (1983–1991) the number of parliamentarians serving in executive government increased from 27 in 1983 to 37 by Hawke’s

third term following the 1987 election. Indeed, it was after the 1987 election with the creation of amalgamated departments when the appointment of junior ministers and parliamentary secretaries became more widespread that the size of the executive became considerably larger. Previous constitutional impediments were overcome by allocating these parliamentary secretary appointees with direct departmental responsibilities. By the time of the second Keating Government (1993–1996) executive numbers had risen to 40 (30 ministers and 10 parliamentary secretaries) representing 17.8% of parliament.

The first Howard Coalition Government with 28 ministers and 10 parliamentary secretaries together comprising 16.9% of the slightly enlarged parliament maintained this proportion. By Howard's last term this number had increased to 30 ministers and 12 parliamentary secretaries, a total of 42 executive members or 18.5% of the Commonwealth Parliament.

The Rudd Labor Government (2007–2010) kept the same number of ministers and parliamentary secretaries representing the same proportion of parliament as its predecessor. So too has Prime Minister Gillard, who replaced Rudd as prime-minister in June 2010, in both her first and second ministries maintained these numbers including in her recent changes to the ministry announced in December 2011 (see Table 1).

The important trend is that it has been since the 1980s when executive numbers grew so large and represented the largest proportion of parliament. That this was despite the overall increase in the number of Commonwealth parliamentarians from 189 in 1983 to 226 by 2007 — a 19.5% increase — further emphasises the significance of the growing proportion of parliamentarians serving in the executive. Indeed, the rate of increase of executive government as a proportion of parliament during this same period (1983–2007) at 30.2% was even greater.

State and territory government trends

Across the states there have been similar trends in the growth of executive government numbers and the proportion of parliamentarians in executive positions during the last decade (see Tables 2, 3 and 4). Table 2 outlines the changes from the first decade of federation to the mid 1930s.

While many of the states, like the Commonwealth, had constitutional limitations on the size of their ministries, these strictures were overcome, usually by amendments to state constitutions.

Table 3 summarises state trends from the 1940s through to the mid 1970s. Gradual increases in the size of executive governments and the proportion of parliamentarians serving in executive positions can be discerned across all states.

Table 2: Proportion of state parliamentarians serving in executive government

	1907	1935
NSW	6.9%	9.3%
Vic.	11.1%	12.1%
Qld	6.9%	16.1%
SA	6.6%	9.0%
WA	8.7%	11.2%
Tas	9.4%	16.6%

Source: *Commonwealth Year Books 1907 and 1935*

Table 3: State executive members 1946–1975

State	Numbers of ministers / parliamentary secretaries				Size of parliament				Proportion of executive members of parliament expressed as a percentage			
	1946	1966	1972	1975	1946	1966	1972	1975	1946	1966	1972	1975
NSW	16	16	18	18	150	154	156	159	10.6	10.3	11.5	11.3
Vic	12	15	16	18	99	100	109	121	12.1	15.0	14.6	14.8
Qld	10	13	14	18	62	78	78	82	16.1	16.6	17.9	21.9
WA	10	12	12	13	80	80	81	81	12.5	15.0	14.8	16.0
SA	6	9	10	12	59	59	67	68	10.1	15.2	14.9	17.6
Tas	9	9	9	10	49	54	54	54	18.3	16.6	16.6	18.5

Source: *Commonwealth Year Books 1945–1976*

Table 4 highlights comparable figures from 1990 to 2007. The significant issue is not just that increases in executive numbers continued, but that it was during this period that the numbers and the proportion of those serving in executive government showed such large increases compared to previous times. For instance, in New South Wales the number in executive positions increased from 19 to 29 during this period — an increase of over 50%. The proportion holding executive government positions rose from 12.3% to 21.5% — a 74.7% increase. Other large increases may be observed in several of the other states during this period.

So by 2007 Victoria, with 35 ministers and parliamentary secretaries, had the largest number of parliamentarians serving in the executive, followed by New South Wales and Queensland with 29 ministers and parliamentary secretaries each. Victoria's ministry constituted 27.3% of parliament while for New South Wales it was 21.5%. Comparable figures for Western Australia, South Australia, Tasmania and the ACT were: 25.3%, 24.6%, 25% and 29.4% respectively.

Of the states, Queensland deserves particular attention. Although with its unicameral legislature Queensland does not have the largest number of parliamentarians, ranking fourth in terms of parliamentary numbers behind Victoria, New South Wales and Western Australia, Queensland until 2009, tied with New South Wales in having the second largest number of ministers and parliamentary secretaries (29). More significantly, Queensland had the largest proportion of parliamentary members serving in executive government across all federal, state and territory governments except for the Northern Territory. Queensland's 29 ministers and parliamentary secretaries (18 ministers and 11 parliamentary secretaries) represent 32.6% of the State's 89 member parliament. These figures reflect the changes made by Premier Beattie immediately following the September 2006 state election when the number of parliamentary secretaries was expanded from 8 to 11 — a 37% increase. This high proportion of Queensland parliamentarians serving in executive government positions was twice as large as for the Commonwealth government (18.5%) and considerably greater than all other states or the ACT (see Table 4). Only Northern Territory with its 25 member Legislative Assembly has a higher proportion (44%) of its members holding executive government office.

Table 4: State and territory executive members 1990–2007

State government	Numbers of ministers/parl secretaries		Size of parliament		Proportion of executive members of parliament expressed as a percentage	
	1990	2007	1990	2007	1990	2007
NSW	19	29	154	135	12.3	21.5
Victoria	20	35	132	128	15.2	27.3
Queensland	18	29	89	89	20.2	32.6
Western Australia	21	23	91	91	23.1	25.3
South Australia	13	17	69	69	18.8	24.6
Tasmania	11	10	54	40	20.4	25.0
NT	9	11	25	25	36.0	44.0
ACT	4	5	17	17	23.5	29.4

Source: Commonwealth Year Books 1989–2007

The growing number of parliamentarians serving in executive government roles may also be assessed in terms of its impact on the governing party from which ministers and parliamentary secretaries are drawn. Such growth has meant that there is an increasing proportion of the governing party whose members are now working in executive government. For instance, in Queensland where the governing Labor Party after the 2006 election holds 59 out of the 89 seats, 29 of its members, or nearly 50% of the party caucus, now serve in executive government.

There have been recent developments following changes in government and/or leadership around the states. In New South Wales the 2011 election brought a sweeping victory to the Liberal and National parties. Premier O'Farrell has established a cabinet with 22 members and appointed 12 parliamentary secretaries. This is an increase of five compared to 2007. In Queensland, the opposite has occurred. Anna Bligh replaced Beattie as premier in September 2007 and won a convincing victory at the March 2009 elections, albeit with a reduced majority. Labor now holds 51 seats in Queensland's Parliament. Bligh has kept the cabinet ministry at 18 members, but reduced the number of parliamentary secretaries from 11 to 7, bringing the total number of executive members to 25 or 28% of parliament — down from 32. 6%. The proportion of those in executive positions as a proportion of the governing Labor Party is now 49% — the same proportion as previously given the loss of Labor 9 seats in 2009 (Mackerras 2010). In Victoria, the new Baillieu Liberal–National Party Government elected in November 2010 appointed 22 ministers and 12 parliamentary secretaries, 34 in total — a marginal decline over previous administrations. In Western Australia, the Barnett Liberal Government elected in 2008 appointed 18 ministers and 7 parliamentary secretaries — a total of 25, up slightly, but with an expanded number of members in the Legislative Assembly (from 2008) and Legislative Council (from 2009), the Western Australian Parliament now has 95 members compared to the previous 91, so the proportion of executive members has increased only marginally to 26. 3%.

Explanations for the growing size of executive government

There are several explanations for this growth in the size of executive government. Foremost amongst these is that increasing government intervention in modern society and growing public expenditure that has marked post World War Two governments, combined with the complexity of modern policy issues, has required more ministers to perform expanded government functions. Prime Minister Menzies believed that the multiplying functions of modern government necessitated an increased number of ministers because of the growing responsibilities of modern government and to counteract the tendency by which ministers would become 'more and more dependent on . . . departmental officers' (see Hughes 1975: 8–9). Menzies argued that the extra costs of more ministers were small in the 'broad sweep of national affairs' (Hughes 1975: 8–9; Weller and Grattan 1981: 25). Another related explanation is that increasing government intervention has been accompanied by a proliferation in the array of government departments. Indeed, it has long been observed that each new government function tends to be accompanied by the creation of new administrative units to carry out such functions (Coaldrake 1978). Such expansion in administrative agencies has led to the perceived need and demand for more ministers and more recently, parliamentary secretaries to oversee such bodies.

There are also political party management reasons for appointing more members to executive government. It has been suggested that governments with large majorities

need to find activities to keep their backbenchers busy, productive and non-disruptive to the existing political leadership. While chairing parliamentary committees may be one response to these demands, such appointments in the Australian political context rarely fully satisfy backbench ambitions. Serving in the ministry remains the prime career aspirations of most parliamentarians (Halligan, Miller and Power 2007). Thus, in states like Queensland, where the governing Labor Party has enjoyed near record majorities since the 2000 election up until the 2009 election, expanding the number of executive government positions, especially through increasing the number of parliamentary secretaries, may be as much about seeking to satisfy backbencher career aspirations, as it does in meeting the increasing demands of office. For Labor governments such arrangements have also provided another means to meet faction alliance expectations. The reduced majority Premier Bligh received at the 2009 election may explain her decision to reduce the number of parliamentary secretaries from 11 to 7. There were not only fewer members to choose from, but also with a reduced Caucus, less pressure to make appointments to executive positions.

A further issue deserving explanation is the disparity in the size of executive governments across the states, territories and the Commonwealth government. One reason for the relatively large number of ministers at the state level compared to the federal government is that all states have to provide a similar range of services and portfolio responsibilities regardless of their population size. This also explains why Tasmania and the Northern Territory for instance, although having small populations and fewer elected members than elsewhere, have ministries of comparable size to the larger states.

Then there is the issue of why Queensland, until recently, had the highest proportion of parliamentarians in executive government across state and federal governments. One suggestion is that Queensland's unicameral legislature, unique among the states, has fewer politicians relative to other jurisdictions with their bicameral systems. This results in a higher proportion of members filling executive government posts. However, Queensland, even with its unicameral parliament, has the fourth largest parliament across the states and territories. Another argument is that Queensland's significant population growth since the 1970s requires a larger ministry to respond to these pressures. Western Australia has also experienced a large growth in population during the last decade, yet had, until 2009, six fewer members in executive posts. They are now equal. The Queensland phenomenon may just have been the consequence of a large majority that Labor administrations enjoyed between 2000 and 2009.

Implications for democratic governance

There are several implications for democratic governance and Westminster processes of accountability arising from the increased number and proportion of parliamentarians now serving in executive government across all levels of Australian government.

First, at its simplest level, the more parliamentarians appointed to the executive means a higher cost of government. A minister earns approximately 25% more than a backbencher, and parliamentary secretaries also receive additional allowances. Furthermore, with ministers and parliamentary secretaries come more staff, cars and offices all of which add to costs. Second, more funding for the executive inevitably means fewer resources for parliamentary activities and services. After all, funding for parliament is largely decided by executive government. Funding levels can determine if a new parliamentary committee is appointed, or whether resources are available for committees to pursue particular investigations. The growth of executive government also has implications for the parliament as more offices and space are allocated to accommodate the additional ministers, parliamentary secretaries and their staff. Third, the growth of executive government gives rise to an even greater need for parliamentary scrutiny of the executive as there are now more members of the executive involved in more activities and making more decisions than previously. A public choice perspective would also argue that executive government members will seek to justify their existence by making proposals for more government actions and increased spending (Niskanen 1971). Fourth, with a greater proportion of parliamentarians now part of the executive there are fewer government backbenchers to meet on a range of parliamentary, as distinct from government, duties. As it is government backbenchers who usually chair most Australian parliamentary committees and constitute the majority of most committee memberships, fewer government backbenchers mean that parliamentary committee activity may be restrained. There are simply not enough parliamentary members available to meet all the potential demands for expanded parliamentary activities. Fifth, as the more senior, skilled and politically important backbenchers are usually the ones promoted to the ministry, the remaining government backbenchers are not only fewer in number, but also tend to be less experienced and influential. This further undermines parliament's ability to scrutinise the executive. Sixth, the growing size of executive government relative to parliament also threatens the separation of powers between the two spheres. Such separation of powers has always been less clear in Westminster democracies where ministers are drawn from and remain part of the parliament. It has also been argued that while the separation of powers is outlined in the Commonwealth Constitution, such provisions are not so constitutionally entrenched across the states (Alvey and Ryan 2005, 14–15; Alvey 2006). With the increasing proportion of parliamentarians serving in executive government roles, the distinctions between the executive and the legislature are becoming less clear and even more blurred than previously, thus further undermining the doctrine of the separation of powers. Last, there is the question of whether parliaments across Australia or more exactly, the government parties within each parliament have the necessary reservoir of talent to meet the demands of an expanding executive government. While lack of talent has not previously prevented appointments to the ministry, the complexity of public policy issues and the serious ramifications of ministerial decisions make this a more critical issue than previously. Mistakes concerning recent major projects and other policy failures (Wanna 2007) cannot all be accounted for as 'systemic failures,'

poor administrative processes, or lack of information, important as these may be. Such policy and project errors must also reflect on the quality of ministers who ultimately have the responsibility to make decisions on such matters, and who drive so much of the policy process.

Reforms

There have been several proposals to address this growth in the numbers serving in executive government and their growing proportion of parliament. One suggestion is to increase the size of parliaments. It may be argued that the real issue is not so much the growth in executive government members, but rather the growing proportion of executive members of parliament that reflects the lack of growth in the size of parliaments. To address this issue the size of parliaments needs to be expanded. For instance, although Queensland's population has grown by 43.9% between 1990 and 2006 (twice the national rate), the size of the State's unicameral legislature has remained static at 89 members since the late 1970s. This suggestion was made some time ago (Reid 1978) and more recently (Laurie 2008) as a means to improve parliament in general. However, convincing the electorate that increased numbers of politicians are warranted remains problematical. Indeed, in recent times some state parliaments have actually been reduced in size (e. g. New South Wales). This issue largely has been overcome at the national level as there is a formula in relation to population and seat numbers and the Constitution's requirements concerning the relative sizes of the House of Representatives and the Senate.

Exhortations for governments to exercise greater restraint in establishing new departments, agencies and organisations and, therefore, to reduce the need for more ministers to administer them seem futile. Establishing new departments and agencies is what governments do to highlight issue interest and to indicate new policy directions. Even governments elected on small government mandates soon diverge from their election platforms and succumb to the political temptations to initiate new programs and to tie these to new departments and agencies. The creation of large amalgamated departments that has occurred at the Commonwealth level could mean the need for fewer ministers. However, in practice this has resulted in the appointment of more assistant ministers or parliamentary secretaries at the Commonwealth level rather than less (Weller 1987). Similar machinery of government changes announced by the Bligh Government following the 2009 Queensland elections has, as noted, made only marginal differences to the number of ministers and parliamentary secretaries. Another suggestion is to make a career in parliament such as chairing a parliamentary committee, as attractive as serving in executive government as a minister. This might include considerable upgrading of pay, staff and benefits for those who chair key parliamentary committees like public accounts. Committee chairs do receive additional allowances now, but whether current levels are enough to resist the call to the ministry is another issue. It is not just an issue of remuneration that makes the ministry so attractive. Prestige of ministerial positions and having power to make decisions are also very important.

Given these limitations it is time to review former Prime Minister Hawke's suggestion made in his 1979 Boyer Lectures (1979, 21–32) of the need to appoint ministers from outside of parliament. Such a reform, accompanied by parliamentary committee confirmation processes of these appointees, could inject more external expertise into the ministry and reduce the need to draw on so many members of parliament to serve in executive positions. This change would also reinforce more effectively the concept of separation of powers between the legislature and executive and allow more parliamentarians to concentrate on the scrutiny of executive government. However, while this proposal raises serious constitutional issues at the Commonwealth level given Section 64 of the Commonwealth Constitution where amendment would be difficult, such changes could possibly be more easily effected at the state level where constitutional change is more often made by the legislature than by resort to popular referendum.

Conclusion

There has been considerable growth in the size of executive government in terms of both numbers and the proportion of parliament since federation and especially during the past two decades at both federal and state levels. While these trends have now stabilised at the Commonwealth level, they are continuing across most states and territories. Despite these trends and their potential adverse impacts on the effectiveness of Westminster notions of parliamentary scrutiny and separation of powers, they have aroused little serious concern from the electorate, interest from opposition parties or comment by the media. However, the trends have been consistent for too long and their impact too potentially significant to ignore. It is an area needing ongoing monitoring and further detailed research to assess in more depth how this growth in the size of executive government is affecting the actual day to day workings of parliament and representing yet another factor that is further undermining the independence of parliament across Australian government. ▲

References

- Alvey, J., 2006, 'The Lack of Separation of Powers in Queensland', *Public Administration Today*, Issue 9 (October–December), 64–71.
- Alvey, J. and Ryan, N., 2005, 'The Separation of Powers in Australia: Implications for the State of Queensland', paper presented to 53rd *Australasian Political Studies Association Conference*. University of Otago, Dunedin, New Zealand, 14–15.
- Boyce, P., 2007, 'Executive Council', in B. Galligan and W. Roberts (eds), *The Oxford Companion to Australian Politics*, Melbourne: Oxford University Press, 195–6.
- Coaldrake, P., 1978, 'Commonwealth Government Administrative Arrangements, 1972–1978', *Australian Journal of Public Administration*, 37(4), 413–15.
- Commonwealth Year Books (Official Year Book of the Commonwealth of Australia), Canberra: Commonwealth Government Printer, 1910–2007.
- Crisp, L. F., 1971, *Australian National Government*, Melbourne: Longman

- Grattan, M., and Weller, P., 1981, *Can Ministers Cope? Australian Federal Ministers at Work*, Richmond: Hutchinson.
- Hailsham, Lord, 1976, 'Elective Dictatorship', *The Listener*, 21 October, 496–500.
- Halligan, J., Miller, R., and Power, J., 2007, *Parliament in the Twenty-first Century*, Melbourne: Melbourne University Press.
- Hawke, R.J., 1979, 'The Resolution of Conflict', *Boyer Lectures*. Sydney: ABC.
- Horne, D., 1964, *The Lucky Country*. Melbourne: Penguin.
- Hughes, C.A., and Graham, B.D., 1968, *A Handbook of Australian Government and Politics 1890–1964*, Canberra: ANU Press.
- Hughes, C.A., 1975, 'Ministers and Departments', *Royal Commission on Australian Government Administration, Report*, Appendix IH, 21021, Canberra: AGPS.
- Hughes, C.A., 2002, *A Handbook of Australian Government and Politics 1985–1999*, Sydney: Federation Press.
- Laurie N., 2008, 'Size Matters — The Problem of Proportionally Shrinking Parliaments', paper presented to the Presiding Officers' and Clerks' Conference, Adelaide, July.
- Mackerras, M., 2010, 'On past performance, the only way is out', *The Australian*, 9–10 January.
- Maley, M., 2000, 'Too Many or Too Few?: The Increase in Federal Ministerial Advisers, 1972–1999', *Australian Journal of Public Administration*, 59(4), 48–53.
- Marsh, I., and Yencken, D., 2004, *Into the Future: The Neglect of the Long Term in Australian Politics*. Melbourne: Black Inc.
- McAllister, I., Mackerras, M., Ascui, A., and Moss, S., 1990, *Australian Political Facts*, Melbourne: Longman Cheshire.
- Niskanen, W.A., 1971, *Bureaucracy and Representative Government*, Chicago: Aldine-Atherton.
- Reid, G.S., 1964, 'Australia's Commonwealth Parliament and the Westminster Model', *Journal of Commonwealth Political Studies* 2(2), 89–101.
- Reid, G.S., 1971, 'Parliamentary–Executive Relations: The Suppression of Politics', in H. Mayer (ed.), *Australian Politics: A Third Reader*, Melbourne: Cheshire.
- Reid, G.S., 1978, 'The Changing Political Framework', in T. van Dugteren (ed.), *The Political Process: Can it Cope?*, Lane Cove: Hodder and Stoughton, 73–97.
- Uhr, J., 2007, 'Parliamentary Secretaries', in B. Galligan and W. Roberts (eds), *The Oxford Companion to Australian Politics*, Melbourne: Oxford University Press, 391.
- Uhr, J., and Wanna, J., 2000, 'The Future Roles of Parliament', in M. Keating, J. Wanna and P. Weller (eds), *Institutions on the Edge: Capacity for Governance*, St Leonards: Allen & Unwin, 10–44.
- Wanna, J. (ed.), 2007, *Improving Implementation: Organisational Change and Project Management*, Canberra: ANZSOG and ANU.
- Weller, P., 1987, 'Assistant Ministers and Mega-departments: Perspectives and prospects', *Canberra Bulletin of Public Administration*, No 52, October, 18–23.

**AUSTRALASIAN STUDY OF PARLIAMENT
GROUP CONFERENCE 2011 —
THE EXECUTIVE VERSUS THE PARLIAMENT:
WHO WINS?**

*Balancing the need for the executive's right to
govern against the necessity for parliamentary
scrutiny*

The Hon. Judy Spence MP is Leader of the House, Queensland Parliament

A new era of parliamentary reform

Judy Spence

The Queensland Parliament has been unique in Australian terms for some time. In 2011, it once again reasserted its uniqueness by introducing a new era of parliamentary reform. The reforms adopted represent the most significant change to the way the Queensland Parliament operates since it abolished its upper house 89 years ago.

The Premier established an all-party parliamentary committee in February 2010 to look at parliamentary reform, particularly committee reform. Nine members of parliament — four of whom had been ministers, many with over 20 years of experience including senior people from the opposition — worked fourteen months to produce a report which made the recommendations for reform. The committee gained valuable insight from visiting the New Zealand Parliament. The Deputy Leader of the opposition and I visited many of the Canadian parliaments. I was also fortunate enough to visit the Scottish and Irish parliaments to talk about these issues. It is easy to become comfortable and assume that other Westminster parliaments operate in the same way as our own and it was useful to examine how other parliaments operate. We were mindful, however, that our recommendations had to be crafted to fit our own unique parliamentary circumstances, our geography, our history and our priorities. As MPs, we understood what was workable and achievable. The fact that we delivered a unanimous report was significant on many levels. We all became enthused by the prospect that it was time for change and that indeed there was sufficient maturity and goodwill to negotiate compromise. There has probably not been many other times in our state's history when such unanimity for major parliamentary reform could have been achieved.

During the ten months that we turned our attention to the way our parliament operated, we examined the history of our parliamentary committees. During its first 60 years, the Queensland Parliament had a very vibrant committee system where all party committees looked at how to get more settlers to Queensland; how to establish a judiciary and a police force; and the establishment of an overland telegraphic line from Rockhampton to the head of The Gulf. In those days, parliamentary committees investigated matters that today would be left to the executive. The strong initial phase of parliamentary committees was to decline in the early part of the twentieth century. Between 1922 when the upper house was abolished and the late 1980s, we saw a second phase of parliamentary committees where almost

nothing was considered unless it related to housekeeping such as printing, refreshment rooms, standing orders and parliamentary buildings. Queensland did not get committees such as the Public Accounts or the Public Works Committee until the late 1980s after the Fitzgerald Commission of Inquiry had begun and a government which had steadfastly resisted reform of the parliament for 30 years was finally exposed.

The third phase of committee reform began with the establishment of these committees and the election of the Goss Government saw the establishment of a vibrant committee system. The committees produced reports and made recommendations which the government of the day and indeed the media and academia were interested in. I think it is fair to say that over the last decade our committees have been producing many valuable reports but much of their influence, independence and status has been eroded and there has been little attention given to their work. The government has routinely rejected committee recommendations and neither the media nor the general public have paid much attention to their reports. We were also forced to acknowledge that the Queensland Parliament was lagging behind many other parliaments with respect to its committee facilities. Many committees in other parliaments have gone paperless, some broadcast all committee proceedings, they have dedicated committee rooms and they have excellent video conference facilities, unfortunately the Queensland Parliament has none of these. We acknowledged that after 20 years of a modern committee system, little attention had been given to providing our committees with modern facilities. Our parliament has often been criticised for not having a house of review as in other states. We agreed that a strong independent committee system was vital to ensuring parliamentary scrutiny of the executive but we had not been paying much attention to whether the committees were successfully fulfilling that function.

Another of our challenges is that in the 25 years since the last increase in the size of the Queensland Legislative Assembly to 89 members, Queensland's population has increased by 30 per cent. There is an understandable reluctance by any political party to increase the number of political representatives by way of creating an upper house or by increasing the number of lower house members. Thus, when we were fashioning the blueprint for the new committee system, we had to be very cognizant of the workloads of MPs, the size of their electorates and their capacity to give more time to their parliamentary obligations.

During the course of our inquiry it was put to us that the modern MP sees his or her role primarily as their community's ombudsman and that their role as legislator is regarded as a secondary one. We all agreed that this has become the case in Queensland and our recommendation that all legislation go to a committee for consideration and public hearing was designed to elevate a member's role as a legislator. From the 1 August 2011, every piece of legislation has been referred to a portfolio committee. The portfolio committees are standing policy, legislative, scrutiny and estimates committees and are responsible for the public accounts and public works functions for their portfolios. They have also assumed the functions of

the scrutiny of legislation committee. For example, the members of the Transport and Infrastructure Committee will be the same group of people who will hear public accounts matters and public works matters and scrutinise legislation and sit as the estimates committee. Those committee members will be able to use the knowledge they have accumulated at each stage of the parliamentary process to better scrutinise the raising, allocation and spending of funds as well as any legislation presented to the House. Parliamentary committees enhance the skills of backbenchers of all parties and increase their experience in and familiarity with public administration, as well as reinforcing their sense of purpose and appreciation of their independent parliamentary role and responsibility. The portfolio committee system will significantly assist MPs in their understanding of public administration through this integrated process. Our portfolio committees will report to the House with recommendations about legislation but, unlike the New Zealand model, they will not change legislation in committee. We believe that this was the province of the House and, at the end of the day if a minister wanted to disregard the recommendations of a committee, then they could argue their case in the House and indeed to the public at large.

In the past, we have had no parliamentary time to debate committee reports. The new system not only gives time to debate these reports when legislation is being debated but we have set aside parliamentary time to discuss committee reports of a non-legislative nature. We have changed our parliamentary sitting times so that Wednesday mornings are now devoted to committee work and committees are also being encouraged to undertake committee inquiries outside parliamentary sitting weeks. As Leader of the House, I consult with our Business Committee and determine which day the bills should come back to the House. As a fallback position, committees have a period of six months to report. We have retained the Ethics Committee and our Parliamentary Crime and Misconduct Committee. We have established a House committee called the Committee of the Legislative Assembly. This committee — which has the function of a business committee, a standing orders committee and a parliamentary services committee — comprises three senior members of the government and three senior members of the opposition and there is no casting vote. So, it is a committee of six equal members overseeing the running of the parliament, and the work of the committee system.

There has been no tradition in Queensland for bipartisan negotiation concerning the running of the House so this is quite a change for us. The contention around the establishment of this committee has revolved around the fact that we do not have the Speaker on the committee unless it is debating matters concerning standing orders and that the committee comprises the Premier and Deputy Premier or their nominee and the Leader of the Opposition and the Deputy Leader of the Opposition or their nominee. The other two members are the Leader of the House and the Shadow Leader of the House. It is not expected that the two leaders of either the government or the opposition will necessarily attend any meetings of the committee of the Legislative Assembly, however, we wanted to give them the opportunity of doing so should they feel the need. Instead, they have appointed permanent alternates.

There has been some criticism that the membership of this committee represents the executive taking over the parliament. We reject that criticism. We wanted to make this committee high powered in order that the government of the day could not ignore its recommendations. For too long the governments of Queensland of either political persuasion have under-spent on work that should have been done in the parliamentary precinct. This is understandable given the propensity of opposition, media and the general public to criticise any spending on the parliament but the reality is that our parliamentary building is the most significant heritage building in Queensland and the work that is undertaken there by committees or MPs needs to be financed adequately. A bipartisan committee of senior MPs is more likely to make strong recommendations which the government of the day can confidently implement knowing that it will carry the support of all members. A committee of backbenchers simply would not have the same influence. We did not include the Speaker because we wanted to redefine the role as the person who chairs the parliament rather than the person who make all the decisions about the precinct.

Members strongly believed that, for far too long, all decision making had been invested in one person and they wanted to be involved in actively setting the rules and the policies about how our parliament conducts its affairs and how the precinct is run. Some outside commentators have even gone so far as to suggest our reforms have represented a breach of the doctrines of the separation of powers. Our Solicitor-General strongly refutes that suggestion. Under the new committee system we have an opposition chair of a committee for the first time in Queensland. We have encouraged our committees to be open to the public so that when public servants come and brief the committee about legislation or any other matter, the hearings are open, recorded and broadcast. We have invigorated our estimates process by removing the timeframes that we had previously adopted for questions and answers and by giving MPs the power to directly question CEOs and extending the time of the estimates debate. Last year a newspaper columnist described these changes as 'a canny plan that would result in the most Opposition friendly parliament we have ever known'. This system does provide MPs, and indeed members of the public, unprecedented opportunities to inquire into and comment on government legislation before it is debated and voted on. It also gives the new committees the ability to report on all the aspects of government activity including investigating and reporting on events and operational matters of the government.

The system is unique and bold but it is not revolutionary. We have taken elements from other systems and adopted them to our Queensland Parliament. I am pleased to report that the first two months of the new system has been very successful and both government, opposition and independent MPs are feeling fulfilled by their new roles. We believe we have begun to transform the way the Queensland Parliament operates by giving members greater responsibility for the scrutiny of the executive; by using the parliament to enliven the executive to their constituents concerns; by ensuring that every Queenslander has the opportunity to have a say on laws that may affect them; and by giving the parliament a committee system that is strong and dedicated to the purpose of scrutiny, review and deliberation. ▲

Dr Kate Jones and Professor Scott Prasser are with the Public Policy Institute, Australian Catholic University

Resisting executive control in Queensland's unicameral legislature — recent developments and the changing role of the speaker in Queensland

Kate Jones and Scott Prasser

Queensland has long been criticised for the limitations of its parliamentary system and its excessive dominance by executive government. The 1989 Fitzgerald Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (henceforth called the Fitzgerald Inquiry), pinpointed Queensland's system of government and particularly its weak parliamentary system as one of the main causes for the State's endemic corruption. As the Fitzgerald Report (1989: 123) lamented:

Any government may use its dominance in the Parliament and its control of public resources to stifle and neuter effective criticism by the Opposition ... A government can use its control of Parliament and public administration to manipulate, exploit and misinform the community, or to hide matters from it.

According to Fitzgerald (1989: 123–5) debate was stifled, parliamentary sitting days too few, the Opposition restrained, question-time redundant and the committee system minimalist. Also, the Speaker of Parliament, the supposed independent chair, was perceived as too partisan, one of the prizes bestowed on party stalwarts by executive government (Fitzgerald 1989: 123). While these criticisms were legitimately aimed at Queensland's National Party government (1983–89), they applied equally to previous Coalition (1957–1983) and Labor administrations (1915–1929; 1932–1957). Strong executive control of parliament was a Queensland tradition. Although not too different from other states, the problem was exacerbated by Queensland's lack of an upper house — abolished by Labor in 1922 despite a referendum to the contrary. The lack of an upper house that had a vibrant committee system has been admitted by former Labor premier Wayne Goss (Goss 2001) and more recently by the current Leader of the House, Judy Spence (2011a: 2), as leading to a decline in the value of committee oversight.

Despite many worthwhile changes to parliamentary procedures since the Fitzgerald Report, mainly by Labor governments, the consensus has been that executive dominance of the Queensland legislature remains largely intact. Parliament still sits too infrequently, legislation is often rushed, debate truncated, the expanded committee system was still limited and remain dominated by governing party members and the Estimates committee process too restricted (Ransley 1992; Ransley 2008; Solomon 1993). However, in the wake of the former Labor Minister Gordon Nuttall going to jail for receiving monies from a mining magnate, issues about lobbying by former ministers and staff and public criticism by former commissioner, Tony Fitzgerald (Fitzgerald 2009), about secrecy and the lack of progress with reform, the Bligh Labor Government embarked on changes to Queensland's integrity processes concerning pecuniary interest, donations to political parties and lobbying. This included a green paper on integrity (Queensland Government 2009a) and subsequent response (Queensland Government 2009b) with new legislation governing lobbying, a single code of conduct across the public sector, improved pecuniary interests arrangements and an expanded role for the existing Integrity Commissioner to name just a few of the changes. In addition, the Bligh Government, to its credit, had made major reforms previously to Queensland's emasculated freedom of information legislation (Solomon 2008).

Part of this integrity review also extended to parliament. It included the appointment of a select committee of parliament in February 2010, the *Committee System Review Committee* (CSRC), to report on 'how the parliamentary oversight of legislation could be enhanced and how the existing parliamentary committee system could be strengthened to enhance accountability' (CSRC 2010: xi). The CSRC reported in December 2010 and made 55 recommendations directed towards these two distinct and complex areas. What has aroused considerable interest and debate was not the new parliamentary committee system proposed by the CSRC, largely accepted by the Bligh Government and representing a major step forward in terms of breadth of coverage, powers and membership of committees. Rather, the issue of concern has been the unexpected recommendations (CSRC 2010: recommendations 8–12) for a new bipartisan committee, the Committee of the Legislative Assembly (CLA) that would take over key functions concerning the management of parliamentary administration, most of which had long been under the control of the Speaker. The Bligh Government accepted this proposal, meaning that the CLA would be responsible for the administration and management of parliament, not the Speaker as occurs in most other Westminster systems and previously in Queensland. In addition, the Speaker would no longer chair the Standing Orders Committee. These new arrangements concerning the CLA have now been established with the passage of the *Parliamentary Service and Other Acts Amendment Bill* in August 2011 with the support of the Opposition. Only a couple of Independents opposed the changes. The current Speaker, the Hon John Mickel and many others, regard the changes, not as improving executive accountability, as contended by the CSRC and the Bligh Government, but as undermining the traditional role of the Speaker as the manager and representative of parliament, increasing executive intrusion in the running of parliament and a major departure

from Westminster practice. Queensland, through this new and unusual arrangement it is argued, continues to be different in its interpretation of Westminster democracy. Just as it is the only state in Australia without an upper house, its new CLA and its displacement of the Speaker by this and other accompanying changes, represent another departure from Westminster tradition, another Queensland first.

This article analyses these particular developments in relation to the role of the Speaker and the new CLA.

The Committee System Review Committee (CSRC) and its report

The Queensland Parliament had a functional parliamentary committee system during the 19th century and until the abolition of the upper house, the Legislative Council in 1922 (Goss 2001). Thereafter the committee system in the Queensland parliament fell into disrepair until it was resuscitated in the late 1980s (Alvey 2008; CSRC 2010, xiii). Indeed, whether Queensland should have a public accounts committee was one of ostensible reasons for the split between the National and Liberal parties in 1983 which resulted in a National Party only government and the near destruction of the Liberal Party at the subsequent 1983 and 1986 elections (Prasser 1984; Prasser and Wear 1990). In 1988 a public accounts committee and a public works committee were established by the Ahern National Party Government and by the end of 1990 another five committees had been established by the Goss Labor Government elected in December 1989 (Alvey 2008; Goss 2001). In 1991 the Electoral and Administrative Review Commission (EARC), established as a recommendation of the Fitzgerald Inquiry to review Queensland's institutional arrangements (Fitzgerald 1989: 14, 347), conducted an inquiry into the committee system. Its 1992 report (EARC 1992) proposed a range of committees largely mirroring public service departments. This report was referred to the Parliamentary Committee for Electoral and Administrative Review (PCEAR), which did not support the EARC recommendations, but instead made its own proposals (PCEAR 1993). Consequently, in 1995 the *Parliamentary Committees Act* was passed, establishing six permanent statutory committees and providing for the establishment of other statutory, select and standing committees. Although not exactly what the Fitzgerald-inspired EARC had proposed, this represented a considerable advance on previous committee arrangements.

Nevertheless, the new committee structure and especially pivotal ones like the Parliamentary Criminal Justice Committee (PCJC) attracted criticism even from the Goss Government's own ranks (Beattie 1992). Academics and those who had worked with Queensland parliamentary committees also questioned whether the new committee system with its dominance by government members, limited resources and narrow policy breadth, would really improve parliamentary scrutiny of the executive or provide conduits for input into decision making for either the public or the Opposition (Ransley 1992). Members of the EARC believed the new committee arrangements were a lost opportunity for real reform (Solomon 1993).

There were further changes to committees in 2009 announced by Premier Anna Bligh in the aftermath of the March elections. That these changes were announced by the executive with limited consultation with the Liberal National Party (LNP) Opposition did little to allay concerns about their intent and impact. So by 2009 and prior to the recent review, Queensland's Legislative Assembly had the following 10 committees:

- Economic Development Committee
- Environment and Resources Committee
- Integrity, Ethics and Parliamentary Privileges Committee
- Law, Justice and Safety Committee
- Parliamentary Crime and Misconduct Committee
- Public Accounts and Public Works Committee
- Scrutiny of Legislation Committee
- Social Development Committee
- Speaker's Advisory Committee
- Standing Orders Committee

Matters may have rested there, but for reasons noted above the Bligh Government initiated a review of the parliamentary committee system by a bipartisan parliamentary committee (the CSRC), chaired by the Leader of the House, the Hon Judy Spence and joined by four other Government members, three from the Opposition and one Independent. The importance of the CSRC is indicated by the fact that it included not only the Leader of the House, herself a former senior Bligh and Beattie government minister, but also the Hon Robert Swarten at the time Minister for Public Works and Information and Communication Technology (until February 2011); Lawrence Springborg, then Deputy Leader of the LNP Opposition (and a former Opposition Leader); and Opposition frontbenchers Mike Horan and Jeff Seeney, who in April 2011 became the Leader of the Opposition in parliament. In other words, the CSRC had a high preponderance of members drawn from the frontbench of both sides.

In addition to considering 'how parliamentary oversight of legislation could be enhanced and how the existing parliamentary committee system could be strengthened to enhance accountability' (CSRC 2011: xi), the CSRC was also required to consider:

- The role of parliamentary committees in both Australian and international jurisdictions in examining legislative proposals, particular with unicameral parliaments;
- Timely and cost effective ways by which the Queensland parliamentary committees can more effectively evaluate and examine legislative proposals
- The effectiveness of the operation of the committee structure of the 53rd parliament following the restructure of committee system.

The CSRC proposed a new committee system with the following 11 committees — nine statutory portfolio committees, a Crime and Misconduct Committee and a Committee of the Legislative Assembly:

- Economics and Industry Committee
- Education Committee
- Environment and Resource Management Committee
- Finance and Administration Committee
- Health Committee
- Legal Affairs Committee
- Police and Public Safety Committee
- Social Affairs Committee
- Transport and Infrastructure Committee
- Parliamentary Crime and Misconduct Committee
- Committee of the Legislative Assembly

The first nine of these would be portfolio committees aligned to the current Queensland Government structure and overseeing government departments, statutory authorities and government owned corporations. The Parliamentary Crime and Misconduct Committee would oversee the Crime and Misconduct Commission — Queensland's anti-corruption body. Importantly, as will be explored later, the Public Accounts Committee, whose final emergence in 1988 was so important in Queensland's parliamentary and political history,³ completely disappeared with its functions absorbed by the other nine portfolio committees. It had under the 2009 Bligh Government changes been merged with the Public Works Committee.

As noted, the focus of this paper is on the Committee of the Legislative Assembly (CLA). The CLA under these new arrangements would be an umbrella committee to oversee all those issues relating to parliamentary power, rules, behaviour, ethics and privileges that have traditionally (in Queensland and elsewhere) been the province of individual committees and the presiding officers. The roles and powers of the CLA were set out in recommendations 8–13 of CSRC report:

8. The Committee recommends that a Committee of the Legislative Assembly be established under the Parliament of Queensland Act 2001

9. The Committee recommends that the Parliament of Queensland Act 2001 be amended to provide for the establishment of the Committee of the Legislative Assembly with the current functions of the Standing Orders Committee and the

³ Queensland lagged behind other Australian jurisdictions in establishing a public accounts committee. In 1983 Liberal Minister Terry White joined with several Liberal backbenchers in support of a unsuccessful motion to establish a public accounts committee. White was sacked as minister, then became Liberal leader, but Premier Bjelke-Petersen would not accept him back into cabinet. The Coalition then ended. The National Party won the subsequent 1983 election and ruled in their own right without Liberal support (see Prasser 1984). Only on Bjelke-Petersen's replacement by Mike Ahern was a public accounts committee finally established.

Integrity, Ethics and Parliamentary Privileges Committee, without the oversight function under the Integrity Act 2009 (which is to be carried out by the Finance and Administration Committee).

10. The Committee recommends that the Parliamentary Service Act 1988 be reviewed. The Committee of the Legislative Committee should determine the budget and resources of committees and make submissions to government to ensure the committees of the Parliament are sufficiently resourced.

11. The Committee recommends that this committee should oversee the establishment of the committee facilities (recommended by this Committee) in the parliamentary precinct.

12. The Committee recommends that the responsibility for the management of construction and maintenance of the Parliamentary buildings and electorate offices (along with the relevant budget) be transferred to the Department of Public Works.

13. The Committee recommends that the membership of the Committee of the Legislative Assembly be:

- Leader of the House (chair)
- Premier (or nominee)
- Deputy Premier (or nominee)
- Leader of Opposition Business
- Leader of the Opposition (or nominee)
- Deputy Leader of the Opposition (or nominee)

The Bligh Government tabled a response to the CSRC report in March 2011. It supported the recommendations in all except three respects. The first was that it preferred a separate ethics and privileges committee. Second, it wanted seven rather than nine portfolio committees. Third, it supported the proposed CLA, but suggested the Speaker would be invited to attend Committee of the Legislative Assembly meetings in an ex-officio capacity when Standing Orders matters were being considered. Legislation to implement the recommendations, the *Parliament of Queensland (Reform and Modernisation) Bill 2011* and the *Parliamentary Service and Other Acts Amendment Bill 2011* was introduced into the Legislative Assembly in March 2011 and June 2011 respectively. The two bills were passed in May and August 2011 with the support of the LNP Opposition. Some attempts at a compromise concerning the role of the Speaker included an Opposition proposal to make the Speaker the chair of the new CLA (Seeney 2011: 1247). This was rejected by the Government as it would, under the Opposition's proposal give the Speaker a casting vote and because of the CLA's role in the disciplining of members (Bligh 2011: 1494).

In summary, Queensland Parliament now has the following committees:

- Community Affairs Committee
- Environment, Agriculture, Resources and Energy Committee
- Ethics Committee
- Health and Disabilities Committee

- Industry, Education, Training and Industrial relations Committee
- Legal Affairs, Police, Corrective Services and emergency Services Committee
- Parliamentary Crime and Misconduct Committee
- Transport, Local Government and Infrastructure Committee
- Committee of the Legislative Assembly

A revised and improved estimates committee system was also agreed upon and is now operating.

Overall, the Government believed the reforms were 'big and bold in its vision' and 'generally supported by members of this parliament and by commentators' (Bligh 2011: 1493; see also Spence 2011b). In relation to the general thrust of the changes this statement is true. However, concerning the new CLA and its impact on the role of the Speaker, the merits of the changes are open to more debate.

Concerns about the proposed Committee of the Legislative Assembly (CLA)

There have been four main concerns about these new arrangements concerning the CLA and the way they were done.

First, it has been argued that the CSRC's proposals concerning the administration of parliament and hence subsequent changes to the role of the Speaker were not part of its terms of reference. It came as a big surprise to those outside the CSRC and to those most affected by the changes, namely the current Speaker, John Mickel. At a national meeting of Presiding Officers and Clerks of Parliament held in Brisbane in July 2011, Mickel (2004: 4) could not understand,

how we started out with a Review Committee to examine the Parliament's committee system so as to strengthen the oversight of legislation and improve accountability and ended up not just with an overhaul of the committee system, but also my position of Speaker skewered and the balance in the relationship between the executive and the legislature fundamentally changed.

That the CSRC report (2010:14) itself notes that 'the functions of internal committees were ... not canvassed widely in the submissions' and that these were matters raised in 'private meetings' does not inspire confidence in the process let alone the outcome. Further, was the subsequent way the government managed the establishment of the CLA and later discussions about the issue. The CLA was quickly established by resolution of the parliament prior to the later legislative changes which were then overseen by the CLA itself (Queensland Government 2011a: 4–5).

Second, and this is the crux of the issue, the Speaker is omitted from the proposed new Committee of the Legislative Assembly. Yet the Australian and overseas examples cited by the CSRC that best resemble the new Committee such as the

Committee of the legislative Assembly of the National Assembly of Quebec (CSRC: 14) is chaired by the President (Speaker). New Zealand and other provinces visited by the CSRC are not mentioned in relation to the CLA recommendation.

Not only will the new Committee of the Legislative Assembly not include the Speaker, but with three members from executive government — the Premier, Deputy Premier and Leader of the House — and the three senior Opposition frontbench members, the new arrangements represent a ‘collusion of the executives’ as backbenchers and Independents are also excluded from any role on the CLA despite its role in the overall management and resourcing of parliament and its other committees. Also, with equal members from each side and no casting vote with the chair, any tied votes will be resolved on the floor of parliament where the government of the day has the numbers. It has therefore been argued that the executive government now fully controls parliament in Queensland in a way not exercised previously — even under the National Party and previous Coalition governments. And let there be no confusion about this new arrangement to exclude the Speaker from the CLA — it was deliberate strategy. As Judy Spence (2011a: 5) herself pointed out:

We did not include the Speaker on this Committee (the CLA) because we wanted to redefine the Speaker’s role as the person who chairs the Parliament rather than the person who makes all the decisions about the precinct.

John Mickel (Mickel 2011) argues these changes demean the office of Speaker, undermine the separation of powers and reduce executive accountability. While the Speaker’s powers to adjudicate on parliamentary debates remains intact, the traditional and important role of managing parliament’s administration, representing the interests of parliament to the executive in relation to resourcing and acting as a bulwark against executive government encroachment on the legislature’s independence, have been allegedly destroyed by these changes. He is not alone in these concerns. In January 2011, Queensland’s Integrity Commissioner Dr David Solomon prepared a commentary on what he saw as some of the major issues arising out of the Committee System Review Committee’s report. Dr Solomon (Solomon 2011) had this to say:

....the Committee, in Recommendation 12, also wants to transfer responsibility for the management of construction and maintenance of the Parliamentary buildings and electorate offices, and the relevant part of the parliament’s budget, from the Speaker to the Department of Public Works. No reason is provided for this unprecedented transfer of power over part of the physical structure of the Parliament from the Parliament to the Executive Government. Making such a change would constitute a significant departure from the traditional independence of Parliament, and further diminish the role of the Speaker (and of the Clerk, who under the Parliamentary Service Act is the chief executive of the Parliamentary Service).

In my view the Parliament should retain both the Standing Orders Committee and the Integrity, Ethics and Parliamentary Privileges Committee, with the latter having oversight responsibilities in relation to the Integrity Commissioner.

In relation to the proposed Committee of the Legislative Assembly, Dr Solomon stated: 'Regrettably, once again, the Committee makes no attempt to justify or explain its recommendations.' Dr Solomon also notes that the Speaker has been removed from any role on the Committee of the Legislative Assembly.

Criticism of the proposal also came from two former Labor Speakers of the Queensland Legislative Assembly, Jim Fouras and Mike Reynolds (Reynolds and Fouras 2011; Fouras 2011). They argued that the recommendations regarding the Committee of the Legislative Assembly were outside the CSRC's terms of reference, which tasked it with inquiring into 'how the parliamentary oversight of legislation could be enhanced and how the existing parliamentary committee system could be strengthened to enhance accountability' (CSRC 2011: 75) and that they flouted the principle of the separation of powers by bringing the parliament under the control of the executive. Fouras (2011) summarised the principle of the separation of powers in this context in the following terms:

The Premier runs the government. The Speaker runs the Parliament. The government (Executive) and the Parliament (Legislature) should operate independently of one another as far as possible.

The Speaker's exclusion from the CLA and the inclusion of the Executive's two most senior members — the Premier and the Deputy Premier — is an anathema to the separation of powers.

The *Accountability Round Table*, a leading non-partisan group that argues for increased executive government accountability, supported the former Speakers' views that the recommendations were an attack on the separation of powers (Accountability Round Table 2011).

More pointedly the Speakers and Presidents at the Conference of the Presiding Officers and Clerks of the Australia-Pacific (2011) held in July 2011 on the eve of the final legislation that cemented the changes, issued a communiqué condemning the changes 'as a substantial diminution of the role and office of Speaker ... a serious breach of the Westminster convention ... (and) weakening the existing separation of powers.' They urged amendment to the proposed legislation.

Professor Carney (2011), a constitutional law expert who tendered advice to the Scrutiny of Legislation Committee on this issue believed the 'status of the Speaker is undermined' and the new Committee 'does not adequately represent the vast majority of Members of the Assembly' and the change 'facilitates Executive intrusion in the management of the Parliament.' Professor Carney's point is that the composition of the CLA with its representation solely from executive government on the one hand, and the front bench of the Opposition on the other, with the Speaker only attending on standing orders issues, impairs the 'effective management and functioning of the House ... threatens the maintenance of the separation of powers' and undermines 'the delicate role of a politically appointed Speaker who must try to retain the trust of both government and opposition' (Carney 2011).

Harry Evans (2011), former Clerk of the Australian Senate, in evidence to the Scrutiny Committee also expressed similar concerns about the restriction of CLA's membership to 'government and opposition executive members ... with no direct backbench representation.' Evans, thought it was 'even more undesirable' that the the Speaker's was reduced to a temporary member of the CLA or what he termed, 'second-class member' joining it only on matters of procedure. As Evans concluded, he 'had never seen as presiding officer treated in such a way.'

Others including a former High Court judge, five former Speakers of Queensland, both Labor and non-Labor, retired speakers from other jurisdictions (New South Wales and Victoria), several Queens Counsels, academics (including one of the authors of this paper), a former premier and several former Queensland ministers and members (*Courier-Mail*, 20 April 2011) believed these changes were an 'assault on democracy.' They argue it undermined the separation of powers, giving executive government too much direct control over parliament and that the CLA, if it is to be established, should be chaired by the Speaker to ensure a demarcation between parliament and the executive.

A third criticism of the changes was that they represented a departure from the previous roles of the Speaker as understood in Queensland and provided for in the legislation. In his 1980 survey of the government of Queensland Professor Hughes (1980: 119) began his account of the Speaker in the following terms:

The first business of each new parliament after the members have been sworn in is the election of the Speaker to preside over its principal business, to manage its domestic affairs, and to represent it in dealings with the executive.

In their history of the Queensland Parliament Wanna and Arklay (2010: 21) compared the Speaker's role to that of a minister 'responsible for the Department of Parliament as a functioning public service agency.'

The *Parliamentary Service Act 1988* established the Queensland Parliamentary Service to provide administrative and support services to the Legislative Assembly, its committees and members of parliament (Queensland Parliamentary Service 2010: 4). Sections 5 and 6 of the Act also defined the powers of the Speaker in relationship to the parliamentary service:

5 Administration under Speaker's control

The Speaker has the control of

- (a) accommodation and services in the parliamentary precinct; and
- (b) accommodation and services supplied elsewhere by the Legislative Assembly for its members.

6 Speaker's role for parliamentary service

- (1) The general role of the Speaker in relation to the parliamentary service is to
 - a) decide major policies to guide the operation and management of the parliamentary service; and
 - b) prepare budgets; and

- c) decide the size and organisation of the parliamentary service and the services to be supplied by the parliamentary service; and
 - d) be the employing authority, for the Legislative Assembly, of parliamentary service officers and employees deciding their remuneration and conditions of service; and
 - e) supervise the management and delivery of services by the parliamentary service.
- (2) The Speaker must ensure that the remuneration, conditions of employment and other benefits given to the Clerk, and parliamentary service officers and employees, are comparable to those of State officers and employees who have similar duties.

The excision of these responsibilities from the Speaker's role represents departure from past practice in Queensland.

A fourth criticism is that the changes represented a major departure from wider Westminster practice. There is considerable support for this contention. In his survey of the role of Speakers in Commonwealth parliaments Laundy (1984: 62–63; 105–106, 155–56, 172–73, 183–84, 186) observed that Speakers invariably had a role, to a greater and lesser extent, in the administration of the parliament. The most limited role was in New Zealand, where the Speaker did not control expenditure; the most powerful was in India where 'the Speaker's authority over the staff of the House, its precincts and its security arrangements is absolute' (Laundy 1984: 186). Nevertheless, in *Parliamentary Practice in New Zealand* by David McGee it is observed that the, 'Speaker is the chairperson of the Parliamentary Service Commission and has principal political responsibility for the services and facilities provided to Members of Parliament' and the 'control and administration of the Parliamentary precincts is vested in the Speaker on behalf of the House' (McGee: 20005: 52). In other words, the Speaker has a pivotal role in relation to the operations of New Zealand's unicameral parliament.

In the British House of Commons the Speaker has an administrative role as ex-officio chair of the House of Commons Commission, the body responsible for the management and administration of the House of Commons. The Commission comprises the Speaker, the Leader of the House, a member appointed by the Leader of the Opposition (normally the Shadow Leader of the House), and three other members appointed by the House, normally one senior backbencher from each of the two main parties and a representative of the smaller parties (House of Commons Information Office 2010, 2). The responsibilities of this role were described by Baroness Boothroyd, Speaker of the House of Commons between 1992 and 2000; she described the House of Commons Commission as 'the body which effectively runs the administration of the House' and noted that it had an annual budget of £313 million and 1,500 staff during her period of office (Boothroyd 2010: 142). In *How Parliament Works*, by Rogers and Walters (2006), it is stated: 'Not only does the Speaker have the task of chairing the House, he is also an enormously influential figure in almost every aspect of the way that the House and its administration are run,' and 'the most important of the Speaker's statutory responsibilities is as the chairman of the House of Commons Commission.'

The Speaker's role in the Canadian Parliament, is summarised thus in the *House of Commons — Procedure and Practice*: 'The Speaker is the head of the House of Commons and is responsible for its overall direction and management;' and 'All matters of administrative and financial policy affecting the House of Commons are overseen by the Board of Internal Economy ... the Speaker chairs the Board of Internal Economy' (O'Brien and Bosc: 2009). And as noted the CSRC itself acknowledges the role of the President (Speaker) in Quebec in chairing the relevant committee.

In Australia, both Commonwealth and Victorian parliaments describe the Speaker's administrative role with respect to parliament as similar to that of a minister's role concerning his or her department. In the Commonwealth Parliament the two presiding officers, the Speaker of the House of Representatives and the President of the Senate are jointly responsible for the parliamentary precinct, while the Speaker is 'in effect "Minister" for the Department of the House of Representatives' (Harris, Wright and Fowler 2005: 178). In Victoria the Speaker has a ministerial relationship with both the Department of the Legislative Assembly and the Department of Parliamentary Services (Victorian Legislative Assembly Procedure Office 2010: 3).

Executive vs Parliament?

Critics have suggested that the transfer of administrative responsibility from the Speaker to the CLA is part of a conflict between the executive and the parliament. However, it should be remembered that the proposed membership of the CLA consists of the Leader of the House, the Premier, the Deputy Premier, the Leader of Opposition Business, the Leader of the Opposition and the Deputy Leader of the Opposition, thus giving equal representation to the government and the opposition. The Speaker, on the other hand, is almost invariably a member of the government party and there is no convention in Australian parliaments that the Speaker removes himself or herself entirely from party involvements. It could therefore be argued that the Speaker is more aligned to the executive than is the new CLA.

The metaphor of the Speaker as the minister responsible for the parliamentary departments is an attractive one, but also has a number of complications and shortcomings. The role of the Speaker in the administration of parliament or the lower house is a matter of convention which has developed over many years rather than of law, and the conventions themselves have changed according to the preferences of both institutions and individuals (Pender 1990: 147–174). This understanding was fully supported by the opinion of Queensland's Solicitor-General on the transfer of the management of the Queensland parliamentary service to the new committee:

The proposed laws arguably breach the Westminster convention that the Speaker performs the administrative role of the head of the parliamentary services. However, this does not give rise to any legal consequences. We have not examined the existing standing orders or rules of the Assembly to identify any breaches. We assume that if the standing orders and rules are inconsistent with the proposal, that

parliament will ensure the orders and rules are changed when the Reform Bill and Service Bill commence operation. Otherwise, we do not consider that the proposed laws breach any other law, doctrine or rule. (Solicitor-General Queensland 2010: 16)

However, it is worth noting in relation to Queensland that the Speaker's role in the administration of parliament had evolved from a matter of convention to a matter of law, with the role specified in the *Parliamentary Service Act 1988*.

In his study of parliamentary administrations Pender has also argued that the role of presiding officers is not immediately comparable to that of ministers because presiding officers, in fact, become involved in administrative matters regarding staffing and finance in a way that ministers do not (Pender: 173).

Paradoxically, the role of the Queensland Speaker perhaps resembles that of a minister more than that of other Speakers because Queensland has a unicameral parliament. In parliaments with two houses administrative power is divided between the presiding officers of the two houses, with control of the parliamentary precinct sometimes being shared.

Another aspect that should be considered is the trend in recent years towards the restructuring of parliamentary administrations. In general bicameral parliaments in Australia have traditionally had five separate administrative bodies: the upper house, the lower house, Hansard, the parliamentary library and a unit or department known as the house committee or the joint house committee looking after salaries, accommodation, finance, catering and any other matters not the territory of the other departments. In 2004 the Commonwealth Parliament restructured its administration by amalgamating the service departments, with the result that it now has a Department of the Senate, a Department of the House of Representatives and a Department of Parliamentary Services (Verrier 2008). State parliaments including New South Wales, South Australia, Victoria and Western Australia have adopted similar structures. This does not necessarily weaken the power of the Speaker (or of the presiding officer of the upper house), but it indicates a trend away from tradition and towards corporate governance that may create a climate more susceptible to the suggestion that the Speaker's role is confined to the House, not in the corporeal parliament. The new arrangements in Queensland's parliament do, however, invite another set of questions, about the role of the Clerk. In Westminster parliaments generally he or she has had a dual role as both administrative head of the relevant department and adviser to the presiding officer on parliamentary procedures and precedents. The Clerk of the Parliament in Queensland appears now to be responsible to two entities, the CLA and the Speaker.

Is Queensland different and has parliamentary practice changed in the Sunshine State?

The question of whether Queensland's political culture and traditions are different from the rest of Australia has been widely discussed and theories related to rural populism, regionalism and agrarianism raised in explanation (Bulbeck 1987;

Fitzgerald, Megarrity and Symons 2009; Head 1986). Bulbeck argued in 1987 that Queensland is not markedly different from the rest of Australia and in fact 'Queensland is not clearly the most rural, the most regional, the most Catholic, the most Anglo-Saxon, the least educated or the least responsibly governed state' (Bulbeck 1987: 20). Twenty years later, Fitzgerald, Megarrity and Symons (2009: 242–243) pointed out that in fact Queensland is different because of the size and importance of its regional towns. Brisbane, they argue, is not politically dominant in the way that Sydney and Melbourne are.

This leads to the often-asked question of whether Queensland is 'different' in political terms. The brief and superficial answer is that the Queensland Parliament is indeed different from other state parliaments and from the Commonwealth Parliament because it has no upper house. Consequently, it lacks the potential check on the government that can be provided by an upper house where the government lacks a majority. The lack of an upper house is also sometimes seen as the reason for the late development of parliamentary committees (Wanna 2003: 81).

One of the commentators on the CSRC's recommendations, Dr Ken Coghill, a former Speaker in the Victorian Legislative Assembly, described both the recommendations and the speedy introduction of legislation to put them into effect as 'reminiscent of the worst excesses of the Bjelke-Petersen years and of the problems exposed by the Fitzgerald Report' (Accountability Round Table 2011). It can be argued that Queensland is different in that the wide-ranging nature of the Fitzgerald Report was unprecedented in Australian politics and resulted in a set of reforms and institutions that have provided a model for other Australian states (Ransley 2008; Wanna and Arklay 2010: 605–10).

The CSRC came to the conclusion that the absence of an upper house did not affect how the Queensland committee system performed and 'that a strong, independent committee system will serve Queenslanders more effectively than the role Upper Houses perform in other parliaments' (CSRC 2011: vii). This was a bold commitment, particularly in view of the fact that the Queensland parliament no longer has a public accounts committee under these new arrangements. It was first merged with the Public Works Committee to form the Public Accounts and Public Works Committee in 2009 and has now been abolished by the recommendations of the CSRC in 2011. The CSRC (2011, viii) remarked that:

We are proposing our portfolio committees undertake the roles currently performed by the Public Accounts and Public Works Committee.

This was expressed in Recommendation 5:

The Committee recommends that each of the nine portfolio committees have responsibility within their portfolio areas for any public accounts and public works formerly the responsibility of the Public Accounts and Public Works Committee.

The establishment of the Parliamentary Committee of Public Accounts in 1988 marked the beginning of a modern parliamentary committee system in Queensland (Alvey 2008). Public accounts committees themselves have a somewhat chequered

history in Australia (Griffiths 2006: 19–23; Jacobs and Jones 2009). Nonetheless they have increasingly been seen internationally as a key method of parliamentary capacity building (McGee 2002; Pelizzo et al. 2006). The abolition of the public accounts committee coupled with the removal of the Speaker's traditional responsibility for the administration of parliament is a major change in the Queensland parliamentary system and a move away from other Westminster systems.

Another important change in the new committee structure is the disappearance of the Scrutiny of Legislation Committee. Its scrutiny role was a specialist one and its work seen as being effective. Such specialist expertise will be diluted as the committee's role will now be spread across seven committees.

However, it should also be recognised that the 'Westminster system' is not an immutable pattern for parliamentary democracy. It is better described as a set of principles and practices that inform how parliaments descended from the 19th century British parliament go about their work or perhaps as a 'constructed notion' without a central core (Rhodes 2005: 150).

Conclusion

The recommendations of the CSRC on the establishment of a Committee of the Legislative Assembly were outside its terms of reference and were unexpected. These changes marked a major departure in the role of the Speaker concerning the office's broader functions of managing parliament and providing a bulwark against executive government intrusion into the legislature in relation to Queensland's past practices, legislative provisions and compared to the role of the Speaker in most other jurisdictions.

The extent that the changes were a deliberate attack on the separation of the powers or the Speaker or motivated by other factors will remain a matter for debate. The role of the Speaker is not immutable. Although affected by convention and tradition and even legislation, it is also influenced by practice. The changes in Queensland could be interpreted as a move towards a more corporate type of governance within parliament. It could also be part of a more general change in the direction of parliamentary reform that includes, for example, the abolition of the extremely traditional public accounts committee in favour of a more streamlined set of committees aligned with departments and portfolios.

Nevertheless, there are odd aspects about the establishment of the CLA and the changed role of the Speaker that need to be identified, if not fully explained. For instance, it is odd how the Government pursued this part of the 'reform' package so strongly and were unwilling to compromise. This seemed particularly strange to the general public as it was not just an attack against the Speaker, but a Speaker who was from the same party and who openly condemned the changes. Internal party politics might be one explanation. Regardless of the motivation, the Bligh Government's dogged pursuit of this issue undermined its credibility about seeking

to improve integrity arrangements in Queensland. It distracted attention from the other worthwhile parliamentary reforms the Government sought to champion. This was bad politics for a government facing a difficult forthcoming election.

However, softening the adverse impact of these actions was the LNP Opposition's actions on this particular issue. They initially supported the changes concerning the CLA and the Speaker, then sought amendments to include the Speaker on the CLA and finally voted with the Government. By so doing, the Opposition got both the principle of parliamentary democracy and the politics wrong. They failed to stand up for an important principle of parliamentary democracy and to exploit internal Labor fissures between the current Speaker and the Government. Yet two days after the legislation was passed in August that brought these changes into force, the Opposition complained about executive dominance of the new portfolio committee system! (Gibson 2011: 2338–43). ▲

References

- Accountability Round Table, *Accountability Group Slams Executive Takeover*, Press Release
- Alvey, J., 2008, 'Parliament's Accountability to the People, the Role of Committees: a Queensland View', *Australasian Parliamentary Review*, 23(1), 62–72
- Beattie, P., 1992, 'Parliamentary Committee and Reforms', in A. Hede, S. Prasser and M. Neylan (eds), *Keeping Them Honest: Democratic Reform in Queensland*, St Lucia: Queensland University Press, 135–48
- Bligh, A., MP, *Queensland Parliamentary Debates*, 12 May, 1493–95
- Boothroyd, Baroness, 2010, 'The Role of the Speaker in the 20th Century', *Parliamentary History*, 29(1), 137–44
- Bulbeck, C., 1987, 'The Hegemony of Queensland's Difference', *Journal of Australian Studies*, 11(21), 19–28
- Carney, G., 2011, Memorandum of Advice, to the Chair of the Queensland Scrutiny of legislation Committee, 28 June
- Committee System Review Committee, 2010, *Review of the Queensland Parliamentary Committee System*. Brisbane: Legislative Assembly
- Evans, H., 2011, Evidence to the Queensland Scrutiny of Legislation Committee
- Fitzgerald, G.E. (Chair), 1989, *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, Brisbane: Queensland Government Printer
- Fitzgerald, G.E., 2010, 'Tony Fitzgerald blasts Labor's 12 years in Power', *The Courier-Mail*, 19 July
- Fitzgerald, R., Megarrity, L., and Symons, D., 2009. *Made in Queensland: A New History*, St Lucia: University of Queensland Press
- Fouras, J., 2011, Review of Queensland Parliament's Committee System, 17 March
- Gibson, D., MP, 2011, *Queensland Parliamentary Debates*, 3 August, 2338–43
- Goss, W., 2001, 'Parliamentary Committees in Queensland', *Australasian Parliamentary Review*, 16(2), 73–79
- Griffiths, G., 2006, 'Parliament and Accountability: The Role of Parliamentary Oversight Committees', *Australasian Parliamentary Review*, 21 (1), 7–46

- Harris, I.C., B.C. Wright, B.C., and Fowler, P.E. (eds), 2005. *House of Representatives Practice*. 5th edn, Canberra: Department of the House of Representatives
- Head, B., 1986, 'Queensland Political Culture', *Social Alternatives* 5(4), 45–47
- House of Commons Information Office, 2010, *The House of Commons Administration: Factsheet G15 General Series*, London: House of Commons
- Hughes, C.A., 1980, *The Government of Queensland*, St Lucia: University of Queensland Press
- Jacobs, K., and Jones, K., 2009, 'Legitimacy and Parliamentary Oversight in Australia: The Rise and Fall of Two Public Accounts Committees', *Accounting, Auditing & Accountability Journal* 22(1), 13–34
- Legislative Assembly Procedure Office, 2010, *The Speaker: Fact Sheet H2*, Melbourne: Legislative Assembly
- McGee, D.G., 2002, *The Overseers: Public Accounts Committees and Public Spending*, London: Commonwealth Parliamentary Association in Association with Pluto Press
- Mickel, J., MP, 2011, 'Changes to the role of Speaker in Queensland', Address to the 42nd Presiding Officers and Clerks Conference, Brisbane, 12 July
- Pelizzo, R., Stapenhurst, R., Sahgal, V., and Woodley, W., 2006, 'What Makes Public Accounts Committees Work? A Comparative Analysis', *Politics & Policy* 34(4), 774–93
- Parliamentary Committee for Electoral and Administrative Review (PCEAR), 1993, Report on the *Review of Parliamentary Committees*, Report No 19, October
- Pender, J.W., 1990, *Parliamentary Administration in Traditional Westminster Parliaments*, MA Thesis, University of Canberra
- Prasser, S., 1984, 'The Liberal Party in Queensland', *Current Affairs Bulletin*, 60(10), March, 24–30
- Prasser, S., and Wear, R., 1990, 'Non-Labor Politics in Queensland: Fusion or Fission?' *Current Affairs Bulletin*, 60(8), January, 22–30
- Presiding Officers and Clerks of Australia and the Pacific, 42nd Conference, 2011, *Communiqué*, 14 July
- Queensland Government, 2009a, *Integrity and Accountability in Queensland*, August
- Queensland Government, 2009b, *Response to Integrity and Accountability in Queensland*, November
- Queensland Government, 2011, *Government Response to the Committee System Review Committee*
- Queensland Parliamentary Service, 2010, *Annual Report 2009–10*, Brisbane: Legislative Assembly
- Ransley, J., 1992, 'Reform of Parliamentary Processes: An Assessment', in A. Hede, S. Prasser and M. Neylan, *Keeping Them Honest: Democratic Reform in Queensland*, St Lucia: Queensland University Press, 135–48
- Ransley, J., 2008, 'Illusions of Reform: Queensland's Legislative Assembly since Fitzgerald', in N. Aroney, S. Prasser and J.R. Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution?* Perth: University of Western Australia Press, 248–61
- Reynolds, M., and Fouras, J., 2011, 'Former Speakers Condemn Moves to Downgrade the Role of Speakers', 17 March
- Rhodes, R.A.W., 2005, 'Australia: The Westminster Model as Tradition', in H. Patapan, J. Wanna and P. Weller (eds), *Westminster Legacies: Democracy and Responsible Government in Asia and the Pacific*. Sydney: University of New South Wales Press, 129–52

- Rogers, R., and Walters, R., 2006, 6th edition, *How Parliament Works*, Harlow, England: Pearson Education
- Seeney, J., MP, 2011, Legislative Assembly, Hansard, 10 May, 1245–49
- Solicitor-General Queensland, 2010, *Memorandum of Advice: Re: Draft Parliamentary Service and Other Acts Amendment Bill 2011 — Matters Relating to the Committee of the Legislative Assembly*
- Solomon, D., 1993, 'The Reform that might have been', *The Courier-Mail*, 4 November
- Solomon, D., 2008 (Chair), 'The Right to Information: Reviewing Queensland's Freedom of Information Act', *Report of the FOI Independent Review Panel*, June, Brisbane: Queensland Government
- Solomon, D., 2011, Evidence to the Scrutiny of Legislation Committee, Queensland Parliament, April
- Spence, J., MP, 2011a, 'A New Era of Parliamentary Reform', Address to Australasian Study of Parliament Group, Conference, 6 October
- Spence, J., MP, 2011b, Legislative Assembly, Hansard, 10 May, 1255–58
- Verrier, J., 2008, 'An Optimum Model for the Governance of Parliaments', *Australasian Parliamentary Review*, 23(2), 115–34
- Wanna, J., 2003, 'Queensland', in J. Moon and C. Sharman (eds), *Australian Politics and Government: The Commonwealth, the States and the Territories*. Cambridge: Cambridge University Press, 74–103
- Wanna, J., and Arklay, Tracey, A., 2010, *The Ayes Have It: The History of the Queensland Parliament, 1957–1989*, Canberra: ANU E Press

Jay Tilley is Electorate Officer in the office of Greg Barber MLC in the Parliament of Victoria

Holding oppositions to account: The slow surrender of parliamentary democracy

Jay Tilley

As uncomfortable as it may be for many, a politician's *raison d'être* is the continual accumulation of power. With the increasing centralisation of power from the states to the federal sphere, from the cabinet to the leader's office and their inner circle of advisers, one could be forgiven for thinking that executive governments have wrested power from their parliaments. I believe, in fact, governments have not actively seized this power, parliaments have ceded it. As constitutional scholar Greg Taylor wrote, there exists a 'mutual non-aggression pact reflecting a convergence of interests between governments and oppositions. Today's opposition is tomorrow's government'.⁴ In the knowledge of this, oppositions are reluctant to bind a government in a way that they might one day be bound. Despite reams of harsard devoted to claims of 'secretive and evasive governments', a large share of this blame lies at the feet of oppositions who refuse to fully utilise the mechanisms of parliament to hold the government to account. This paper will briefly demonstrate why parliaments are unquestionably supreme over the executive government drawn from its benches. It will then proceed to hold opposition parties to account for transforming the parliament and its committee system from the highest watchdog in the land into a spitting, hissing kitten. Along the way, I will point to a range of measures that legislators should use to ensure a healthier and more robust democratic exchange.

Executive supremacy?

The question as to whether governments or parliaments are supreme can be dealt with through a simple question. Has anyone ever heard of the phrase 'executive supremacy'? The only place one would hear of this doctrine would be in nation states such as Fiji, or perhaps in the protracted battle between Prime Minister

⁴ Greg Taylor *The Constitution of Victoria* Federation Press 2006 at 168.

Morgan Tsvangirai and President Robert Mugabe in Zimbabwe. In all healthy democracies, of which Australia's federation is blessed to possess, the doctrine of parliamentary supremacy is what is taught in our classrooms and in our textbooks. Popular culture and mass media do confuse the balance of power between the two, giving the impression that the government is indeed supreme because it spends our hard-earned money. Yet in law, the government's cash flow is solely gifted to the government from the parliament. As the High Court recently reiterated in *Pape*, any appropriation of money without parliament's approval is illegal.⁵

In practice, however the government, in the style of a demanding teenager says 'cough up' while the parliament, as the compliant parent wanting to avoid a quarrel, but always willing to grumpily complain about it says 'how much?' Any threat to this annual supply by an upper house or disgruntled crossbenchers in a minority government would cause a constitutional crisis — as those of you older than me would have observed in 1975. Since this derogation from Westminster tradition occurred, state constitutions have expressly removed appropriations and taxation powers from its houses of review. Obviously, amending the federal constitution is a far more difficult task, so this disqualifying power over the 'ordinary annual services of government'⁶ is still available to the Senate, but the point should be made that in the states it has been the legislatures confining their powers over supply to its lower houses, and for fair enough reason. This point reinforces my theme, that it is parliaments who are relinquishing their power, not necessarily governments taking it. When it comes to one exerting power over the other, the law is clear, the parliament wins. The High Court's joint judgment in *Re Residential Tenancies Tribunal (NSW)* stated this quite succinctly when they said 'indeed, it is the very nature of executive power in a system of responsible government that it is susceptible to control by the exercise of legislative power by Parliament.'⁷ Legislative power here can have two meanings: first, the power of the laws made by the legislature which directly regulates executive behaviour. This is what the High Court was concerned with in this intergovernmental immunities case and is relatively straight forward. The second meaning of 'the power of the legislature' concerns the legislature as a body — the parliament, in which the government members must sit.⁸ The powers of the legislature as a body to control the ministers in a house are powers for the house alone to define. This is an incredibly vast source of power over the executive. It is made even vaster by the fact that the only aspect in which the courts oversee this power is to examine if the specific power exists in standing orders, legislation or age-old case law and whether the scope of the power

⁵ *Pape v The Commissioner of Taxation* (2009) 238 CLR 1.

⁶ Section 53 of the *Commonwealth Constitution Act 1901*.

⁷ *Re Residential Tenancies Tribunal (NSW); Ex Parte Defence Housing Authority* (1997) 190 CLR 410 at 441.

⁸ Putting aside the ability for ministers to sit outside the parliament for very limited time periods. For example, section 51 of the Victorian Constitution allows a minister to hold office for three months without sitting in the parliament.

correlates with the disputed actions in question. The creation and prosecution of such powers are questions solely for the Parliament. As McHugh J stated in *Egan v Willis*:

A house of the...parliament may require a minister of the Crown to answer questions or provide information, and has a power to suspend a member who obstructs its business. It is for the House alone to determine whether its business has been obstructed.⁹

This power goes so far as to exempt sections 53 and 54 of the federal constitution from judicial review. These sections establish procedures for bills dealing with appropriation between the houses. The High Court has twice ruled¹⁰ that procedures such as proposed laws for taxation or appropriation could originate in the Senate, and perhaps by implication, in legislative councils across the country. This is despite express statutory provisions to the contrary as such directions are interpreted simply as a guide to inter-house dispute resolution. If a lower house were to accept a taxation bill, or an amendment to an appropriation bill by an upper house it will have waived its privileges and sanctioned the other house's action.¹¹ The legislation, once proclaimed is of full legal effect. This principle of 'proposed laws and their procedures' being the sole dominion of the legislature could even extend so far as to one day render manner and form entrenchment provisions in state constitutions meaningless. For my part I hope that a state legislature one day decides to ignore these restrictions. A later parliament should not have to jump over a bar that the enacting parliament never had to meet.

The powers of the parliament to control the executive are immensely broad and clearly a one way relationship, so the obvious question arises, why does the executive have so much power that escapes the surveillance and enforcement of the parliament? To answer that question, we must in large part turn towards opposition parties, who set the parameters for how a government will make its decisions and administer its powers.

Opposing an opposition

As Ian Killey identified in his book on constitutional conventions, the concept and phrase of 'His Majesty's Opposition' was originally a derisive title employed by progressive reformers of the British parliament who saw the main opposition party consistently adopting identical policy positions to 'His Majesty's Government' (2009, p. 58). So it is fitting that this critique on oppositions should begin with its semantic origins; of oppositions aligning with governments to water down the risk of parliament exposing uncomfortable information involving the government of the

⁹ (1998) HCA 71 at 424

¹⁰ *Osbourne v The Commonwealth* (1911) 12 CLR 321 and *Northern Suburbs General Cemetery Reserve Fund v Commonwealth* (1993) 176 CLR 555.

¹¹ Peter Hanks, Patrick Keyzer & Jennifer Clarke. *Australian Constitutional Law* 7th edn. Lexis Nexis at 278.

day. This proposition runs contrary to the generally agreed purpose of an opposition. To hold a government to account, to discover and prosecute any errors, whether they were committed by accident or malign intent. In truth, the meta-purpose of opposition parties (except for perhaps the Australian Democrats) that overrides this accountability purpose is for the opposition to replace the government. Any strategic conflict between the 'accountability purpose' and 'replacing government purpose' of an opposition will be resolved invariably in favour of replacing government. A deeply unfortunate consequence of this tension is the weakening of parliament's inquisitorial powers.

Structural flaws in parliament's current information gathering methods exist in every crevice one seeks to look, whether it be speakers and presidents being drawn from government benches, whose duty to be the impartial umpire between the parliament and the executive is tarnished *ab initio*. This has flow on consequences that affects the quality of debate, the quality of answers to questions or responses to motions and the petulant manner in which members often behave. Such appointments should not be made along party lines, but on merit, with a fiduciary-like duty owed to the house as a whole, not just to those who sit on the presiding officer's right-hand side. Other shortcomings can be found in committees, which are the engine rooms of inquiry but suffer from atrophy whenever the majority and chairs are occupied by government members. As a result of government control, the terms of inquiry are moulded in their favour and simple procedures can thwart desired outcomes because of something as simple as how witnesses are questioned. A chair might truncate a dissecting, forensic approach to gathering information, or move onto the next questioner without a satisfactory answer being provided. There is also the well-known problem of government's ignoring timelines for responding to committee reports, recommendations and question on notice deadlines set down in standing orders.

These are all symptoms of a sub-standard culture in which parliament refuses to flex its muscle to ensure a greater and more efficient flow of information – information creates knowledge which is power. This power over information, in the spirit of the highest constitutional principles must be separated between these two arms of the state. Unfortunately, MPs prioritise the pleasures of the executive over the primacy of parliament. When government members are defiant of parliament's will and the parliament refuses to assert its authority, the parliament not only sanctions such behaviour, it encourages it. Our current parliamentary culture is a result of all these little defiant acts, like sedimentary layers built on top of each other that have been tolerated by the parliament. This has become a quasi-breeding ground for executive power all because oppositions don't utilise the full powers available to them for fear that they may one day be used against them in government. This can quickly be summarised by a recent case study of the Standing Committee into Finance and Public Administration's inquiry into the Windsor Hotel that occurred here in Victoria in 2010. A ministerial adviser accidentally sent a media plan to the ABC which showed how the government would establish a fake consultation process on the development of the hotel just

across the road. The responsible minister refused knowledge of the plan and distanced himself from his adviser, in much the same way the former federal foreign minister did when his staff received a fax regarding AWB's oil for food bribes. The Attorney-General defied the committee's summons to appear on the basis of a convention that staff cannot be questioned in any circumstances. This so called 'convention' is precisely what I refer to as these sedimentary layers of deferral to the executive. Even if such a convention really did exist in the twenty-odd years since adviser positions were created, it does not remove the parliament's legal power to compulsorily summons any witness it wants, other than a privileged member of one of Australia's other 12 houses. The committee subsequently agreed with the Attorney-General that staffers could not be questioned and appointed the Ombudsman to question the staff. So the committee came to the distorted conclusion that the Ombudsman, whose powers derive from parliament, apparently possesses a power that the parliament itself does not. As a result, the interviews were conducted in secret and not in public, the parliament tacitly reinforced this 'convention' and the opposition that refused to assert the parliament's power has since become the government. Their decision not to enforce parliament's power of compulsorily summons was made with their eye on government and they have been rewarded for their caution.

Since coming into government, the Liberal party voted against an amendment by the Greens to have non-government chairs and majorities on committees despite supporting the identical amendment when in opposition four years earlier. To their credit the government have promised reform to the *Freedom of Information Act 1982*. They will hopefully reign in the talismanic properties of 'commercial-in-confidence' which has increasingly allowed governments to contract information out of public disclosure. They have also promised to establish a Parliamentary Budget Office similar to the federal parliament's recent reforms which, indeed, strengthens parliament at the expense of the executive's monopoly on authoritative economic advice. Such reforms are welcome. A final reform which has been a poignant lesson was amending the assembly's standing orders to make a minister's answers relevant. The amendments have had no effect; the house is as unruly as ever because the leaders of the government and opposition parties have not pushed for a cultural change within their ranks so that parliamentary exchanges are respectful and informative instead of aggressive and empty. Behind any legal change, must be a cultural change.

Culture change

When I first began to write this paper, I believed that many of the problems I identified could not be solved in the three unicameral parliaments because a house of review was necessary to hold a government accountable. On deeper reflection, I realised that irrespective of the number of houses and who they are controlled by, empowering a parliament is only possible if an opposition genuinely craves parliamentary reform and, when forming government, enact those changes in

standing orders, legislation and most importantly through member's behaviour and ministerial practice.

When Odgers, as Clerk of the Senate in 1965 proposed a committee system, based on his research in Washington, the Cabinet Secretary Sir John Bunting advised that such a change would be 'erosive of government authority and responsible government'.¹² The report was shelved. In opposition, Lionel Murphy managed to convince his party that such a check on government power, with no limit to the information that could be gathered, was a reform worth pursuing. Once in government, and with the deciding vote from Liberal Senator Ian Wood who crossed the floor, the parliament was empowered to extract information from the executive in a way that they had never been able to do before. This is what inspires hope because, while old habits die hard, all these parliamentary blemishes can be easily remedied so that a government will be more susceptible to having information it wants concealed to be revealed. At a time when governments have become masters at managing information flows, such reforms are crucial — a stronger, more assertive and respectful parliament will enhance a government's performance which ultimately is what we all want. All it takes is a firm commitment by an opposition to seek a cultural change when they form government and the other sides of politics will be forced to comply or be left looking stupid carrying the bad habits of a bygone, weaker era of parliamentary supremacy. ▲

¹² Harry Evans 'My 40 years of Canberra Joy' in *Crikey* 24 July 2009.

Scott Hickie is a lawyer and a former policy and legislation adviser

Diminishing the efficacy of disallowance motions: quasi-legislation in state jurisdictions

Scott Hickie

Delegation is a fact of life. As much as they might like to micromanage the world, legislatures in highly developed market economies and technologically advanced societies cannot be omnipotent, ‘all seeing, all knowing’ entities. They inevitably have to delegate authority to either ‘Big Government Nanny States’ or ‘Tea Party-esque small government’ inspired executives who rely on delegated powers to extend¹ or retract² the tentacles of government influence. To prevent the legislature from handing the executive a blank cheque in the form of delegated legislation, the legislature must retain oversight and a veto — a simple exchange of ‘delegated authority’ for ‘oversight.’ With the introduction of innovative breeds of delegated instruments the compact between the executive and legislature — delegation for oversight — ceases its balancing function and gives rise to a potential shifting of legislative powers to the executive. This paper revisits the fears expressed about ‘quasi-legislation’ diminishing parliamentary oversight and examines whether state jurisdictions need to develop safeguards, similar to those enacted by the Legislative Instruments Act 2003 (Cth) (LIA), to manage quasi-legislation. To assess the need for reform, use of quasi-legislation such as codes, guidelines, directives and protocols within delegated legislation are examined and the question of whether such usage diminishes the effectiveness of parliamentary disallowance powers is posed.

Delegated legislation

When it comes to legislation the devil is always in the detail. That is not to say that delegated legislation³ is inherently evil, but sometimes the most inequitable, unjust laws and egregious affronts to basic civil rights can only be exercised when they are hidden in the fine print — the seemingly innocuous, mundane and everyday provisions of delegated legislation.⁴ Lord Hewart was one of the first to open fire against the incursions of delegated legislation with his 1929 book ‘*The New Despotism*.’⁵ He described delegated legislation as disrupting the roles demarcated by the separation of powers⁶ and undermining the democratic legitimacy of parliament by allowing zealous executives to overextend their administrative

mandate without sufficient parliamentary oversight.⁷ By all accounts, the rise and rise of delegated legislation,⁸ and its lesser-known cousin quasi-legislation,⁹ may suggest that Hewart's polemic did not convince history's legal minds of such tyrannical potential, with such laws becoming an indispensable element of modern governance.¹⁰ Australian parliaments have responded to the concern of executive overreach achieved through delegated legislation with the development of legislative safeguards such as publication and tabling requirements,¹¹ powers to disallow regulations,¹² preparation of Regulatory Impact Statements (RIS)¹³ and establishment of delegated legislation parliamentary review committees.¹⁴ However, in some jurisdictions increased use of quasi-legislation in the form of codes, guidelines and protocols has enabled executives to circumvent these traditional safeguards. With the introduction of the *Legislation Instruments Act 2003 (Cth)* (LIA) imbalance caused by quasi-legislation, between executive administration and parliamentary sovereignty, is largely prevented.¹⁵ Under the LIA most federal quasi-legislation is confronted with publication, tabling and disallowance provisions as instruments are subject to legislative safeguards based on their function¹⁶ not what the executive call them. Calling a regulation a code in the federal sphere will not allow the legislation to hide from parliamentary oversight.

In comparison the vast majority of state and territory jurisdictions continue to subject regulatory instruments to disallowance provisions based upon their name with the implication that creatively named instruments are immune from parliamentary oversight.¹⁷ If it is not your traditional, run of the mill regulation or ordinance then it is not disallowable. With the exception of Victoria,¹⁸ many states¹⁹ have not kept pace with important reforms delivered by the LIA²⁰ leaving parliaments hobbled when trying to oversee an ever-expanding palette of diverse quasi-legislative instruments. The full specter of this problem is evident where strong parliamentary majorities empower the executive to use non-disallowable quasi-legislation rather than disallowable instruments such as regulations. A more inconspicuous use of quasi-legislation is in regulations — the wolf in sheep's clothing. Where 'Skeleton Acts'²¹ shift the theatre of parliamentary policy battles and defer 'tough policy' questions to regulation, quasi-legislation becomes an important tool for the executive. The outsourcing of policy 'flesh' to regulation opens up the prospect for greater sub-delegation through quasi-legislation.²² In these circumstances states and territories who have not adopted LIA style reforms or extended traditional safeguards to 'Skeleton Regulations' and quasi-legislation may be leaving loopholes in parliamentary oversight.

The rationale for quasi-legislation

Why do we need quasi-legislation? For what purpose do executives deploy an ever expanding universe — some may say jungle²³ — of 'not quite legislation' such as codes of practice, guidelines, guidance notes, protocols, circulars, policy notes, practice statements, directives, codes of conduct, conventions . . . (and the list could go on, limited only by one's imagination)?²⁴ Over time parliaments have developed

theories for why certain content is placed in an act and other content is left to regulation.²⁵ Reduced to its simplest, acts are used to define principles and policy, whereas operational and administrative details are left to the regulations.²⁶ There are practical reasons for adopting this model. Parliaments may not have the time or technical capacity to comprehensively write every single piece of legislation. Delegation allows the departmental apparatus to operationalise the will of the parliament. In the same vein we may ask: what objectives are achieved by expanding the hierarchy of legislation to include quasi-legislation, which could not be achieved by more traditional forms of delegated legislation?

Quasi-legislation may have a legitimate role in facilitating the practical dimensions of regulatory harmonisation. Inter-jurisdiction consistency, particularly in policy areas that effect interstate trade and commerce, can be readily achieved by linking state regulations to centralised quasi-legislation produced by Commonwealth ministerial councils, Commonwealth departments or national industry peak bodies.²⁷ Similarly, the use of professional codes and standards can be used to shape due diligence requirements via parliament rather than leaving it to the judiciary. Providing guidance in these instruments may also avoid some of the complexities associated with industries understanding judicial precedents on due diligence. Regulation free from undue political interference or influence has also been raised as a reason why a non-governmental entity might be given powers to develop and publish quasi legislation²⁸ such as the use of self regulatory based codes of practice in the public broadcasting and media sphere.²⁹ Universities seeking to maintain academic freedom may make similar claims that quasi-legislation provides a buffer from political interference.³⁰ The most interesting and revealing use of quasi-legislation is in the context of public asset or service privatisation. Regardless of the economic rationales proffered, government privatisation programs have a tendency to deploy quasi-legislation in order to protect the public from the worst excesses of the free market³¹ without raising political risk alarm bells for investors. Cast in this light, quasi-legislation is painted as a regulatory halfway house, a lawmaking space where market/industry self-regulation is tempered by ‘big government interventionism’ or where co/self-regulatory approaches — that would otherwise be understood as ‘Dracula in charge of the blood bank’ — are legitimatised.

Problems posed by quasi-legislation

For all the legitimate and appropriate use of quasi legislation there remains a suspicion that sometimes its use is not always driven by the desire for regulatory effectiveness, particularly considering the problems of inconsistent and poor drafting³² and accessibility.³³ Quasi-legislation has historically presented real life challenges to those subject to regulation and those charged with interpreting law³⁴ raising difficult questions about how effective such regulation is. Beyond the practical deficiencies, there are more esoteric concerns pertaining to the potential reduction in parliamentary oversight resulting from quasi-legislation.

[I]t is a matter for real concern that government departments will knowingly seek to reduce a parliamentary committee's jurisdiction by adopting forms of statutory instrument that are not caught by the definition 'regulation' in the empowering Act.³⁵

Others have similarly questioned the motives of the executive and government departments³⁶ who rebrand laws in absence of pressure³⁷ to fulfill regulatory harmonisation, regulatory innovation or 'at arms length' regulation objectives. In this context, the use of quasi-legislation simply circumvents standardised requirements for publication, drafting, consultation and parliamentary disallowance. Executives may seek to insulate themselves from political risk³⁸ or challenge by substituting disallowable instruments with quasi-legislation³⁹ or by outsourcing regulatory content to quasi-legislation. Many state jurisdictions limit the power to disallow delegated legislation to traditional forms such as regulations or by-laws, meaning that other forms, such as quasi legislation, are given a free run.⁴⁰ For example in NSW the parliament's power to disallow delegated legislation is limited to statutory rules,⁴¹ which are defined as regulations, by-law, rule or ordinance made or confirmed by the Governor.⁴²

Two key questions with the use of quasi-legislation in regulations arise: does the presence of quasi-legislation reduce the efficacy of disallowance motions; and, does it allow regulatory change without parliamentary oversight?

Does it diminish the effectiveness of disallowance motion?

For situations where acts delegate lawmaking power through quasi-legislation rather than regulation, disallowance is rendered meaningless. In situations whereby regulations incorporate quasi-legislation the impact on disallowance varies. The issue of incorporation of quasi-legislation or external documents 'by reference' in regulations has been considered on a number of occasions by the courts.⁴³ Courts have been called upon to examine the validity of regulations that incorporate external material on the grounds of uncertainty and non-publication.⁴⁴ Walsh J in *Wright v TIL Services Pty Ltd*⁴⁵ proposed that incorporation of an external document did not render a regulation invalid on the ground of uncertainty as long as the external document was clearly identifiable and 'contained no ambiguity in its own terms'. While the judiciary has cause for concern with the practice in terms of citizens having access to the laws that govern their lives, quasi-legislation poses a different type of challenge for legislatures. Section 42(1) of the *Interpretation Act 1987* (NSW) provides that a regulation is within power even if it regulates by 'applying, adopting or incorporating, with or without modification the provisions of . . . any other publication' thereby giving the executive a broad mandate to control the form and structure of delegated legislation. Common empowering provisions such as the minister may 'make regulation', 'prescribe in regulation' and 'in regulation define' do not ensure all substantive content is numbered and detailed within the body of a statutory rule. The practical function of s 42(1) is to facilitate the application of quasi-legislation as law without integrating all the text into the regulation.

The implication of s 42(1) is that a single clause of a regulation that could be subject to disallowance, may in effect reference an expansive and complex quasi-legislation document containing ‘the good, the bad and the ugly’ of regulatory content. For example, sub-clauses 80A(a) — (f) of the *National Parks and Wildlife Regulation 2009* (NSW) makes reference to six different codes of practice and guidelines. Individual sub-clauses in the regulation can be disallowed but the effect of disallowing a sub-clause is the repeal of the complete referenced document, thereby removing useful as well as detrimental regulatory content. Most state jurisdictions provide for disallowance of any identifiable portion of a statutory rule.⁴⁶ The validity of disallowing individual portions of delegated legislation was considered in *Borthwick v Kerin*⁴⁷ after the Attorney-General and the Solicitor-General challenged the ability of the Senate to disallow individual export control orders contained in a single amending order. Ability to identify and disallow pinpointed portions of a statutory instrument prevents the disallowance of regulations from being an ‘all or nothing’ proposition.⁴⁸ Parliaments do not have to take the good with the bad and can repeal any numbered and identifiable provision.⁴⁹ Rules that require the disallowance of a regulation in whole can serve as a strong political disincentive against disallowance, no matter how repugnant the offending part, clause or sub-clause is.⁵⁰ Use of quasi-legislation in delegated legislation can reintroduce the ‘all or nothing’ problem. While some regulations fully incorporate numbered quasi-legislation into schedules⁵¹ others simply reference whole non-statutory regimes within a single clause. Consider the example of Part 3 of the *Coastal Protection Regulation 2011* (NSW) which would sit between these two extremes.

The *Coastal Protection Regulation 2011* is a good example of a skeleton regulation.⁵² If a parliamentarian sought to disallow a particular provision of the Code of Practice they would be faced with the situation whereby they could only disallow the whole clause, which means removing multiple chapters of the Code.

Even more problematic are regulations that do not directly reference quasi-legislation and instead create a power for the minister to publish quasi-legislation by order. For example the *Water Industry Competition (General) Regulation 2008* (NSW) provides for the establishment of a marketing code created by a ministerial order.⁵³ Similarly the *Mining Regulation 2010* (NSW) allows the minister to define by order activities that are not prospecting or mining for the purpose of the act.⁵⁴ This format further divorces the quasi-legislation from the parent regulation and means that quasi-legislation cannot be disallowed without removing the minister’s power to issue an order. From a practical point of view the minister may not even issue an order creating quasi-legislation until after window of opportunity to lodge a disallowance motion has closed.⁵⁵ Giving a minister the power to create quasi-legislation under regulation from time to time, after the close of the disallowance window, highlights the point that this legislative format also suffers from the same problem as quasi-legislation that is not ‘date stamped’. The minister can repeatedly vary content without amending the principal regulation.

Part 3 — Requirements relating to emergency coastal protection works

7 Requirements for placement of material as emergency coastal protection works

For the purposes of section 55P of the Act, the requirements set out in Parts 1 and 2 of the Code of Practice relating to the placement of material as emergency coastal protection works are specified.

8 Requirements for maintenance of emergency coastal protection works

For the purposes of section 55R of the Act, the requirements set out in Parts 1 and 3 of the Code of Practice relating to the maintenance of emergency coastal protection works are specified.

9 Requirements for removal of emergency coastal protection works and restoration of land

For the purposes of section 55Y (1) of the Act, the requirements set out in Parts 1 and 4 of the Code of Practice are specified.

10 Requirements for restoration of land in compliance with order to remove certain materials and structures unlawfully placed on beaches

For the purposes of section 55ZA (3) (b) of the Act, the requirements set out in Part 5 of the Code of Practice are specified.

11 Requirements for restoration of land in compliance with order relating to emergency coastal protection works

For the purposes of section 55ZC (5) (b) of the Act, the requirements set out in Part 4 of the Code of Practice are specified.

Does quasi-legislation allow greater malleability of regulations without a corresponding parliamentary oversight?

Parliaments have a degree of oversight into variation or amendment of delegated legislation. Executives cannot just unilaterally change laws or regulations without parliamentary oversight. Creation of an amending regulation opens up the opportunity for parliaments to disallow amendments. However, what if the content of a regulation could be amended or varied without creating an amending regulation and opening up disallowance powers? Quasi-legislation has the potential to create an additional platform for alteration or variation of content without enacting an amending regulation — the skeleton is the same, just a change of clothes. This concern is aptly demonstrated by the Commonwealth *Senate Standing Committee on Regulations and Ordinances* in its analysis of the *Airports (Environment Protection) Regulation 1997 (Cth)*. The regulation made reference to a number of environmental testing methods to be applied in fulfilling the Act, which is an external standard established from ‘time to time’ by the US Environmental Protection Agency (USEPA).⁵⁶ This outsourced a substantive, operational element of the regulation to an agency outside of the Australian jurisdiction that could be continually altered without parliamentary review.⁵⁷ The Senate Committee found the USEPA standards were not identified (or frozen) at a particular point in time

meaning they contravened a provision of the *Acts Interpretation Act 1901 (Cth)* and exceeded power.⁵⁸ Executive or third party legislative change by stealth is avoided by 'date stamping' quasi-legislation referenced in delegated legislation.

In NSW, which is not unique in its use of quasi-legislation, a range of regulations similarly reference external documents. The *Native Vegetations Regulation 2005* (NSW) uses two highly detailed and comprehensive quasi-legislation documents, an Assessment Methodology⁵⁹ and Code of Practice⁶⁰ to regulate operational and policy elements of native vegetation management. In this case the potential for continued departmental or executive amendment after the closure of the disallowance period of 15 sitting days is avoided through an act specific procedure for amendment of quasi-legislative documents. Clauses 26(1)(c) and 29D(1)(c) require regulatory amendment of definitions before amendments to these referenced documents can take effect.⁶¹ For example, if the minister sought to make a rewrite of the Private Native Forestry (PNF) Code of Practice the changes would not come into effect until an amendment regulation was enacted to update the definition of 'PNF Code of Practice'. Through this process, the changes made to the non-statutory document are put into a regulatory form and can be subject to disallowance.⁶² A similar point could be made in relation to the *Coastal Protection Regulation 2011* whereby the definition of the Code of Practice is defined at a particular point in time and published on a particular date.⁶³ In these circumstances 'date stamping' quasi-legislation referenced in regulations prevents the executive from making changes to quasi-legislation that are not subject to the oversight of parliament. It also provides an important safeguard against continual executive amendment of regulations after the window for parliamentary disallowance has lapsed.

Despite these examples and the practice of date stamping quasi-legislation being generally required under Section 69 of the *Interpretation Act* (NSW), it is not always applied. An Assessment Methodology central to the operation of the *Threatened Species Conservation (Biodiversity Banking) Regulation 2008* (NSW) is not 'date stamped'.⁶⁴ While the regulation does create specific procedures for amendment, variation or revocation of a 'biobanking methodology'⁶⁵ including public consultation and departmental review, the methodology can be altered without creating an amending regulation. While s 69(1) Interpretation Act (NSW) requires the reference to quasi legislation to be fixed or in force at a particular time, s 69(2) allows a publication to be incorporated into a statutory instrument from 'time to time' if such an intention is expressed in the parent act. This, in turn, means empowering provisions can be structured by parliament to avoid the requirement of date stamping. An examination of NSW acts with authorisations under s69(2) raises the question of whether there has been sufficient and consistent parliamentary consideration of empowering such a practice. Acts such as the *Children and Young Persons (Care and Protection) Act 1998*,⁶⁶ *Local Government Act 1993* (NSW),⁶⁷ *Work Health and Safety Act 2011* (NSW),⁶⁸ *Fisheries Management Act 1994* (NSW)⁶⁹ and the *Ports and Marine Administration Act 1995*⁷⁰ are some of the examples of acts authorising variation of quasi-legislation in regulations from time to time without exposing the regulation to disallowance. Notwithstanding the

arguments for particular regimes to create such discretion, there should be a presumption that all variation of quasi legislation should be subject to parliamentary oversight unless it can be demonstrated that it not of a policy or legislative character.

Improving oversight of quasi-legislation in statutory instruments

State jurisdictions need to consider how to preserve the effectiveness of parliamentary disallowance as quasi-legislation is playing a greater role in the regulatory toolbox. How can equilibrium between parliamentary and executive function be maintained if the executive retains discretion to mould regulation into a form that reduces parliamentary oversight? The LIA approach of exposing instruments to parliamentary safeguards based on their 'legislative character' has a stronger capacity to sort out which laws are legislative and which are pure administrative, enabling a principled approach to balancing parliamentary and executive roles.⁷¹ The inherent logic of this approach makes a strong case for state jurisdictions to build elements of the LIA into their own subordinate legislation and interpretation acts. The alternative to LIA inspired reform is targeted amendments to address the problems quasi-legislation causes for disallowance powers. Date stamping all quasi-legislation referenced in regulations will prevent variation without parliamentary oversight or potential disallowance. To ensure universal 'date stamping's 69(2) of the *Interpretation Act 1987* (NSW) and any empowering provisions allowing for quasi instruments to be incorporated '*from time to time*' could be repealed. Full incorporation of quasi-legislation content into regulation schedules is a simple solution to the concealment of regulatory content in referenced material. Already a substantial number of codes of conduct are incorporated into schedules of regulations. Amendment to s 42 of the *Interpretation Act* requiring all 'publications or other material' to be incorporated into the schedule of the principal regulation or instrument would greatly improve the quality of quasi-legislation drafting and open up all elements of quasi-legislation to disallowance, removing the 'all or nothing' proposition. The counter argument is that the drafting flexibility obtained through simply referencing quasi-legislation would be lost if it needed to conform to regulatory drafting standards. Continuance of non-conforming, inconsistent and often poorly drafted quasi-legislation for departmental convenience is not, however, a convincing justification for avoiding full regulatory incorporation. The middle ground would be to allow amendment, not just repeal of regulations under a disallowance motion similar to the disallowance power in Western Australia. In this way, exemptions to particular provision in quasi legislation could be inserted by way of amendment into the regulation.⁷²

Both these suggestions are not without their problems and challenges. Broader reform, consistent with the LIA, will allow state jurisdictions to deal with quasi-legislation in a more holistic way and have an approach that accurately reflects the balance that needs to be struck between the respective roles of the legislature and the executive. ▲

Appendix A

State	Ambit of delegated legislation definition	Scope of Disallowance Provisions	Rules of Incorporation by Reference for Quasi-legislation
<i>Victoria</i>	Statutory Rule ⁷³ and Legislative Instrument ⁷⁴ — Sections 4 and 4A respectively of the Subordinate Legislation Act 1994 (Vic)	Statutory Rule and Legislative Instrument — Sections 23 and 25C respectively of the Subordinate Legislation Act 1994 (Vic) ⁷⁵	As in force or 'from time to time' with special notification and tabling requirements — Section 32(3) &(4) Interpretation of Legislation Act 1984
<i>Queensland</i>	Subordinate Legislation ⁷⁶ — Section 9 Statutory Instrument Act 2001 (Qld)	Subordinate Legislation — Section 50 Statutory Instrument Act 2001 (Qld)	'As in force' or 'from time to time' — Section 23 Statutory Instruments Act 1992.
<i>Tasmania</i>	Subordinate Legislation ⁷⁷ — Section 3(1) Subordinate Legislation Act 1992	Regulations ⁷⁸ — Section 47(4) Acts Interpretation Act 1931	No provisions applicable.
<i>Western Australia</i>	Subsidiary Legislation ⁷⁹ — Section 5 <i>Interpretation Act 1984</i> (WA)	Regulations ⁸⁰ — Section 42(2) Interpretation Act 1984 (WA)	'From time to time' — Section 43(8) Interpretation Act 1984
<i>South Australia</i>	Regulation ⁸¹ — Section 4 Subordinate Legislation Act 1978 (SA)	Regulation — Section 10 (5a) & (5b) Subordinate Legislation Act 1978 (SA)	'As in force' — Section 40 — Acts Interpretation Act 1915
<i>New South Wales</i>	Statutory Rule ⁸² — Section 3(1) Subordinate Legislation Act 1989 (NSW)	Statutory Rule — Section 41(1) Interpretation Act 1987(NSW)	'As in force' or if intention expressed in principal Act 'from time to time' — Section 69(1) &(2) <i>Interpretation Act</i> (NSW)
<i>Australia Capital Territory</i>	Subordinate Law ⁸³ or Disallowable Instrument ⁸⁴ — Section 8 and 9 respectively Legislation Act 2001 (ACT)	Subordinate Law or Disallowable Instrument — Section 65 Legislation Act 2001 (ACT)	'As in force' or if intention expressed in principal Act 'from time to time' — Section 47 Legislation Act 2001 (ACT)
<i>Northern Territory</i>	Subordinate Legislation ⁸⁵ — Section 17 <i>Interpretation Act</i> (NT)	Subordinate Legislation — Section 63(9) Interpretation Act (NT)	As in force — Section 66(b) Interpretation Act (NT)

Endnotes

- ¹ See Aronson, Mark. 'The Great Depression, This Depression, and Administrative Law' (2009) 37 *Federal Law Review* 165 for a discussion of the use of delegated legislation and administrative law in the context of social or economic crisis such as the Great Depression, the New Deal, privatisation programs and the global financial crisis. Aronson appears to be suggesting that the current 'economic crisis' will result in an expansion of state activity and regulatory intervention. See particularly 179–85.
- ² On the contrary Klein would argue that economic or social crisis create a necessary precondition for the imposition of neo-liberal economic structures that are more in line with libertarian principles of 'small government. Klein argues that the post –11 Bush Government pursued a 'Corporatists State' whereby key government functions were outsourced. See Klein, Naomi, *The Shock Doctrine: The Rise of Disaster Capitalism* (2007) New York, Metropolitan Books at Chapter 14 & 15.
- ³ Delegated Legislation is common described as law made by the executive branch of government with the authorisation of parliament. References in this paper to 'delegated legislation' should be interpreted as a reference to regulatory instruments created pursuant to direct delegation from parliament and which are subject to the full range of common legislative safeguards and subordinate legislation requirements such as regulations, rules, by laws and ordinances.
- ⁴ In terms of Australia's history with delegated legislation the *Transport Workers Act 1928–1929 (Cth)* which gave the Governor-General wholesale powers to create laws regarding transport workers remains an example of the impact delegated legislation can have on rights. The wide power conferred allowed the government to make regulations that in effect prohibited the employment at Australian ports of people who did not belong to the Waterside Workers' Federation. The question of whether section 3 was ultra vires was tested in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan* (1931) 46 CLR 73. Parliament in the same year disallowed the *Transport Workers (Waterside) Regulations*. The validity of the disallowance was tested in *Dignan v Australian Steamships Pty Ltd* (1931) 45 CLR 188. For an outline of the use of quasi-legislation in the United Kingdom in relation to industrial relations (codes on picketing and closed shop) and social security administration see Ganz, Gabriele. 'Quasi Law' in Third Commonwealth Conference on Delegated Legislation (1989) London, HMSO (Record of Proceedings) at 20–21.
- ⁵ Lord G Hewart, *The New Despotism* (Benn, London, UK, 1929). In response to the Chief Justice of England and Wales and his claims of delegated legislation producing despotic power whereby government departments placed themselves above parliament and the courts the United Kingdom set up the Donoughmore Committee. The Committee laid the foundation for the justification of delegated legislation much of which is still relevant. See also Morris, Caroline and Malone, Ryan. 'Regulations Review in the New Zealand Parliament' (2004) 4 *Macquarie Law Journal* 7 at 9.
- ⁶ Phrasing it in these terms one could assume we have moved on from an absolute and strict separation of powers doctrine and accepted the practicalities of modern government and the extensive use of delegated legislation, which with appropriate safeguards still conforms to the underlying spirit of the separation of powers. Morris & Malone above n 5 at 8.
- ⁷ In debates after the publication of Hewart's book, some tailored the fear of excessive and overbearing executives to the political fears of the 1930–1950s. Some participating in the debate about delegated legislation suggested that delegated legislation configured the administrative state to be a Trojan Horse for socialism. Aronson above n 1 at 170 citing

Michael Taggart, 'From 'Parliamentary Powers' to Privatization: the Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 *University of Toronto Law Journal* 575, 590–600.

- ⁸ In the Federal Parliament disallowable instruments have grown from 855 in 1985–86 to 2983 in 2007–08. The biggest increase between 2004 to 2005 (1561 to 2432) can be explained by the introduction of the Legislative Instruments Act 2003. See *Odgers' Australian Senate Practice* (2008) (ed.) Evans, Harry, 12th edn, Australia. Parliament. Department of the Senate at 327. See also Pearce, Dennis & Argument, Stephen. 'Delegated Legislation in Australia' (2005), LexisNexis Butterworths, 3rd edn, at 9–10, which breaks down the increasing diversity of instruments between 1988–89 and 2003–04. In NSW during 2007 408 statutory rules were tabled compared to 99 Bills. The proportion of statutory rules to Bills has remained at the ratio for five years. See Lovelock, Lynn & Evans, John. 'New South Wales Legislative Council Practice' (2008) Federation Press, Sydney at 423 & footnote 4. For a broad comparative see Berg, Chris. 'Policy without Parliament: the growth of regulation in Australia' (November 2007) 19(3) Institute of Public Affairs (Chart 9 and 10 only) as the methodology of measuring regulatory intervention in terms of page volume can be misleading.
- ⁹ The term quasi-legislation was first used by Megarry in Megarry, R E, 'Administrative quasi-legislation' (1944) 60 *Law Quarterly Review* 125. There is no doubt that Megarry had in mind a particular type of legislation made by administrative bodies. As acknowledged by Ganz, quasi-legislation is not a term of art. Definition is contested particularly because it is an ever expanding and changing field of regulation. Parliaments and departments are constant creating new labels and formats for the presentation of rules. See Ganz above n 4 at 20. For the purpose of the paper quasi-legislation includes but is not limited to instruments such as codes, guidelines, protocols, directives, policy directives, instructions, policy, standards, notices, orders or frameworks.
- ¹⁰ It may be argued that the demand for delegation of power in parliamentary systems are driven by a more general need for general principles laid down to be practically implemented through the administrative operations of government. In this sense delegated power is not a specific feature of advanced, modern economies and is inherent dimension of political systems. See *Baxter v Ah Way* 1910 8 CLR 626 for the High Court's rational of delegating authority through subordinate legislation as discussed in Odgers above n 8 at 325.
- ¹¹ For example see Section 38 of the *Legislative Instruments Act 2003* (Cth) which requires all legislative instruments to be tabled before each House within six sitting days after registration. State jurisdictions also have tabling requirements for delegated legislation.
- ¹² See Section 42(1) of the *Legislative Instruments Act 2003* (Cth). See also Section 41 *Interpretation Act 1987* (NSW)
- ¹³ Many Commonwealth jurisdictions make provision for Regulatory Impact Statements (RIS) although requirements and content can vary significantly across jurisdiction. The concept of RIS is to "force policy makers to consult, and to work through a sequential process of articulating the problem, assessing a range of options, recommending the best option and explaining why other options are not as good." See Banks, Gary. 'Challenges for Australia in Regulatory Reform' (2001) Regulation Reform Management and Scrutiny of Legislation Conference, Sydney, New South Wales. See also Office of Best Practice Regulation details on Regulatory Impact Statements accessed at <http://www.finance.gov.au/obpr/ris/index.html> on 23/09/2011.

- ¹⁴ Pearce & Argument above n 8 at 10, which outlines the detail of relevant State, delegated legislation review committees. See also Argument, Stephen, *'Apples and Oranges: Comparison of the Work of Various Australian Delegated Legislation Committees'* (1999) 21 *Australian Institute of Administrative Law Forum* 37. In the NSW context the joint Legislative Review Committee is empowered to review statutory rules. See Lovelock & Evans above n 8 at 437–41.
- ¹⁵ Pearce, Dennis. *'Rules, Regulations and Red Tape: Parliamentary scrutiny of delegated legislation'* (25 June 2004) Presented Senate Occasional Lecture Series at Parliament House at 89. Accessed at <http://www.aph.gov.au/senate/pubs/pops/pop42/pearce.pdf> on 23/09/2011.
- ¹⁶ See section 5 *Legislative Instruments Act 2003* (LIA) for the definition of 'legislative instrument'. The definition of 'legislative instrument' is an instrument in writing that is of a legislative character. See s 5(1)(a) LIA.
- ¹⁷ Generally definitions of 'statutory rules' or 'regulations' or 'subordinate legislation' are restricted to a very limited class of instruments although there are a multitude of exceptions in a number of jurisdictions. See *'Subordinate Legislation Act 1978* (SA) Section 4 (regulation); *Subordinate Legislation Act 1992* (Tas) Section 3(1) (subordinate legislation); *Interpretation Act* (WA) Section 5 (subsidiary legislation), *Statutory Instruments Act 1992* (Qld) Section 8 (statutory rule); *Subordinate Legislation Act 1989* (NSW), Section 3 (statutory rule); *Interpretation Act* (NT) Section 61 (regulations). For the full listing and detail see Appendix A.
- ¹⁸ The *Subordinate Legislation Amendment Act 2010* (VIC) provides for the classing and exemption of instruments as statutory rules (Section 4) or legislative instruments (Section 4A) through regulation (*Subordinate Legislation (Legislative Instruments) Regulation 2011* (VIC)). Legislative instruments are subject to a parallel process of analysis, public consultation and scrutiny through the regulatory impact statement (RIS) process if the legislative instrument imposes a significant economic or social burden. While the amendments may ensure a more holistic examination of quasi-legislation instruments in the form of RIS the continuing limitations on disallowance in the Victorian legislation undermine the reform to some degree.
- ¹⁹ It should be noted that the states and territories have varying approaches to delegated legislation and in particular quasi-legislation with some having more developed systems and driving greater reform. Some jurisdictions have a greater capacity to manage threats to parliamentary oversight by quasi-legislation. Victoria and Queensland from a comparative perspective have frameworks geared to deal more thoroughly with quasi-legislation when compared to New South Wales, South Australia and Tasmania. However, the majority of jurisdictions have individual and unique deficiencies in dealing with quasi-legislation. Appendix A (at the end of the paper) sets out the definition of delegated legislation in each jurisdiction (identifying what each definition includes) and the instruments within the definition to which disallowance motions/provisions apply. In some jurisdictions it is clear that certain types of delegated/quasi-legislation is not subject to disallowance meaning there is an inconsistency between what is considered delegated legislation and the type of delegated legislation exposed to disallowance. For example WA's definition of subsidiary legislation encompasses more instruments than other jurisdiction however only regulations are subject to disallowance. In other jurisdiction there is consistency between definitions and what is disallowed for example NSW where all instruments listed as statutory rules and disallowable.

- ²⁰ See Pearce and Argument, above n 8 at 111 that provides a general endorsement of State jurisdictions addressing the issue of quasi-legislation ‘head on’ through reform that focuses on subjecting instruments that have legislative effect to the same safeguards traditional forms of delegated legislation are subject to.
- ²¹ For an up to date discussion about recent debate on Skeleton Acts see Argument, Stephen. “‘Leaving it to the Regs’ — *The pros and cons of dealing with issues in subordinate legislation.*” (2011) Australasian Drafting Conference, Adelaide. Accessed at <http://www.pcc.gov.au/pccconf/papers/Stephen%20Argument%20-%20Leaving%20it%20to%20the%20Regs.pdf> on 23/09/2011.
- ²² The concept behind this statement is that an empowering provision in a Bill allows the legislature to shape the nature of delegation. However, the legislature has little control over additional sub-delegation under regulation.
- ²³ See Ganz above n 4 at 20 in reference to the findings of the Committee on Ministers’ Powers (1932) which famously stated of delegated legislation in the United Kingdom; ‘*The most scientific explorer cannot make a map out of a jungle*’
- ²⁴ See the list provided by Ganz above n 4 at 20.
- ²⁵ For a broader discussion and critique of traditional justifications for delegated legislation see generally Argument above n 21. Note particularly the discussion of the *Carbon Credits (Carbon Farming Initiative) Bill 2011* at and at 8–10.
- ²⁶ See Senator Chris Evan’s explanation of this in the context of the *Carbon Credits (Carbon Farming Initiative) Bill 2011*. Senate, *Hansard*, 5 July 2011, at page 89: “[t]he reality of the way legislation works is that we get the framework of the legislation and then we move to regulations or other things that implement that broad legislation. People always want all the detail when, in fact, that is not the way the legislative process works.”
- ²⁷ For example national and international wide codes of practice or standards such as the *Agricultural and Veterinary Chemicals Code* (Agvet Code) and the *Australia New Zealand Food Standards Code* are referenced or incorporated into State based regulation.
- ²⁸ See Burrows, John. ‘*Legislation: Primary, Secondary and Tertiary*’ (2011) 42 *Victoria University of Wellington Law Review* 65 at 71–73
- ²⁹ The link between the themes of press freedom and self-regulation are a common feature of the media regulation debate. Some commentators directly link press freedom as only achievable under self-regulation models, suggesting direct or co-regulatory models will allow government interference in the media. For example see Berg, Chris. ‘*Have the media watchers undermined press freedom?*’ (20 September 2011) accessed at <http://www.abc.net.au/unleashed/2907894.html> on 23/09/2011. For a broader discussion on media regulation models see also Senate Select Committee on Information Technologies. ‘*In the Public Interest: Monitoring Australia’s media*’ (April 2000) Commonwealth of Australia at Chapter 1.
- ³⁰ See Burrows above n 28 at 71–73. The degree to which parliaments actually refrain from entering into the internal politics of universities is debated. See *University of Sydney Amendment By-law 2001* disallowance motion moved in the NSW Legislative Council — *LC Minutes* (6/6/2001) 1009–1010.
- ³¹ Burrow above n 28 at 72.
- ³² Quasi-legislation is often drafted by departments or agencies who do not necessarily conform to the rules and procedures applied by centralized drafting agencies such as Parliamentary Counsel Offices or Attorney General’s Department. Specifically there may be a lack of numbering, dating and logical expression of rules. See Argument, Stephen.

'*Parliamentary Scrutiny of Quasi-legislation*' (May 1992) Papers on Parliament No. 15 at 23.

- ³³ The problem with accessibility relates to a number of problems. Navigating the expanding universe of statutory instruments and quasi-legislation has become increasingly difficult due to the magnitude of expansion seen in this area of delegated legislation. A specific problem with accessibility is the reference and incorporation of Australian Standards (AS) into delegated legislation whereby access to AS can be cost prohibitive. See Legislative Instruments Act Review Committee '2008 Review of the Legislative Instruments Act 2003' (2009) Commonwealth Attorney-General's Department at 29–30. See also Interdepartmental Committee on Quasi-Regulation Report '*Grey Letter Law*' (December 1997) at xvi. However it should be noted that the Register of legislative instruments at the Federal level has greatly improved recording and access to these instruments.
- ³⁴ *Blackpool Corporation v Locker* [1948] 1 KB 349 at 361–62 per Lord Justice Scott. Lord Justice Scott points out that the rule of law may be broken down by the average citizen remaining ignorant of rights conferred in 'secret' or in unpublished delegated legislation. See also *Watson v Lee* (1979) 155 CLR 374 at 394.
- ³⁵ Wiese, Robert. 'A regulation by any other name' (22 May 1991) Third Conference of Australian Delegated Legislation Committees, Perth at 1
- ³⁶ See O'Keeffe, Peter. 'Who is Watching the Regulators' (October 1989) 58 Business Council Bulletin 32 at 35 and Lord Justice Scott in *Blackpool Corporation v Locker* [1948] 1 KB 349, at 368 both cited in Argument, Stephen. '*Parliamentary Scrutiny of Quasi-legislation*' (May 1992) Papers on Parliament No. 15
- ³⁷ The evolution of RIS is part of a greater government emphasis on examining regulatory choice and evaluating different modes of regulation. Pressure for smarter and more efficient regulation comes from a range of stakeholders. In the context of quasi-legislation there are pressures both from government and business stakeholders to cut red/green tape and make regulation more effective. See Holmes, S. (1997) *Some Lessons from the Use of Environmental Quasi-Regulation in North America*, Office of Regulation Review Staff Working Paper, Office of Regulation Review, Industry Commission, Canberra at 1 for a introduction to some of the drivers of quasi-legislation use in the context of natural resource and environment management.
- ³⁸ Political risk is a prevalent concern in private public partnerships and privatisation processes. Investors and businesses want certainty in contractual arrangements with a Government leading to situations where potential for parliamentary challenge of executive actions are removed. For example in NSW the Acts authorising the privatization of NSW Lotteries and waste services included provisions that made regulations enabled under the respective Acts exempt from been a statutory rule. See Schedule 4 Clause 33 and 34.
- ³⁹ Section 7A of the *Gene Technology (GM Crop Moratorium) Act 2003(NSW)* involves the use of a non-statutory instruments to achieve what may be interpreted as a policy determination that should be made by parliament. Under the section the Minister can issue an order, not subject to disallowance by parliament, to allow an exemption from a State wide moratorium on genetically modified food plants for a class or breed of GM food plants (such as canola or wheat) based upon voluntary industry protocols. Section 7A is even more problematic due to the insertion of a privative clause which prevents any judicial review of any Ministerial order. For the discussions on the validity of privative clauses both at Commonwealth and New South Wales see *Plaintiff S157/2002 v Commonwealth of Australia* (2001) 211 CLR 476 and *Kirk v Industrial Relations*

Commission of New South Wales [2010] HCA 1. See also Ng, Gerald. 'Slaying the Ghost of Henry VIII: A reconsideration of the limits upon the delegation of commonwealth legislative power.' (2010) 38 Federal Law Review 205 at 206–210

⁴⁰ For a full comparative list of disallowance provisions in different jurisdictions see Appendix A.

⁴¹ Section 41(1) *Interpretation Act 1987*(NSW)

⁴² Section 21 *Interpretation Act 1987*(NSW) and Section 3 Subordinate Legislation Act 1989 (NSW) noting statutory rules identified in Schedule 4.

⁴³ See *McDevitt v McArthur* (1919) 15 Tas LR 6, *O'Keefe v City of Caulfield* [1945] VLR 227, *McIver v Allen* (1943) 43 SR (NSW) 266 all been cases where the invalidity of incorporating material into legislation was upheld. See *Wright v TIL Services Pty Ltd* (1956) 56 SR (NSW) 413, *Dainford Ltd v Smith* (1985) 115 CLR 342 and *Dorfler v Pine River Shire Council* [1994] 1 Qd R 507 which support the validity of incorporation. For a discussion of this case law see Pearce & Argument above n 8 at 300–307

⁴⁴ Both *Arnold v Hunt* (1943) 67 CLR 429 and *McIver v Allen* (1943) 43 SR (NSW) 266 dealt with a price list incorporated by reference under national security legislation whereby there was an issue relating to publication. The price list was only available to members of the United Licensed Victuallers Association. See Pearce & Argument above n 8 at 301

⁴⁵ (1956) 56 SR (NSW) 413 at 421–22

⁴⁶ Section 41(6) *Interpretation Act 1987* (NSW)

⁴⁷ 87 ALR 527

⁴⁸ There have been examples in the Senate whereby movers of disallowance motions have withdrawn motions as they could not pinpoint or disentangle inappropriate provisions from particular regulations. See Odgers above n 8 at 332.

⁴⁹ There is even greater flexibility in ACT and WA with parliaments not only having the ability to repeal delegated legislation but an additional ability to amend regulations. See Section 42(3)–(4) *Interpretation Act 1984* (WA) and Section 68 *Legislation Act 2001* (ACT)

⁵⁰ Odgers above n 8 at 332.

⁵¹ *Plantations and Reafforestation (Code) Regulations 2001* utilises a code as the basis of regulation yet inserts the full code (numbered) into the Appendix of the Regulation. The *Housing Regulation 2009* adopts a regulatory code in a similar way by placing the full code in the Schedule of the regulation. In both contexts the full regulatory code is numbered within the Schedule allowing key provisions to be pinpointed for potential disallowance. See also *Animal Research Regulations 2010* Clause 4 and Schedule 1 and *Children and Young Persons (Care and Protection)(Child Employment) Regulation 2010*. See also the *Veterinary Practice Regulation 2006* that inserts the Code of Practice in Schedule 2 of the Regulation and each provision of the Code is numbered.

⁵² However it is not necessarily representative of the form in which quasi-legislation is used in Regulations.

⁵³ Clause 26

⁵⁴ Clause 13

⁵⁵ In NSW (other state jurisdictions have similar procedures) a parliamentarian can lay the disallowance motion before the House with the 15 sitting days after the tabling of a regulation in parliament. After 15 sitting days have lapsed since the tabling of a

regulation, neither House can disallow the regulation or any part of it. There are obvious difficulties where a minister does not publish quasi-legislation within the 15 sitting day timeframe or intentionally waits until after the 15 day period has expired. The only way to deal with this situation would be to lay a disallowance motion before the house that simply repeals the power of the minister to publish quasi-legislation and leave the motion dormant until the code is published under an order.

⁵⁶ Clause 1.08 *Airports (Environment Protection) Regulation 1997 (Cth)*

⁵⁷ At the time Section 49A of the Acts Interpretation Act 1901 was in force which allowed the incorporation of materials other than Acts and Regulations but only as they existed at a particular time. Section 46AA of the Acts Interpretation Act 1901 now deals with incorporation of publications in non-legislative instruments. See also LIA section 14.

⁵⁸ See Allars, Margaret. 'A Critique of Criteria and Cases: Parliamentary Scrutiny of Acts, Regulations and Codes.' in Seventh Australasian and Pacific Conference on Delegated Legislation (22 July 1999) at 105

⁵⁹ Native Vegetation Regulation 2005 Part 5 (Clause 24)

⁶⁰ Native Vegetation Regulation 2005 Part 5A (Clause 29A)

⁶¹ For example see *Native Vegetation Amendment (Assessment Methodology) Regulation 2010* that amends the Clause 24 by inserting a new date. For a full list of Assessment Methodology revisions see Native Vegetation Regulation 2005 (Notes). However, it should be noted that there is Ministerial scope for changes to the application of the Assessment Methodology and the application of the PNF Code of Practice. See Clause 27–29 and 29C. There may be arguments for and against flexibility in the applicability of these non-statutory documents.

⁶² Disallowing a regulation that changes the definition of a non-statutory document in order to disallow the overall code or methodology may not be a particularly efficient or effective approach to disallowance.

⁶³ See Clause 3(1); In this Regulation: "Code of Practice" means the document entitled *Code of Practice under the Coastal Protection Act 1979* published by the Department in March 2011.

⁶⁴ See definitions in Clause 2 *Threatened Species Conservation (Biodiversity Banking) Regulation 2008(NSW)*

⁶⁵ Clause 5 to 10 *Threatened Species Conservation (Biodiversity Banking) Regulation 2008(NSW)*

⁶⁶ Section 264(3)

⁶⁷ Section 748(5)

⁶⁸ Section 276(3)

⁶⁹ Section 289(3)

⁷⁰ Section 110(3)

⁷¹ See Argument, Stephen. 'Legislative Scrutiny in a Time of Rights Awareness' (March 2005) Ninth Australasian and Pacific Conference on Delegated Legislation & Sixth Australasian and Pacific Conference on the Scrutiny of Bills at 7. See also Giles, Patricia. 'Scrutiny of Federal Quasi Legislation in Australia' (1989) Third Commonwealth Conference on Delegated Legislation (1989) London, HMSO (Record of Proceedings) in relation to distinction between administrative vs legislative character.

⁷² This practice is sometimes adopted in relation to incorporation by reference of Commonwealth based documents or instruments in State regulation. Individual States

may provide some exemptions or turn specific provisions off to tailor the application to their State jurisdiction.

⁷³ Under Section 4 the Governor in Council may make regulations prescribing instruments to be statutory rules. Prior to the Subordinate Legislation Amendment Act 2010 section 3 defined statutory rules, which primarily included regulations, rules and any instruments deemed to be statutory rules.

⁷⁴ These are prescribed on an act-by-act basis in the Subordinate Legislation (Legislative Instruments) Regulation 2011 (Vic).

⁷⁵ It is important to note that there is no general power of disallowance in Victorian parliament. A statutory rule or legislative instrument are only disallowable if they meet the preconditions under s 23 and 25C respectively which only allow disallowance if the authorising act make the delegated legislation subject to disallowance, the Scrutiny Committee has recommend disallowance there was a failure laying the rule before parliament and the Scrutiny Committee has reported the failure.

⁷⁶ This includes statutory rule that is a regulation, rule, by-law, ordinance or statute; a statutory rule that is an order in council or proclamation of a legislative character; any statutory instrument (including an order in council or proclamation) that is declared to be subordinate legislation by an Act or a regulation made under this Act. Note Section 9(2) provided for instruments to be exempted and listed in Schedule 1A.

⁷⁷ This includes regulations, rule or by-law and any other instrument of a legislative character that is made under the authority of an Act and declared by the Treasurer under subsection (2) to be subordinate legislation for the purposes of this Act.

⁷⁸ This includes rule or by law. See Section 2A *Acts Interpretation Act 1931* (Tas)

⁷⁹ This includes proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument, made under any written law and having *legislative effect*.

⁸⁰ This included includes rules, local laws and by-laws. See Section 42(8)(b).

⁸¹ This includes regulation, rule or by-law made under an Act. Do note that Section 9 of the Subordinate Legislation Act 1978 does enable the Governor to declare by proclamation that any provision of the Act apply to 'any enactment of a legislative character made pursuant to any Act.

⁸² This included regulation, by-law, rule or ordinance excluding instruments specified in Schedule 4.

⁸³ This includes regulation, rule or by-law (whether or not legislative in nature)

⁸⁴ This includes a statutory instrument (whether or not legislative in nature) that is declared to be a disallowable instrument by an act, subordinate law or another disallowable instrument or a determination of fees or charges by a minister under an act or subordinate law. A statutory instrument is defined under Section 13.

⁸⁵ This includes regulations, rules or by-laws or statutory instruments (meaning an instrument of legislative or administrative character) subject to procedures in Section 63.

**AUSTRALASIAN STUDY OF PARLIAMENT GROUP
CONFERENCE 2011 —
THE EXECUTIVE VERSUS THE PARLIAMENT:
WHO WINS?**

*The effects of non-government controlled
upper houses on restraining the executive*

Katrin Steinack is a Research Fellow in the Faculty of Business and Economics at Monash University

The impact of multi-party government on parliament-executive relations — examples from Britain and Germany^{*}

Katrin Steinack

This paper deals with common concerns about multi-party and minority-governments, in particular, that they are unstable, that there is no clear string of delegation, that they may facilitate a dictatorship of the smaller party, and that they limit the parliament's scope to take the executive to account. It addresses the effect multi-party government has on parliament–executive relations by looking at empirical data from the United Kingdom and Germany, and takes account of the mechanisms used and experiences obtained in these countries when setting up and maintaining multi-party government.

In Britain, with its Westminster influence, parliamentarians in the devolved assemblies in Scotland and Wales have grown slowly accustomed to coalition and minority government. Facilitated by a proportional representation system, coalition governments are the norm for Germany, both on a federal and at state level. These coalitions are established and maintained through a range of measures that secure the continuing support from the party, the party group, and the executive. These have provided stable and accountable governments over long periods of time.

Background and context

Following the 2010 federal election in Australia that did not produce a clear majority, Julia Gillard chose to govern with a minority of seats. Her minority government — the first one on a federal level for almost 70 years — was to be supported by confidence and supply agreements with the Green's only delegate in the House of Representatives and three independent MPs. Media comments and the

^{*} Parts of this work were supported by the Economic and Social Research Council (UK), ESRC Grant Number PTA-026-27-1803.

public debate precluding and following this decision mirror the response to Britain's current coalition government. They show the electorate's uneasiness with this model of government. Despite the fact that all of Australia's states and territories have had a hung parliament in the last 25 years (Horne 2010, Griffith 2010), and anticipations that Australia's two-party hegemony is in slow decline (Bowe 2010), ruling without a clear majority of seats in many ways is felt to be inadequate for Westminster-style parliaments. The public discomfort in the UK and Australia with this model of government, which is much more common in continental Europe, was particularly palpable with regards to three issues. First, there seemed to be very limited knowledge of how governments requiring multi-party cooperation could work effectively. This was evident by the various newspaper articles following the recent general elections in the UK and Australia with headlines such as 'How the coalition government will work',¹ 'Minority government: how it works'² or 'Labor's minority government explained'.³ Secondly, was a fear that the smaller partner or partners would exert almost dictatorship-like influence without being adequately informed or resourced,⁴ that they were unable to make a right choice (Costar 2011a, 5f.) and that, by doing so, voters' preferences would not be adequately represented (Curtin & Miller 2011, 4ff). Thirdly, the recent British experience with multi-party government raised concerns that there are no clear lines of responsibility and action — one year after its promising start in May 2010, Britain's coalition between the Conservatives and the Liberal Democrats reignited public concerns about the unsuitability of multi-party government for Westminster systems. According to an Institute for Government poll, more than two-thirds of people believed the government was 'weaker, less decisive and 'confused' about what it stands for'.⁵

What follows will address these three aspects by examining how multi-party government has been managed by other assemblies that have in the past been exposed more frequently to this particular way of governing. In so doing, it draws on interview material from the British devolved assemblies in Scotland and Wales that, from May 1999 to May 2011, were governed through minority or coalition arrangements. Looking at experiences gained by the devolved assemblies can be useful in the Australian context as they highlight the cultural changes politicians have to face when transferring expectations made against the backdrop of majority governments to newly created multi-party arrangements. Adding to this are examples from German state and federal governments where multi-party arrangements have been the norm throughout the post-war era. The vast experience German parties have had with multi-party government has led to the development of an extensive set of formal and informal measures to ensure a balance of power of all stakeholders involved. As a result, the example of Germany is widely referred to in the context of multi-party arrangements, even in countries that — like the UK — follow a clear majoritarian approach (for example Seyd 2002, Bell & Murray 2007, Boucek 2010). Prior to looking at these examples from abroad this contribution will briefly analyse how multi-party coalitions in Australia have been typically managed in the past. By working out the particular idiosyncrasies of the country-specific

models, this article aims to draw some conclusions as to how multi-party government ‘Australian style’ could further develop in order to take account of societal developments that — despite the public uneasiness with multi-party arrangements — seem unable to back one majority party.

With regards to terminology, broad definitions are used, defining multi-party government as any government that is supported by more than one stakeholder (either a party or individual independents). The term coalition-government will be reserved for multi-party governments that are set up between two or more parliamentary parties that — in contrast to independent MPs — each aim to pursue policy changes that will affect society as a whole.

There is a plethora of literature on how coalitions are negotiated and formed (for example Laver & Schepsle 1996), with more recent research focusing on effective measures to control the cabinet personnel (Müller & Meyer 2010). However, the question how coalition-management affects the relationship between executive and the parliament, has only recently obtained more attention from parliamentary scholars, with Strøm, Müller & Smith (2010) conceding that knowledge in this field remains patchy and typically limited to single-country studies.

Australian experiences with multi-party government

The Australian public’s uneasiness with multi-party governing arrangements is surprising, as being governed by more than one party is not a new concept. Even if one does not follow Brian Costar’s example of interpreting government through the permanent alliance of National and Liberal party (Costar 2011b) as multi-party government, there have been multiple occasions of minority and coalition governments at state level (Griffith 2010) that precluded the example at a national level. Prominent instances are the selection of two Green ministers to the Tasmanian Government in 2010 and the appointment of two-non Labor members to cabinet in South Australia in 2002. Many of the minority parliaments in power since 1989 were based on simple written ‘confidence and supply’ arrangements with independent MPs who in return managed to secure benefits for their constituencies. In cases where MPs from outside the majority party were appointed to cabinet (ACT, South Australia, Western Australia, Tasmania) further agreements were drawn to both secure commitments with regard to the legislative program and to allow dissent from cabinet decisions on particular issues (Griffith 2010, 6ff.). However, even when deals on such *Ersatz Coalitions* (Moon 1995) covered policy areas, this was generally limited to a few topics and did not embrace any of the cooperating party’s legislative agenda as a whole. Apart from South Australia, where the then Premier honoured his agreement with the two independents by re-appointing them to office in 2006 despite Labor winning a comfortable majority in the Lower House (Abjorensen 2006, 4), all of these arrangements were strictly limited to the ongoing election period. In each of the cases the cooperating stakeholders from outside the governing party also retained their liberty to withdraw their support for projects that contradicted their political aims and beliefs. In

addition, while the verdict on the current coalition between Labor and the Greens in Tasmania is still outstanding, the Greens previous experiences in supporting the government while sitting on the cross-benches (in 1989–92 and 1996–98) were unsatisfying as their coalition partners failed to fully honour their arrangements (Herr 2005).

When drawing agreements with the Green MP Adam Bandt and three of his independent colleagues, the Gillard government could build on the experiences gained with differing arrangements in the states. The deals Ms Gillard struck with the individual players reflect the width of agreements tried and tested in the state assemblies but do not exceed them. The arrangement with the Greens took account of the party's specific aims with regard to climate change and a range of further policy issues and installed regular consultations between the Prime Minister, Greens Leader Bob Brown and Mr Bandt (Greens 2010). In contrast, the detailed agreements drawn with independent MPs Tony Windsor and Rob Oakeshott focused on parliamentary reform and policy initiatives to be implemented in their electorates (Windsor 2010). The understanding signed by Andrew Wilkie finally bound the government both to infrastructural improvements in Wilkie's electorate and policy changes for the gambling industry.⁶

If one draws a brief synopsis of multi-party government in Australia based on the experiences to date, the following aspects emerge as typical:

- arrangements for multi-party government may require negotiations and written agreements with various independent stakeholders, each of whom may run a different agenda;
- depending on the co-operating parties' individual aims these confidence and supply agreements may trigger financial support for very specific constituency relevant aspects or particular policy areas, though they will run across a party's manifesto as a whole;
- even if in cabinet, stakeholders are at liberty to withdraw their support for the government's legislative agenda if this conflicts with their own aims and beliefs, thus contradicting the idea of a cabinet's joint responsibility.

Based on these features, multi-party government Australia style has obtained a footprint that makes it distinctive from its European counterparts.

Examples from abroad

What follows focusses on long-standing multi-party arrangements for German state and federal governments and on the practical experiences with multi-party government in the devolved assemblies in Scotland and Wales. Legislatures in both contexts have been set up to counter existing models. In the case of Germany, the pre-war Weimar model gloriously failed when a rising numbers of left- and right-wing splinter-parties in the parliament had made it increasingly difficult to form solid democratic majorities. The powerful position of the Reich's president, who frequently was referred to as substitute emperor and could not be reined in by

parliament, enabled Hitler, once elected into office, to further undermine the state's democratic structures by issuing decrees without the parliament's support. In response to these issues, the post-war Federal Republic of Germany was set up within a framework of a clear separation of powers (reducing the now indirectly elected president to a primarily representational role), and an extensive system of checks and balances (for example by the distribution of legislative powers between parliament and the Federal Council and by setting up a powerful Constitutional Court). While a system of proportional representation has been maintained, parties have to overcome a 5 per cent threshold to enter the Bundestag or any of the 16 *Länder* assemblies. As a consequence of these measures, multi-party governments are the norm and German politics is characterised by an intertwined and overlapping system of decision-making which in the past has been tellingly labelled as 'Grand Coalition state' (Schmidt 2002) and 'Joint Decision Trap' (Scharpf 1988). While Germany's overall political culture differs from that of Australia in regard to the party landscape, the election system and the relationship between parliament and the executive, the two countries share similarities as both have influential second chambers that — in times of divided control — may impact severely on the government's legislative agenda (Steinack 2012).

While the historic backdrop for institutional arrangements in Scotland and Wales has been less dramatic, it equally reflects attempts to improve arrangements that were deemed to be unsatisfying. Set up in 1999 as part of the newly elected Labour government's program of institutional reform, the assemblies were explicitly constructed as modern and efficient counter-drafts to the traditional Westminster model. A framework for this was set out in the government's White Papers 'Scotland's Parliament' (The Scottish Office, 1997) and 'A Voice for Wales' (Welsh Office 1997). The consecutively established Consultative Steering Group (1998) for Scotland and the National Assembly Advisory Group (1998) for Wales stressed the new institutions' participative approach to legislation and policy making as a key principle and distinguishing feature that should lead to a different style of politics. The mixed member proportional (MMP) system used for the elections to both assemblies is similar to the one used for the Bundestag and most of the German *Länder* parliaments. Following the first elections to the devolved assemblies in May 1999, MMP has frequently produced assemblies with no clear majority and several smaller opposition parties that — in contrast to the classic Westminster model — require multi-party governing arrangements. However, politicians in these two regions were socialised in a Westminster-environment, similar to the one present in Australian assemblies, and consequently initially approached multi-party government against this backdrop.

In what follows, I will examine in more detail the formal and informal mechanisms used by the German, Welsh and Scottish assemblies and parliamentary parties for setting up and maintaining multi-party government, before discussing how these arrangements impact on the parliament-government relations. In addition to taking account of readily available literature, documents and newspaper articles published on the parliaments in question, parts of this research are based on interviews

conducted in early 2009 with members of the devolved assemblies, conducted as part of recent research on party group interaction.⁷

Experiences in the UK

While parliamentary scholars dispute, whether devolution actually has delivered by leading to a different style of politics (Mitchell 2000, Bromley et al. 2006, Megawhin & Jeffery 2009, Larkin 2011), the MMP system has doubtless facilitated a stronger influence of smaller parties on Scottish and Welsh politics. In the past 12 years, both Scotland and Wales have gained significant experience with multi-party and minority governments,⁸ though in May 2011 both assemblies returned to single-party government. The growing impact of the Liberal Democrats, the Greens, the Scottish National Party (SNP) and the Welsh national party Plaid Cymru has ‘confirmed the reality of multi-party politics away from Westminster’ (Lynch 2007, p. 323). As a consequence, the Scottish Parliament and the National Assembly for Wales quickly developed mechanisms for setting up and dealing with multi-party arrangements (Seyd 2004). These include the support of civil servants in the process of negotiating a coalition, the development of coalition agreements, information sharing between coalescing parties, and informal ministerial meetings, with the two party leaders being at the centre of each of these steps (Seyd 2004, p.6).

While the first 12 years of managing multi-party arrangements in the devolved assemblies have contributed to further developing these initial arrangements, recent research (Steinack 2009, 2010) shows, that — after being socialised in a Westminster system — dealing with multi-party government clearly required a change of mindset of all stakeholders involved. The idea of entering a coalition per se initially had been quite foreign to many politicians, as the following quote illustrates:

It’s been a hard road in understanding, understanding coalitions because all of the UK parties, in fact all of us come with a tradition in the first past the post elections, you come with the tradition of being, you know, the party gets a majority and it’s been a very unusual circumstance when you have a coalition so for parties it’s been a learning process’. (AM6_Lib, para2).⁹

In contrast with the Liberal Democrats, who governed with Labour until 2007, Plaid Cymru was an unlikely partner for ideological as well as strategic reasons (Osmond, 2007). Consequently, its members were worried about entering the coalition with Labour as they feared a loss of political identity, as one spokesperson highlighted:

...a number of people felt and thought well we can’t do this for pragmatic reasons because Plaid Cymru, it will lose its status as the main opposition and therefore we will suffer immediately, now there, there is no reason for believing that that has happened in fact I would probably say the opposite. If anything I think we are doing better in term of getting our message across the media than we did before. (AM5_PC, para 32).

Indeed, MPs from the smaller parties — the Conservatives, the Liberals, and Plaid Cymru — highlighted the benefits multi-party government had brought them. In particular, the promotion of a more subject-oriented debate with frequent consensus on policy issues amongst all parties and the somewhat surprising fact that many of the other party's political ideas could be accommodated without giving up any of one's own integral standpoints. For Wales, a 'One Wales' coalition agreement identified core policy areas to be addressed over the next four years (One Wales, 2007) and was ratified by special conferences of both parties prior to taking up government. A 'One Wales delivery plan' provided more detailed information on how and by when policy milestones would be reached; of which more than 90% had been implemented by the end of April 2011. To limit the potential of conflict amongst the coalition partners in their collective decision making, the 'One Wales' agreement (2007, pp. 39) set up various measures. Amongst these were:

- Collective responsibilities of the government as a whole for all decisions, announcements while at the same time guaranteeing confidentiality of all government-internal discussions.
- Autonomy of both coalition partners in nominating their personnel for previously agreed portfolios.
- Joint responsibility of the First Minister and the smaller coalition partner's Deputy First Minister for the presentation of policies.
- The establishment of a Cabinet Committee, comprising of First Minister, Deputy First Minister, Business Minister and the Business Manager of the other party to manage the day to day business of the coalition, to monitor the implementation of the delivery plan and to resolve any disagreements which may arise.
- The establishment of a joint Cabinet Committee on Finance to discuss strategic spending priorities and to control government spending.
- More detailed agreements on inter-party support from the backbenches that included frequent consultations of ministers with spokespersons of both parties.
- The acknowledgement that both parties need to maintain distinctive political identities and may express different views publicly.

Despite the fact that Labour and Plaid Cymru initially were seen as very unlikely partners to enter a coalition (Osmond 2007), their partnership endured over the full four year period. In Scotland, the SNP minority government depended on cooperation with the two Green MPs. In the agreement set up between the partners, the Greens committed to electing SNP's leader, Alex Salmond, as Scottish First Minister. In return, the SNP nominated a Green MP to convene one of the parliament's subject committees. Both parties also agreed to work constructively together on policy areas where there was common ground.¹⁰ In addition, and in order to limit the potential damage of government defeats, the SNP leader publicly announced that, while his government might be defeated from time to time, this would not necessarily be considered a matter of confidence (Paun & Hazel 2010, p. 218). Using this tactic, he safeguarded a potential deadly blow to the government in

early 2009 when it did not get its budget through: Potentially, this could have brought the government down,¹¹ however, none of the parties were keen on new elections, and with the joint effort of all parties the decision was swiftly rectified, as one of the parliament's clerks recalled:

The way our Parliamentary procedures are set out, decisions are always taken at five o'clock (...) so when this budget was going through, at ten to five it still wasn't clear if the Government had enough support and the Green Party members were still discussing between themselves, whether they were supporting or not, as late as five minutes to go, and when the vote came through it was tied and, with a tied vote, the presenting officer has a casting vote but he's obliged to cast on the status quo. So he cast his vote against the budget and the budget fell, so that was a big blow for the Government, but overall the parties ... it could have become a matter of confidence in the Government. The opposition parties weren't opposed to the budget for the sole reason of bringing the Government down. They could have pursued that but they weren't. They were all trying to secure their own priorities and get more out of the Government and, in the minute the bill fell, they all were very quick to state that they wanted to work with the Government and get a budget through as soon as possible, so from what could have been an absolute disaster at 5 o'clock on the Wednesday, by the Thursday morning it was clear that they were all going to sort it out and we were able to put the budget through the next week, so it wasn't a case of attacking the Government just for the sake of attacking the Government, and they did all manage to get something out of the process which allowed them to vote for the budget and we all moved forward on that one. (MSP6_clerk, para 4).

Interviews conducted with Scottish MPs show that minority government overall strengthened parliament's role towards the executive as the SNP government had to open up to the other parties in order to gain support for its policies. At the same time, the SNP's minority role increased the other parties' responsibilities to be more realistic in their policy demands, as a conservative MP explained:

[Minority government] obviously made life an awful lot more exciting for us because (...) we have an input which we formerly did not have. For the Labour Party's perspective, clearly this has resulted in devastation because they operated the basis of the divine right to rule Scotland and this doesn't happen anymore and they simply have not adapted — even some of them have realised that they have not adapted to the role of opposition. And particularly to the challenging role that opposition now provides in that you cannot just go into that chamber now and part out the party line and go on a frolic of your own (...) As a result, I think, this is now making for better governance of Scotland and I think it is making for a better democratic set up. (MSP2_Con, para 2)

The experiences gained with multi-party government in Scotland and Wales reflect how a previously Westminster-oriented party system and electorate slowly become accustomed to multi-party government. However, the fact that both states returned to single party government after the last elections in May 2011 (Labour in power in Wales; a clear SNP majority in Scotland) indicates, that societal adaptation to multi-party opportunities may be a long process.

Experiences in Germany

Facilitated by a proportional representation system, multi-party governments are the norm for Germany, both at a federal and at a *Länder* level, though there have been significant periods of minority government in some of Germany's 16 states.¹² The establishment and maintenance of these coalitions is facilitated by various measures securing the continuing support from the party, the party group, and the executive. They have provided stable and accountable governments over long periods of time. Lodge and Wegrich (2007, p.32), have described the way coalition government is managed in Germany as 'marriage evaluation conducted by the wider public in the presence of potential new mating partners'. This situation of constant public scrutiny requires both a sound preparation for multi-party government from everyone involved and good maintenance agreements throughout the course of government. Incentives are each party's willingness to share power, and the fear that — if the government of the day does not perform well — the coalescing parties may lose votes in the next elections.

The most important tool used by German parties to facilitate multi-party government is a detailed *coalition agreement* that sets the agenda across all departments over the period in office. With the thought in mind that conflict can be best prevented by putting as much as possible in writing, these agreements have become more and more detailed over the past 30 years. Recent coalition agreements in Germany reached from a little over 42,000 words for the conservative-liberal coalition federal level (CDU & CSU & FDP, 2009) to an epic length of almost 58,000 words for the Green lead coalition government (with the Labor equivalent SPD as the junior partner) in Baden-Württemberg (Bündnis 90/Die Grünen & SPD, 2011). Apart from providing specific guidelines on the policies that the coalition wants to achieve over the course of its life, coalition agreements normally conclude with a brief overview of how portfolios are distributed and some general guidelines on coalition behaviour. As a minimum, these request that no coalition member votes with changing majorities and that none of the governing parties may introduce legislation without seeking the partner's prior consent to do so. For each party involved, the agreements are approved by a special party conference to ensure the party base's backup for the plans. In addition, they require the consent of the party group within the assembly. With these steps, the parties formally acknowledge the need to compromise if they want to govern together. To be accepted by party base and parliamentary party, the compromise needs to be a balanced one that will not allow one party to dictate over the other.

While the policies the partners want to achieve normally try to reconcile differing points of view are implemented as the coalition's policies, the management of ministries is down to the individual parties — i.e. it is the party's responsibility to name their minister for a particular portfolio. The independence of ministers is also highlighted in the constitution as concept of 'departmental principle' (*Ressortprinzip*). The minister's 'power to propose, to negotiate and to formulate'

(Manow 1996, p. 100) makes it very clear who is to blame if particular policies aren't implemented very well. This is all the more important as coalitions in Germany rarely resort to appointing 'watchdog' junior ministers (Thies 2001). Instead, the minister's actions would be scrutinised through a corresponding subject specific committee chaired by either an opposition MP or an MP from the other coalition party (Kim & Loewenberg 2005).

In addition to the detailed coalition agreements, coalition governments in Germany have developed a dense system of informal structures that help keep all parties involved (Schreckenberger 1994, Kranenpohl 1999). At the top normally stands a *coalition (steering) group* with the head of government, the informal vice-chancellor¹³ the party leaders, the parliamentary groups' chairpersons and whips as main participants. Consisting of an equal number of representatives of each of the coalition partners involved (Rudzio 2008, p. 12), the group meets on a monthly or even weekly basis. In those meetings it sets the agenda for forthcoming weeks and reaches consensus on contested issues. The daily business of government is managed by the whips who remain in constant contact with all stakeholders. At committee level, the network is complemented by *coalition working groups* that help the coalescing parliamentary parties to find common grounds at an early stage. Often the experts pride themselves on solving a complex issue without escalating it to the top level, forcing them to find an early compromise, as the following example by a member of the smaller coalition party, FDP, shows:

Everyone who beliefs to be an expert in their area is normally so full of distrust with regards to the accidental results of the 'meetings of the elephants' — just by looking at how they work! So they try to keep them out. This is their joint interest. And it is also something that you can't use as a threat toward others because everyone knows that the other one does not want to escalate it to the coalition group. (Kranenpohl 1999, p. 290; own translation).

At the same time dealing with topics at this level ensures that only very few issues boil to the top and reach the potential to actually damage the coalition. As a result, past coalitions have managed to implement well above 70% of policies promised in their coalition agreement, thus allowing both partners to claim success.¹⁴ In cases where disputes can't be resolved, issues may be postponed — if necessary into the next legislative period. Smaller coalitions with a minimum of seats are generally thought to offer backbenchers of the governing parties more opportunities in making their voice heard, as in tight decisions every vote counts. However, research on Germany's two grand coalitions at a federal level (1966–68, 2005–09) indicates that having an overly large majority does not necessarily reduce the parliamentary party's influence. In the case of the more recent grand coalition, led by chancellor Merkel, various factions within the SPD forced the government to make substantial changes to its planned federalism reform. Though the influence of individuals (as opposed to factions) may be slightly smaller, this is compensated by the grand coalition's convenient majority which can more easily deal with abstentions from its own members than a tight-cut minimal coalition (Gast & Krahnenpohl 2008, p. 23).

A further important element of multi-party government in Germany is a public awareness and tolerance of conflict between coalescing parties. It is, for example, not uncommon, for ministers to publicly criticise colleagues if they believe their particular policies do not meet the coalition's expectations. One recent example is the critique German's foreign minister, Westerwelle, was forced to endure following his abstention in the UN Security Council's decision for a mandate against Libya. Apart from triggering calls for his resignation both from the opposition and senior high-ranking FDP members, Westerwelle was severely criticised by his cabinet colleague, defence minister DeMaizière, who publicly declared that the government had made at least three wrong decisions in dealing with Libya.¹⁵ The public's principal openness for critique and compromise goes along with the understanding that the chancellor's role is more to facilitate political decisions than to enforce her party's particular agenda. In the German constitution, this has been adequately labelled as *chancellor's 'guidelines competence'* — i.e. the chancellor makes sure that her ship sails in the right direction, but she does not micro-manage the minister's portfolios.¹⁶

Multi-party government's effect on the executive-parliament relations

Looking at Germany and the devolved assemblies in Scotland and Wales, multi-party government and the management of coalitions has various effects on the way parliament and the executive government interact. By nature, having more than one party determining a government's fate makes politics more complex. This applies at an *institutional level* as it adds more bodies where decisions are prepared and taken, and it affects *communication structures* (within a party, cross-party and towards the public) as achieving the stakeholders' support may require more complex, time-consuming negotiations. For minority government this means an opening in principle toward policy influence and input from MPs of other parties as they are needed by the government to forge compromises and support its legislative agenda. The case of the Scottish Parliament shows, that this does not imply that the government is taken hostage by one particular party. In contrast, each of the parties involved got some benefit out of the budget negotiations. In addition, engaging with a minority government forced the opposition parties to be more specific and realistic with regards to their own planned policies as there was an increased likelihood to achieve a package deal with the government. In contrast, coalition governments lead to more formal structures of communication and decision-making.

Coalition government per se leads to a more permanent interlocking of the executive and parliament as coalition agreements are normally sketched out over the full period of government. During this time, each party needs to find understanding and support in its own ranks for the compromises the joint policies with the partner may require. This is achieved by a fluid multi-level network of informal contacts amongst coalition partners that reach wide into the parliamentary

parties. In the case of Germany this network reaches far beyond a core group of high-ranking members of the executive. Both coalition working groups and subject experts amongst the MPs are essential in reaching consensus amongst coalition partners when preparing committee decisions on coalition policies. While the more complex decision making process does not always allow for quick and easy fixes and policy u-turns, it does provide parliament with ample opportunities to exert influence on how policy agreements are actually implemented. In this context, subject committees play an important role for developing joint solutions between MPs of different parties. Both German and Scottish committees have the power to re-draft government bills; the Scottish committees may even initiate legislation, though they rarely use this privilege (Arter 2004, Carman & Shepard 2009). The extensive discussion of legislation in the committees gives both coalition and opposition MPs the opportunity to amend and alter ministerial policy drafts and to leave parliament's mark.

Most importantly, however, multi-party government requires a *different approach to decision making* from all stakeholders involved as compromises need to be reached that are both mutually agreeable and sustainable. Along with this comes the opportunity to learn from each other and to take ownership of policies that might initially stand somewhat in contrast to one's own political ideals. Finally, managing such a complex system of reaching consensus requires a *different role of the head of government* who, by moderating competing interests, takes up the position of a 'strolling arbitration panel' as Merkel's predecessor in managing a Grand Coalition, chancellor Kiesinger, once has famously been dubbed (Nielauß 1988, 90).La

Conclusion

Against the backdrop of Australian experiences with multi-party government, this paper has looked at how multi-party arrangements are managed by coalition and minority governments in Germany and the devolved assemblies in Scotland and Wales. While detailed coalition agreements provide a policy agenda over the whole period of government, a multi-level network of informal steering and working groups ensures the ongoing support of all members of the coalition's parliamentary parties for the implementation of the coalition agreement. The example of Germany shows that multi-party governments have successfully managed societal problems over a long period of time. A precondition of this are well established measures of managing the different expectations of all partners involved — both within government and within parliament — and the general acknowledgement that democracy more often than not is about compromising. The Scottish example of minority government shows how this can be achieved on a much simpler, less complex level, by actively involving all parties when taking decisions on particular policies.

What, if anything, can Australia learn from the examples above? From a (biased) European view it is certainly the insight that — while governing in multi-party arrangements may not be as straight forward as with a 'proper' Westminster

majority — it is able to deliver sustainable policy changes, albeit often less radical ones and at a slower pace. In particular in cases where multi-party arrangements were focused on a broader set of policies (such as in Germany's coalition governments and in Welsh coalition between Labour and Plaid Cymru), merging the two coalescing party's political aims in one coherent legislative program empowered individual MPs and as a consequence parliament as a whole. As their support was vital to pass the government's legislative agenda, party leaders had to ensure that the MP's voices were heard and taken into account. The interviews with MPs in the devolved assemblies in Scotland and Wales show, that — approaching it from a Westminster-angle — governing in multi-party arrangements is a learning process for politicians, the media and the public, but that it can be enjoyable and beneficial for parliament if it is approached in a consensual manner and with the adequate structures to manage it. At the same time the fact that both Scotland and Wales returned to single-party government after 12 years of multi-party experience highlights that multi-party government is not a panacea and that adjusting to this particular style of politics may take time. ▲

References

- Abjorsen, Norman (2006), Rethinking Westminster: South Australia's cabinet experiment. Democratic Audit of Australia, Discussion Paper 30/06. URL: http://democratic.audit.anu.edu.au/papers/20061026_abjn_cabsa.pdf (retrieved 26.01.2012)
- Arter, D. (2004), *The Scottish Parliament. A Scandinavian-Style Assembly?* London: Franc Cass.
- Bara, J. (2005), A question of trust: Implementing party manifestos, *Parliamentary Affairs* 58(3), 570–84.
- Bell, M. & Murray, A. (2007), *In the balance: coalition and minority government in Britain and abroad*. Centre Forum Discussion Paper, London: Centre Forum.
- Boucek, F. (2010), The Least Worst Option? The Pros and Cons of Coalition Government, *Political Insight*, 1(2), 48–51.
- Bowe, W. (2010), Green members in green chambers: The role of the Australian Greens in government formation, *Australasian Parliamentary Review* 25(1), 137–49.
- Bromley, C., Curtice, J., McCrone, D., Park, A. (2006). *Has Devolution Delivered?* Edinburgh: EUP.
- Bündnis 90/Die Grünen, SPD (2011): *Der Wechsel beginnt. Koalitionsvertrag zwischen BÜNDNIS 90/DIE GRÜNEN und der SPD Baden-Württemberg. Baden-Württemberg 2011 — 2016*. URL: <http://www.gruene-bw.de/partei/news/article/der-wechsel-beginnt.html> (retrieved 27.09.2011).
- Carman, C. & Shephard, M. (2009), Committees in the Scottish Parliament, in: Jeffrey, C. & Mitchell J. (Eds.) *The Scottish Parliament 1999-2009: The First Decade*, London: Hansard Society/Luath Press, pp. 21-28.
- CDU, CSU, FDP (2009): *Wachstum, Bildung, Zusammenhalt. Der Koalitionsvertrag zwischen CDU, CSU und FDP. 17. Legislaturperiode*. URL: <http://www.cdu.de/portal2009/29145.htm> (retrieved 27.09.2011).

- Consultative Steering Group on the Scottish Parliament (1988), *Shaping Scotland's Parliament*, Edinburgh: The Scottish Office.
- Costar, B. (2011a forthcoming), *Seventeen Days to Power: Making a Minority Government*, in: Simms M. & Wanna J. (eds): *Julia 2010: The Caretaker Election*, Canberra: ANU press.
- Costar, B. (2011b), Australia's curious coalition, *Political Science* 63(1), 29–44.
- Curtin, J. & Miller, R. (2011), Negotiating Coalitions: Comparative perspectives, *Political Science* 63(1), 3–9.
- Gast, H. & Kranenpohl, U. (2008), Große Koalition — schwacher Bundestag?, *Aus Politik und Zeitgeschichte* 16, 18–23.
- Griffith, G. (2010), *Minority Governments in Australia 1989-2009: Accords, Charters and Agreements*, Background Paper No. 1/10, Sydney: NSW Parliamentary Library Research Service.
- Henssler, O.-T. (2011), *Entscheidungstheoretische Determinanten politischen Handelns. Ein Analysemodell auf Basis des rot-grünen Koalitionsvertrages NRW 2000*. PhD thesis, University Duisburg-Essen. URL: <http://duepublico.uni-duisburg-essen.de/servlets/DocumentServlet?id=24192> (retrieved 27.09.2011).
- Herr, R.A. (2005), Reducing Parliament and Minority Government in Tasmania: Strange Bedfellows Make Politics — Badly, *Australasian Parliamentary Review* 20(2), 130–43.
- Horne, N. (2010): Hung parliaments and minority governments, *Background Note*. Parliament of Australia, Parliamentary Library. URL: <http://www.aph.gov.au/library/pubs/bn/pol/HungParliaments.htm> (retrieved 19.05.2011).
- Kim, D. & Loewenberg G. (2005), The role of parliamentary committees in coalition governments: keeping tabs on coalition partners in the German Bundestag, *Comparative Political Studies* 38(9), 1104–29.
- Kranenpohl, U. (1999), 'Man kann nicht jeden Monat die Koalitionsfrage stellen!'. Koalitionsinterne Konfliktlösungsmechanismen und Einflusspotentiale, *Zeitschrift für Politik* 46(3), 283–97.
- Larkin, P. (2011), The politics of coalition in Scotland, *Political Science* 63(1), 61–78.
- Laver, M. & Shepsle K. A. (1996) *Making and Breaking Governments: Government Formation in Parliamentary Democracies*. New York: Cambridge University Press.
- Lodge, M. & Wegrich, K. (2007), Germany, in: Bell, M. & Murray, A.: *In the balance: coalition and minority government in Britain and abroad*. Centre Forum Discussion Paper, London: Centre Forum pp. 28-34.
- Lynch, P. (2007), Party System Change in Britain: Multi-Party Politics in a Multi-Level Polity, *British Politics* 2, 323–46.
- Manow, P. (1996), Informalisierung und Parteipolitisation exekutiver Entscheidungsprozesse. Zum Wandel exekutiver Entscheidungsprozesse in der Bundesrepublik, *Zeitschrift für Parlamentsfragen* 27(1), 96–107.3–283.
- Megaughin, E. & Jeffery, C. (2009), Introduction: The First Decade in Perspective, in: Jeffery, C. & Mitchell, J. (eds) *The Scottish Parliament 1999-2009, The First Decade*. Edinburgh: Luath Press, pp. 9–14.
- Miller, B. & Müller W. (2010), Managing Grand Coalitions: Germany 2005-09, *German Politics* 19 (3-4), pp. 332–52.

- Mitchell, J. (2000), New Parliament, New Politics in Scotland, *Parliamentary Affairs* 53, pp. 605–21.
- Müller, W. & Meyer, T. (2010), Meeting the challenges of representation and accountability in multi-party governments, *West European Politics*, 33 (5), pp. 1065–92.
- National Assembly Advisory Group (1998), Report to the Secretary of State for Wales, August 1998.
- Niclaß, K. (1988), *Kanzlerdemokratie*. Stuttgart: UTB.
- One Wales (2007), *One Wales. A progressive agenda for the government of Wales. An agreement between the Labour and Plaid Cymru Groups in the National Assembly*. Cardiff, 27th June, URL: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/27_06_07_owales.pdf (retrieved 25.09.2011).
- Osmond, J. (2007), Wales, in M. Bell & A. Murray (eds), *In the balance: coalition and minority government in Britain and abroad*. Centre Forum Discussion Paper, London: Centre Forum, pp. 21–27.
- Paun, A. & Hazel, R. (2010), Hung Parliaments and the Challenges for Westminster and Whitehall: How to Make Minority and Multiparty Governance Work. *The Political Quarterly* 81(2), 213–27.
- Rallings, C. (1987), The influence of election programmes: Britain and Canada 1945–79, in I. Budge, D. Robertson & D.J. Hearl (eds), *Ideology, strategy & party change: Spatial analyses of post war election programmes in 19 democracies*. Cambridge: CUP.
- Rudzio, W. (2008), Informelles Regieren — Koalitionsmanagement der Regierung Merkel, *Aus Politik und Zeitgeschichte* 16, 11–15.
- Scharpf, F. (1988), The Joint-Decision-Trap: Lessons from German Federalism and European Integration, *Public Administration* 66 (3), pp. 239–78.
- Schmidt, M. (2002), Germany: The Grand Coalition State, in: J.M. Colomer (ed.), *Political Institutions in Europe*. London: Routledge (2002, 2nd edn), 55–93.
- Schreckenberger, W. (1994), Informelle Verfahren der Entscheidungsvorbereitung zwischen der Bundesregierung und den Mehrheitsfraktionen: Koalitionsgespräche und Koalitionsrunden, *Zeitschrift für Parlamentsfragen* 35(3), pp. 327–46.
- Seyd, B. (2004), *Coalition Governance in Scotland and Wales*. London: The Constitution Unit.
- SPD, Bündnis 90/Die Grünen Landesverband Bremen (2011), *Vereinbarung zur Zusammenarbeit in einer Regierungskoalition für die 18. Wahlperiode der Bremischen Bürgerschaft 2011–2015*, URL: <http://www.gruene-bremen.de/wahl-2011/koalitionsvertrag/> (retrieved 27.09.2011).
- Steinack, K. (2009), Does devolution make a difference? A comparison of party group interaction in the Scottish Parliament and the Welsh Assembly, refereed paper presented at the *PSA Parliaments and Legislatures Specialist Group Annual Conference*, Constitution Unit, Department of Political Science, University College London, 24 June.
- Steinack, K. (2010), How cultural, structural and institutional factors shape MPs' behaviour in parliament. Party group interaction in the Scottish Parliament and the Welsh Assembly, refereed Paper presented at the *APSA Annual Conference 2010*, University of Melbourne, 27–29 September.
- Steinack, K. (2011), Two patterns of opposition: Party Group Interaction in the Bavarian State Parliament. *Journal of Legislative Studies* 17 (1), pp. 1–26.

- Steinack, K. (forthcoming, 2012), 'Opposition outside Westminster. Conflict and Compromise in the German Bundestag', in N. Aroney, J.R. Nethercote, S. Prasser (eds), *Her Majesty's Opposition*, Perth: UWA Publishing.
- Strøm, K., Müller, W., Smith, D. (2010), Parliamentary Control of Coalition Governments, *Annual Reviews of Political Science* (13), pp. 517–35.
- The Greens (2010), The Australian Greens & The Australian Labor Party (The Parties) — Agreement, URL: http://greens.org.au/sites/greens.org.au/files/Australian%20Greens_ALP%20agreement.pdf (retrieved 26.01.2012).
- The Scottish Office (1997), *Scotland's Parliament. Presented to Parliament by the Secretary of State for Scotland by Command of Her Majesty*, July 1997, URL: <http://www.scotland.gov.uk/government/devolution/scpa-00.asp> (retrieved 15.03.2010)
- Thies, M.F. (2001), Keeping Tabs on Partners: The Logic of Delegation in Coalition Governments, *American Journal of Political Science* 45(3), pp. 580–98.
- Timmermans, A. (2006), Standing apart and sitting together: Enforcing coalition agreements in multiparty systems, *European Journal of Political Research* 45, pp. 263–83.
- Welsh Office (1997), *A voice for Wales: Government's Proposals for a Welsh Assembly* (Command Paper 3718), The Stationary Office.
- Windsor, T. (2010), Agreement to form Government, URL: <http://www.tonywindsor.com.au/releases/AgreementToFormGovt.pdf> (retrieved 26.01.2012).

Endnotes

- ¹ *The Guardian*, 12 May 2010.
- ² *The Australian*, 22 August 2010.
- ³ ABC News, 8 September 2010.
- ⁴ See, for example, Niki Savva's opinion piece 'Shackled with a few rogue fence jumpers', *The Australian*, 7 September 2010.
- ⁵ *The Guardian*, 12 May 2011.
- ⁶ ABC News: 'Wilkie backs Gillard government', 2 September 2010, URL: <http://www.abc.net.au/news/2010-09-02/wilkie-backs-gillard-government/2245782> (retrieved 26.01.2012). The arrangement was withdrawn by Wilkie in January 2012, arguing that the executive had not honoured the agreement. ABC News: 'Wilkie withdraws support over broken pokies deal', 21.01.2012, URL <http://www.abc.net.au/news/2012-01-21/wilkie-withdraws-support-over-broken-pokies-deal/3786040> (retrieved 26.01.2012)
- ⁷ ESRC postdoctoral fellowship 'The influence of party identities on opposition strategies in parliament. Policy making on a territorial level' (ESRC Grant Number PTA-026-27-1803). As part of her fellowship program the author conducted a total of 17 semi-structured interviews with MPs and clerks in the National Assembly for Wales (8) and the Scottish Parliament (9). All interviews were transcribed and coded, using Maxqda, a program developed for managing unstructured qualitative data. Codes were developed along the overarching themes of Party Identity, Party Group Behaviour, Governing Arrangements etc.
- ⁸ From 1999–2007 Scotland was governed by a Labour led coalition government with the Liberal Democrats. From 2007–2011 this was replaced by a minority government of the SNP. At the last assembly elections in May 2011 the SNP won the absolute majority of seats. Apart from short spells of Labour-minority government, Wales has been governed by a Labour led coalition government

with the Liberal Democrats from 1999–2007. In 2007 this was replaced coalition between Labour and the nationalist Plaid Cymru before Labour managed to regain sole power in May 2011, relying on exactly 50% of seats.

⁹ This is echoed by the comment of a Labour colleague: ‘I think it took time for an understanding of coalition politics to engrain itself in the minds of the Welsh political parties because historically we weren’t use to it. But, I think now, that you know people understand what coalition is all about and can work within a coalition, which is essential, given the electoral system that we have’ (AM4_Lab, para3).

¹⁰ SNP and Greens Publish Cooperation Agreement. *SNP News*, 11.05.2007, <http://www.snp.org/node/7169>.

¹¹ ‘Alex Salmond threatens to call election after Scottish parliament rejects SNP’s budget. SNP’s minority government suffers serious setback after MSPs reject the 2009–10 budget bill’, *The Guardian*. 28.01.2009, URL: <http://www.guardian.co.uk/politics/2009/jan/28/scotland-snp> retrieved on 26.09.2011.

¹² The most dramatic example for this is Bavaria, which from 1962–2008 has been governed by an absolute majority of the conservative CSU, thus forcing the opposition parties to explore alternative avenues of influence outside parliament (Steinack 2011).

¹³ It is custom that the leader amongst the junior coalition partner’s ministers will act in lieu of the chancellor if she is not available.

¹⁴ According to Miller & Müller (2010, 337 with further references) 73% of the policies discussed in the agreements for Germany’s red-green coalition on a federal level (1998–2002) have been implemented. Henssler (2011, 105) confirms an implementation rate of 71,2 % for North-Rhine Westphalia’s red-green coalition (2000–2005). This success rate slightly exceeds the 70% found by Rallings (1987) for parliaments in Canada and the UK between 1945 and 1979 and is not extensively far of the 88% Bara (2005) found for the majority led British House of Common in the period 1987–2005.

¹⁵ ‘De Maizièrè räumt Fehler in deutscher Lybien-Politik ein’, *Financial Times Deutschland*, 26.08.2011.

¹⁶ Anecdotal evidence for this is the appearance of ministers in public. In comparison to their Australian colleagues, German ministers seem to have much more autonomy and independence in presenting their department’s policies, plans and achievements on television, and they normally do so without the chancellor’s support. In contrast, in the Australian television it seems to be regularly the prime minister doing the talking while the ministers in charge of their portfolio play a supporting act only.

Jordan Bastoni is Visiting Research Fellow, School of History and Politics at the University of Adelaide

The executive versus the legislative council: a case study from the South Australian Parliament

Jordan Bastoni

This paper considers the relationship between the government of South Australia (SA) and the SA Legislative Council and attempts by the government to maintain supremacy over the Council. The conflicts that arise are examined through a case study of the Council's attempt to apply scrutiny to a prominent government minister. It is argued that the Rann Government provides a good example of the ways in which governments can attempt to delegitimise political institutions that frustrate and oppose them.

Introduction

Westminster parliaments are dominated by the executive (Lijphart 1984, 6). This is especially true of Australian parliaments. While all Westminster derived parliamentary systems are noted for their high level of party cohesion, the Australian parliaments are the exemplars of strong party cohesion and discipline. It is highly unusual for members of one major party to 'cross the floor' and vote with members of the opposing major party (Jaensch 1986, 32–45). This places a great degree of power in the hands of the government of the day. The government in parliament is powerful. In order to stay in office it needs to maintain a majority in the lower house. Thanks to the high degree of party cohesion, it is generally easy for a government to be sure of maintaining a majority on the floor of the lower house, leaving it unfettered to act as it will in that chamber, subject to the standing orders and public opinion. Even when the government is in a minority position, it still tends to dominate this chamber. As a result, lower houses are often reduced to chambers in which rhetoric and theatrical displays flourish, but that nevertheless can offer no substantial impediment to government action. This is where upper houses step in. In the Australian parliamentary system, upper houses are generally constituted through proportional representation. This enables a greater diversity of

parties to be represented, which leads to a chamber that is generally not controlled by the government of the day, and is therefore more independent. Even in cases where the government of the day does find itself possessed of a majority in the upper house, it can still find a more independent spirit amongst its members. This greater degree of independence allows upper houses to act as a check on government in a way from which lower houses are generally constrained. The executive can be checked both in a policy sense, by having their legislation exposed to parliamentary debate and examination in a chamber with a greater diversity of representation, and therefore opinions, and by a more general scrutiny of their actions in carrying out the tasks of government and the use of their powers (Prasser, Nethercote and Aroney 2008, 3–4).

Why specifically study the Legislative Council to determine the nature and types of parliamentary conflict that occur in SA? Though the House of Assembly has been host to two minority governments out of the last four governments, and has regularly seen the return of minority governments, the conflict that occurs in this chamber is best characterised as theatre. To maintain their hold on the treasury benches, the government of the day needs to keep an iron grip on the numbers in the House. The first Rann Government, in which the ALP's one seat deficit was solidified with the promotion of an independent and a National Party member to the ministry, and two independents, in succession, to the Speakership, provides possibly the finest example in recent Australian history of how a government can turn a minority position in a lower house into a strong, stable government (Jaensch 2006, 198–9). The SA Legislative Council, since the introduction of proportional representation in 1973, has never been controlled by the government of the day. The balance of power has always been in the hands of a crossbench of varying size. This has rendered it a chamber more independent from the executive than the House of Assembly is, and a chamber that is friendlier to the work of minor parties and the opposition. For example, each sitting Wednesday is dedicated first to private members business (Standing Orders — Legislative Council of South Australia, s.64). The greater degree of independence possessed by the Council casts it as the true source of institutionalised opposition in the SA Parliament. It is also this greater degree of independence that can lead the Council to cause frustration to the government of the day.

The Rann Government has shown that it is generally a fairly unenthusiastic defender of the place of parliament in SA's system of government. Indeed, the government has developed a reputation of treating parliament and the parliamentary process with a degree of disdain (Bastoni and Macintyre 2010). One member of the opposition who was involved in the work of committees noted that the government had always seemed somewhat hostile to the investigations of Council committees, and would often seek to cause inconvenience to the work of the committees where they could. For example, if one non-government member, of a five-member committee, could not attend a committee session, the two government members would absent themselves, preventing a quorum and thus preventing the committee from meeting (Lucas 2011). It is my aim to show the strategies the government has

engaged in to undercut the legitimacy of the Council when it has exercised the independence that it enjoys to scrutinise the government in ways the government would prefer it did not.

Legislative Council committees in the lead up to the 2006 election

I will consider the conflict that raged around the former Attorney-General, Michael Atkinson, in the lead up to the 2006 election. Atkinson was a senior member of the right faction of the SA branch of the ALP, and was one of Premier Rann's key ministers. He was also a strong parliamentary performer, and was frequently successful at embarrassing members of the opposition in parliament. For these reasons, when allegations surfaced that he had authorised a former government staffer to offer a series of inducements to a disgruntled former ALP candidate in order to have him drop an unfair dismissal claim, the opposition and cross-bench members of parliament were quick to turn their focus to them. These allegations were the subject of several investigations, including a formal police inquiry, and ultimately Atkinson was cleared of wrong-doing. The Atkinson–Ashbourne–Clarke affair came to light when the Attorney-General, Michael Atkinson, resigned his portfolios on 30 June 2003, after the opposition alleged that inducements had been offered to former Labor MP Ralph Clarke in order for Clarke to drop a defamation suit against Atkinson (Parkin 2003, 602). In 1997 assault charges were brought against Clarke, then still an MP, and though the DPP dropped the charges in February 1999, Clarke lost his pre-selection. Some months later, Atkinson made some comments that prompted Clarke to launch a defamation action (Parkin 2003, 602). In response, Atkinson counter-sued. In November 2002, it was announced that both parties had agreed to discontinue their actions. The opposition, possibly through a leak by factional enemies of Atkinson, later alleged that Clarke had dropped the action after having been offered positions on government boards by the senior policy adviser to the Premier, Randall Ashbourne. A government instigated investigation cleared Atkinson of any wrongdoing, but Ashbourne was later charged with abuse of public office (Manning 2004, 288). Ashbourne was later acquitted of any wrong-doing after a short trial. Rann then proposed a closed judicial inquiry would be established to investigate the matter. The opposition and members of the cross-benches asserted that any investigation should be open so that the public could be made aware. When Rann refused the call for an open inquiry, the opposition and cross-bench MLCs convened a select committee of the Legislative Council to investigate the affair (Manning 2005, 609–10).

The other potentially embarrassing committee involving Atkinson was popularly termed the 'Stashed Cash' committee. This committee was convened after a public argument between Atkinson and the former head of the Justice Department, Kate Lennon. In October 2004, after the tabling of the Auditor-General's annual report, it was revealed that creative accounting had been used by the department to retain \$5.9m of unspent funds that would otherwise have had to be returned (Parkin 2005, 304). After this was revealed, whilst debates were still raging about its legality,

Lennon, who had moved to become the CEO of the Department for Families and Communities, resigned. Scrutiny then turned to Atkinson, who was questioned over what he knew. Atkinson denied any knowledge of the matter, and was supported in this denial by the Auditor-General, of who has been observed: ‘Auditor-General MacPherson...has played a role in this political drama unusually prominent and opinionated for somebody occupying his stalwartly nonpartisan office’ (Parkin 2005, 305). This is an opinion shared by the then shadow treasurer, Rob Lucas, who felt that MacPherson’s actions painted him as being too close to the government (Lucas 2011). Atkinson and Lennon proceeded to engage in a public argument about where responsibility should lie (Parkin 2005, 306). A government dominated House of Assembly select committee into the matter cleared Atkinson of wrongdoing (Manning 2006, 321), but a Legislative Council select committee continued its inquiries (Lucas 2011).

Attempts to constrain the work of the committees

On the morning of the day that Ralph Clarke was to appear before the Atkinson–Ashbourne–Clarke committee, Rann announced that he would move to have a referendum held — concurrent with the election due in 2010 — on the future of the Legislative Council. Characterising the Council as a ‘relic of a time in our democratic history that is long gone,’ and stating that it was ‘passed its used by date’, he said that voters would have the option to retain the Council with no change, reduce it in size to 16 members and reduce the term length of members from eight years to four, or to abolish the Council entirely (AAP Australian National News Wire, 24 November 2005). Rann made it clear that abolition was his preferred option. He further said: ‘[n]ow, people want to use the chamber as some form of smear machine...It has become a petty, partisan circus’. (Rann, cited in Kelton 2005). It would seem reasonable to conclude that this was an announcement borne partly from frustration with a chamber of parliament not controlled by the government demonstrating its independence (Macintyre and Williams 2008, 223). Equally, it seems the announcement was intended, initially at least, to serve as a smokescreen to distract attention from the work of the Council. By attacking it as an undemocratic relic, Rann was also attacking the legitimacy of the work being engaged in by the Council’s committees.

However, the more determined attempt to stop the committees came several weeks later. The SA parliament had adopted fixed terms, and the date for the 2006 election had been long known to be 18 March 2006. Parliament was prorogued on 8 December 2005, more than three months before the election was due. The government was attacked by the opposition and minor parties and by commentators in the media, who viewed this early prorogation of parliament as an attempt to avoid scrutiny that could derail its re-election attempt (see for example Parliamentary Debates — Legislative Council, 1 Dec 2005, *Advertiser* Editorial 14 November 2005). These allegations were given added weight when the government argued that after parliament was prorogued, all parliamentary committees, including

those committees inquiring into the Atkinson–Ashbourne–Clarke and Stashed Cash affairs, could no longer rely upon the protection of parliamentary privilege, even though the Council had successfully passed a motion allowing the committees to continue to sit (Davis 2010, 1–2). On the Council’s last sitting day, the Leader of the Government, Paul Holloway, stated:

[T]he privileges which attach to Committee proceedings, unless provided by Statute, cease to exist upon Prorogation. Thus, members who purport to comprise a Committee that sits after the Prorogation put themselves at risk of being sued for defamation. By all means, if the Leader of the Opposition wants to pass this motion he could have all the committees that he likes, but what he will not be able to do, I would suggest — or he will be at great risk by doing, if he does, is to invite people to come and make defamatory comments that we have seen in the past, because they may lack the protection. I just put that warning! (Parliamentary Debates — Legislative Council, 1 Dec 2005)

In a letter to the Clerk of the Legislative Council, Jan Davis, Holloway stated the following:

A select committee of the Legislative Council is not entitled to sit after prorogation...

Committees appointed by standing order or by resolution of a House, or of both Houses, for the life of the Parliament may not meet after prorogation but may meet again in the new session of the same Parliament:

Statutory committees...continue in business and may meet and transact business...

All other committees, such as select committees, appointed by resolution of a House cease to exist upon prorogation.

The privileges which attach to committee proceedings, unless provided by statute, cease to exist upon prorogation (Holloway, cited in Davis 2010, 2).

The letter concluded by asking for a copy of the letter to be tabled at select committee sessions held after the prorogation, and for its contents to be made clear to potential witnesses at the select committees (Davis 2010, 2).

It is not the purpose of this paper to determine the validity or otherwise of the position that the government took with respect to prorogation, the important point for this paper is the effect that the declaration of the government had on the work of the committees that were meeting at the time. I would, however, like to note in passing that the observance of the government’s position over prorogation has not been consistent, as the prorogation of the parliament in 2008 did not seem to interfere with the work of committees, or of the willingness of witnesses to appear before them (Davis 2010, 10). The committees did convene meetings during the period after parliament was prorogued. The government members of the committees chose not to attend the sessions, however, both opposition and cross-bench members continued to attend. The effectiveness of the committees was negatively impacted though by the government’s comments on the legality of the hearings. Some of the witnesses, including the senior public servants and officials that the

committees wanted to call, refused to attend citing the lack of parliamentary privilege (Lucas 2011). Some of the committees also found department heads refusing to tender advice to the committees until they were reconstituted after the election (Lucas 2011).

Whilst the government was attacked for shutting parliament down so early, these attacks on the motives of the government did not seem to be effective. The government had been enjoying a commanding opinion poll lead in the months leading up to the election, a lead that it managed to preserve until polling day, when it won an overwhelming two party preferred vote of nearly 57%, turning its minority position in the House of Assembly to a solid majority position. Interestingly though, this record vote level did not translate into the Legislative Council, where the Independent MLC Nick Xenophon won re-election with 20.5% of the vote, enough to fill two and a half quotas (Jaensch 2006, 204–205). This divergence suggests that a significant section of voters understood and respected the different roles of the two houses. The government's prorogation was effective in granting it the clear air that it required before the election campaign. While the action suffered some negative commentary in the media, the committees were constrained in the work that they were able to do. Both committees were re-established following the 2006 election, however, the time when their work would have been most effective and recognised had passed and the attention of the media and the public had moved to different issues.

The role of upper houses and the challenges presented by government power

Upper houses are frequently given the descriptor 'house of review', to render them distinct from lower houses, which are considered the 'house of government'. The designation 'house of review' has been analysed and defined by many scholars (Russell 2001, Uhr 2001, Aroney 2008, Mulgan 1996). Broadly, upper houses are expected to perform two broad functions — scrutiny and accountability. The scrutiny function involves the detailed examination of legislation that comes before it, and the proposal of amendments to constructively improve legislative outcomes, and the occasional veto of legislation that is poorly drafted, or would not enjoy public support. The scrutiny role also extends to the actions of members of the government, and also of public officials. This scrutiny encompasses both issues of administration, as well as issues of probity and competence. Accountability flows from the latter aspect of the scrutiny function, and is best defined as the means by which the executive can be made answerable to the people. This owes much to the view of Harry Evans, who stated 'Governments should be accountable to Parliament, that is, obliged to give accounts of their actions to Parliament, and through Parliament to the public. Governments are then responsible to the electorate at election time' (Evans 1999). This answerability is achieved in part by ensuring probity of action amongst the members of the executive, and it is in achieving this goal that the SA Council select committees play a role.

The important thing about bicameralism, especially as it pertains to the upper house acting as a house of review, is that it — much like the other checks and balances that exist in Westminster style parliamentary democracies — relies upon the division of power against power (Evans 2008, 67–68). The reason upper houses are able to act as houses of review is that they are not controlled by the government of the day. That governments are not in a position to control the scrutiny functions of upper houses can be an intensely frustrating experience, especially when they feel that the scrutiny could be politically damaging. However, as Harry Evans stated in relation to the Senate, though equally applicable to the SA Council:

It is often said dismissively that Senate inquiries are based on party politics. Indeed they are. Free states work through party politics. Subjecting the rulers to the scrutiny of their rivals and opponents is what the safeguard is all about. (Evans 2008, 77).

If Governments feel aggrieved by something that is alleged in a committee of Council, they have many forums available in which to present their case and correct the record. However, the actions of the SA Government in proroguing the parliament show a flaw in the house of review model. While the government was powerless from stopping the committees being formed, it was able to undermine their work through its powers to control the sessions of parliament. This is a flaw that needs to be remedied if the Legislative Council is, in the future, going to be able to properly exercise its scrutiny function as intended. To offer a provocative suggestion — the SA Constitution could be amended to remove the unilateral power to prorogue parliament currently possessed by the executive. Given the fixed terms employed in SA, the Parliament could be scheduled to be automatically prorogued a fixed period prior to the election, say four to six weeks, and for a similar amount of time around the end of each calendar year. Any other prorogation would have to be approved by way of an absolute majority vote in each house. In this way, the houses of parliament would gain more control over their organisation, and the balance of power between the executive and the parliament might progress a little closer to equality. This could be an amendment from which all sides of politics could benefit. The tides of political fortune always turn, and the Labor Party will again find itself on the opposition benches. When that occurs, they will not want any precedent that they may have established regarding the prorogation of parliament to be turned against them. ▲

References

Advertiser Editorial. 24 November 2005

Anderson G. and A. Parkin. 2006. 'Political Chronicles: South Australia — July to December 2005', *Australian Journal of Politics and History*, 52(2): 316–22

Aroney N. 2008. 'Bicameralism and representations of democracy', in N. Aroney, S. Prasser and J.R. Nethercote (eds) *Restraining Elective Dictatorship: The Upper House Solution?* Crawley: UWA Press.

Bastoni J. and C. Macintyre. 2010. 'What's In It for Us? Why Governments Need Well Resourced Parliaments', *Australasian Parliamentary Review*, 25(1): 177–83

Davis J. 2010. 'Matters Concerning the Effect of Prorogation: An Argument of Convenience', paper presented to the 41st Conference of Presiding Officers and Clerks.

Evans H. 1999. 'The Senate and Parliamentary Accountability', ANU Graduate Program in Public Policy Discussion Paper 65.

Evans H. 2008. 'The case for bicameralism', in N. Aroney, S. Prasser and J.R. Nethercote (eds) *Restraining Elective Dictatorship: The Upper House Solution?* Crawley: UWA Press.

Jaensch D. 1986. *Getting our Houses in Order. Australia's Parliament: How it works and the need for reform.* Ringwood: Penguin Books.

Jaensch D. 2006. 'The 2006 South Australian Election', *Australasian Parliamentary Review*, 21(2): 198–207

Kelton G. 2005. 'Rann to call referendum for 2010; abolish the upper house', *Advertiser*, 24 November 2005.

Lijphart A. 1984. *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries.* New Haven: Yale University Press.

Lucas R. Interview with the author, conducted 1 September 2011.

Macintyre C. and J. Williams. 2008. 'The embattled South Australian Legislative Council', in Aroney N., S. Prasser and J.R. Nethercote (eds) *Restraining Elective Dictatorship: The Upper House Solution?* Crawley: UWA Press.

Manning H. 2004. 'Political Chronicles: South Australia — July to December 2003', *Australian Journal of Politics and History*, 50(2):287–94

Manning H. 2005. 'Political Chronicles: South Australia — January to June 2005', *Australian Journal of Politics and History*, 51(4):606–12

Manning H. 2006. 'Political Chronicles: South Australia — July to December 2005', *Australian Journal of Politics and History*, 52(2): 316–322

Mulgan R. 1996. 'The Australian Senate as a 'House of Review'', *Australian Journal of Political Science*, 31(2): 191–204

Parliament of South Australia. 1999. *The Standing Orders of the Legislative Council.* Parliamentary Debates — Legislative Council, 1 December 2005

Parkin A. 2003. 'Political Chronicles: South Australia — January to June 2003', *Australian Journal of Politics and History*, 49(4): 597–603

Prasser S., J.R. Nethercote and N. Aroney. 2008. 'Upper houses and the problems of elective dictatorship', in Aroney N., S. Prasser and J.R. Nethercote (eds) *Restraining Elective Dictatorship: The Upper House Solution?* Crawley: UWA Press.

Russell M. 2001. 'What are Second Chambers For?' *Parliamentary Affairs*, 54: 442–58

Uhr J. 2001. 'What is a House of Review?' *Constitution Commission of Victoria Opening Address*, 16 August 2001

Dr Alistair Harkness is Lecturer in Criminal Justice, Monash University

Restraints upon the agenda: policy making in Victoria 1982–1992

Alistair Harkness

The election of John Cain's government 30 years ago in April 1982 broke Labor's 27 year electoral drought in Victoria, but the party's elevation to the treasury benches brought with it a decade of trials and tribulations for a party intent on enacting its social and economic policy agenda. Only limited academic literature exists on this period of governance in Australia's second most populous state. This article seeks to address this deficiency by analysing the inhibitors to executive government in the bicameral Victorian parliament by its second chamber, and by examining other impediments which confronted the governments of Cain and Joan Kirner between 1982 and 1992.¹

Victorian electoral politics was turgid until the 1950s, with governments forming and falling rapidly as alliances and allegiances altered. Following the ALP split in Victoria in 1955, stability ensued with the Liberal governments of Henry Bolte, Rupert Hamer and Lindsay Thompson dominating until the election of John Cain's Labor Government on 4 April 1982. The advent of the Cain administration was seen by many as a welcome change after the long continuous conservative reign that, by the late 1970s, had become politically exhausted. The Cain government prided itself on its 'counter-revolutionary' economic strategy — a style of Keynesian-inspired interventionist policy at odds with the (relatively) new and prevailing orthodoxy of Friedmanite free-market and governmental withdrawal from the economy. John Cain and his Labor team came to power with promises to implement substantial social reform in addition to pursuing this economic strategy. It was an openly and outwardly social-democratic government intent on satisfying not just the needs of workers and its traditional trade union base, but the ever-expanding middle class which had invested faith in the ALP in large numbers in 1982.

It is the contention of this article that various factors impede good governance but, as with other governments without a majority in both houses of a two-chamber

legislature, the impact of the Legislative Council was most acutely felt by Victorian Labor during its decade in office. Despite maintaining the confidence of a majority of members of the lower house, the lack of a majority in the upper house necessitated substantive and continual bargaining and negotiation in order for a policy agenda to be implemented.

Legislatures are an important part of the liberal-democratic tradition, constituting one of the three arms of the ‘doctrine’ of separation of powers, along with the executive and the judiciary. As law-making bodies, they have the ability to vet a potentially over-zealous or unscrupulous executive. Bicameral parliaments add an extra element to this system, requiring executive government to have its legislation pass through two houses. While upper houses are not inherently undesirable parliamentary institutions, the extent of their manipulation by executive government and the extent to which they force their own political will determines their degree of usefulness in the legislative process. Bicameralism is the foremost division of parliamentary power and while rationales for upper houses are diverse, the prime justification is to provide checks and balances. Evans notes that one of the prevailing themes of political thought is that legislative power should not be vested in a single body of persons alone,² a sentiment concisely expressed by Huntington in 1788; Shackleton and Clark assert the importance of a body of experienced people to revise and amend ‘ill-considered, defective, hasty, and even oppressive legislation coming from the House elected by universal suffrage’;³ and Lord Halsbury agrees that the ‘Upper House must not be impotent, it must not simply be the tool or puppet of the Lower House’ arguing that checks and balances are essential to prevent an abuse of legitimate power. For Shell, ‘checks and balances’ translate as a means by which first chambers can be prevented from pushing through changes with important constitutional implications.⁴

Costar provides a detailed examination of bicameralism in Victoria, and this article does not seek to provide replication of his work.⁵ However, it is worth observing that, if structured correctly and appropriately, bicameral parliaments can provide effective checks and balances on executive government within Westminster-derived parliamentary systems by preventing the passing of hasty or harsh legislation by ensuring deliberation. The reflection of opinion of electors over a greater period of time, historically achieved by way of staggered terms, served to act as a brake on the most recent electoral success of a party in the lower house.⁶ Crucial in the modern era, however, is the need to ensure that upper houses act as houses of review — to approve legislation, to go into detail, and to scrutinise the legislative role of the lower house — but ought not merely replicate the lower house nor unnecessarily impede the actions of reformist governments. As Sawyer notes, ‘no one has succeeded in devising an upper house which is significantly different from the lower house, and that preserves the institutional advantage of a ‘brake’ while avoiding mere political bias.’⁷ In the Victorian experience, an upper house not controlled by the government can undermine (at worst) and frustrate (at best) the will of a reforming government. Internal party machinations and external interest groups constitute two other prominent and problematic constraints.

Managing the legislature: bicameralism in Victoria

Cowen expressed doubt about the usefulness of a bicameral system in Victoria:

No doubt as a revising chamber the Council can and does perform useful functions, but some may question the purpose of preserving a bicameral structure when the two houses are so identical in structure.⁸

Davies, too, questioned the usefulness of the Victorian upper house, describing it as 'a malicious, mechanical coconut-shy ... pitching back bills and bits of bills, unpredictably' and as a body whose veto worked by 'a sort of convulsive shudder of the property interest'.⁹ Conversely, Sharman argues that strong upper houses are important as checks and balances to prevent executive excess. Just because governments win elections does not mean they should assume majority support for each and every subsequent proposal, or that an election win absolves them of the need to justify their legislation outside the confines of the party room.¹⁰

The 1982 election saw the ALP come within four seats of dominating the upper house. Had it not been for staggered terms (abolished in significant reforms made by the Bracks Labor Government in 2003), Labor would have controlled the Legislative Council. In 1982, upper house members elected at the 1979 election still had three years left of their terms. Staggered terms hark back to colonial times when they were introduced to insure against a government elected in the lower house on a popular whim, or a 'majority of the moment', and in the Victorian experience Council terms were fixed for six years duration until reforms passed in 1984 made them two terms of the Assembly. The clear aim was to entrench a conservative majority in the second chamber. Former Liberal Minister Rob Knowles is one defender of staggered terms, arguing that in a bicameral system there must be some basis of differentiating the upper house from the lower house, and one such method of differentiation is to have upper house members elected at separate elections: to maintain some tension that forces an upper house to allow governments to make difficult decisions; and to provide a different composition.¹¹ Characteristic of those who disagree is former Labor Premier Steve Bracks who argues that having a 'fresh mandate' rather than a 'stale mandate' is preferable, and that it is undesirable that half of the upper house is representative of a different era and a different mood of the electorate.¹²

Obstructionist or rubber stamp?

Members of the Cain government regularly bemoaned the fact that Labor's policy program could not be passed into law in its entirety, although former Liberal Party parliamentarians deny that they acted obstructively during the Labor decade. One of the eternal questions in Victorian politics is whether, when controlled by the opposition, the upper house is obstructionist; and when controlled by the government is a rubber stamp. Following the 1982 election, Alan Hunt, as Leader of the Liberal Party in the upper house, adopted a set of constitutional and tactical guidelines to shape the party's behaviour and performance in opposition, including

recognition that the Liberals were not in government and ought not attempt to govern from the upper house.¹³

Ken Coghill, a former Labor MP and Speaker of the Victorian Legislative Assembly, argues that throughout the 1980s and early 1990s Labor was ‘in Government but not in power’, noting that this was a frequent lament of members and supporters of the Cain and Kirner administrations.¹⁴ From its genesis, the Cain government faced a hostile upper house intent on forcing amendments upon legislation, or simply by blocking it either in the parliament or by indicating that if introduced, certain legislation would not pass. However, Coghill notes that the overwhelming majority of government Bills were passed without a division at any stage — 80 per cent over the 10-year period.¹⁵ Looking at these figures and comparing the proportion of Bills that were blocked or amended alone is misleading because it fails to take into account the number of Bills that were not presented because they had no chance of success. Significant is the number of Bills the government abandoned even before they were due to be debated by parliament. In the first term, there were just two, but in the second term 28 (7 per cent) and in the third term 40 (9.8 per cent).¹⁶ In a number of cases, amendments by the Council changed the policy effect of Bills, but the government proceeded with them nevertheless.

Paul Rodan argues that, when faced with a hostile upper house, governing parties may react in one or a combination of three broad ways: first, in a confrontationist approach where a full policy agenda is presented and when blocked the upper house is portrayed as obstruction of a mandate; second, for a government to be selective in what it presents, and to reluctantly accept amendments for the sake of getting some legislation passed; and, third, to negotiate and horse trade with other parties, although this is only applicable when the third party holds a balance of power. Cain opted largely for Rodan’s second option, with the most spectacular example of the government’s retreat on an issue was its failure to legislate for the reintroduction of probate duty — a much vaunted election commitment. The non-Labor parties clearly outlined their intention to block the necessary legislation and, after a month of vitriolic public debate, the Bill was withdrawn, never to be reintroduced.¹⁷

In 1983 several bills were blocked or substantially amended, including moves to remove the minimum price of beer,¹⁸ proposed changes to municipal election rules and procedures to allow non-naturalised Australians to hold office in local government,¹⁹ a Bill concerned with the real estate industry,²⁰ and payroll tax.²¹ The conservatives planned to use their numbers to block historic-buildings legislation, which was dropped by the government as a result.²² The National Party failed to rule out blocking legislation it did not believe was in the best interests of the state, for instance indicating that it would block supply in order to prevent probate duty²³ — a display of arrogance, according to some commentators.²⁴ The Liberal Party also threatened to block the much promised prostitution law reform legislation²⁵ and later, under Alan Brown’s leadership, attempts were made to block the sale of the State Insurance Office (although Kennett had proposed its sale in 1984).²⁶

Supply bills

The issue of blocking supply represents an interesting constitutional dilemma, and raises questions about the role of upper houses in a Westminster-derived system of government — exactly what role should an upper house play in securing accountable government? Australian parliaments are based upon the Westminster system of responsible government, whereby governments are formed by the support of a majority in the lower house. This system differs greatly from the system of separation of powers found in the United States, in which the executive, legislature and judiciary are kept more at arm's length from one another.²⁷ During this decade, the Legislative Council remained overly powerful on general legislation, with no double-dissolution provision in the state's constitution; had the ability to reject or amend legislation originating in the Assembly, often with apparent impunity; and possessed the ability to block money bills until April 2003. This power of veto opened the way for partisan and opportunistic politics to interfere with a Government's legislative program. Unlike the Australian Constitution, Victoria had no provision for dissolving both houses of parliament should a recalcitrant Legislative Council continually refuse to pass Bills. Again, this was a deliberate decision by the constitution makers to prevent the upper house being dissolved by a 'radical' government in the lower house.²⁸

Apart from constitutional considerations, matters central to democratic ideals are raised with the blocking of government Bills by an upper house. The age-old issue of the existence or otherwise of a mandate is raised when an upper house decides to block or amend Bills originating in the lower house, or to go to the extreme and block — or merely threaten to block — money bills. In recent years there has been a revival of the term, with governments and oppositions claiming or denying a mandate, although few discount the applicability of the doctrine when advantageous to do so. Much confusion and ambiguity surround the term, and ownership of a mandate is further confused in a bicameral parliament where the government does not control both houses.²⁹ While a tenuous notion, often confused with much rhetoric, there does remain the underlying principle that a government is elected with a general mandate to govern. Most governments are also elected with a specific mandate to implement particular policies announced during an election campaign, but to deny a government supply is to deny the existence of any mandate at all.

Jaensch questions the relationship between the opinions of the voters and the decisions their representatives make once elected.³⁰ Emy observes that the term mandate 'flourishes despite criticisms', and notes that much broader constitutional questions are raised concerning the relationship between the executive and the legislature, and between the two houses of parliament.³¹ The doctrine of mandate is complicated in bicameral parliaments where, with two chambers and two ballot papers, it can be logically argued that there are two elections on one day — one for each house.³² Often, when a government comes to power or is re-elected, it may claim that non-government members of the upper house should respect the government's mandate. Invariably, though, opponents of a government claim that they,

too, have been awarded a (counter-) mandate by the people who voted for them. The crux is whether the two houses have equal powers, and thus multiple mandates, or whether the lower house (where government is formed) takes precedence.³³ Mandate theory raises a multitude of issues. If a party wins government with a bare majority, or indeed less than a plurality of the vote, does it have as strong a mandate as would a government with an overwhelming majority? Does a mandate last for an entire term, or should public opinion be considered throughout a government's term? Are there, indeed, multiple mandates, counter-mandates, or a mandate to oppose in a bicameral parliamentary system? What mandate does a government possess to deal with change should new issues arise? In a majoritarian political system such as in Victoria, winning government does not automatically bestow the right to implement everything in a party's election platform.

Amendments to section 66 of the Victorian constitution in 1984 allowed for four-year parliamentary terms, with a minimum of three years. This was subject to three exceptions: a vote of no confidence in the government by the Legislative Assembly; the rejection twice by the Council of a 'bill of significant importance'; and the rejection or failure to pass an appropriation bill 'for the ordinary annual services of the Government'. Section 4, subsection (3)(c) of the constitution deals with the matter of supply bills or, more precisely, with the appropriation of the Consolidated Fund for the ordinary annual services of government, but does not include a Bill to appropriate moneys for the construction or acquisition of public works, land or buildings; the construction or acquisition of plant or equipment that would normally be regarded as involving an expenditure of capital; appropriations for the services proposed to be provided by the government and that have not formerly been provided by the government; or appropriations for or relating to the parliament.

Since supply bills in Victoria traditionally contain one or more of these items, the rejection of a money bill will not automatically enable the dissolution of the Legislative Assembly. Should the Council choose to block supply in the first three years of a government's term, no double-dissolution provisions existed to resolve the dispute. The only feasible route out of such a scenario was through negotiation. Supply has been formally blocked by the Legislative Council seven times in Victorian history, and during the Labor decade there were a number of occasions when it seemed likely that supply would be blocked again, as the Liberal Party under the leadership of both Jeff Kennett and Alan Brown eagerly sought government.

The Liberal Party realised, as the 1982 election approached, that retaining government was unlikely. Comments by Liberal minister Digby Crozier in 1979 were probably an indication of things to come when he indicated a belief that his party should use its upper house numbers to 'sack' a Labor government if it tried to introduce 'socialist' legislation.³⁴ Labor introduced legislation in May 1982 designed to remove the Legislative Council's right to reject supply, but not affect its power on other money bills. The legislation would provide 'certain, solid and secure government', Cain argued, and would 'end forever the threat of a popularly-elected government, with a clear majority in the Legislative Assembly, being forced

out of office by the malice or caprice of the Legislative Council'.³⁵ The *Age* described the legislation as appealing on democratic principle, and a good tactical manoeuvre,³⁶ and the *Herald* declared that the conservative parties would be 'irresponsible' to block it.³⁷ Nevertheless, with the non-Labor parties declining to rule out the possibility of blocking supply, Cain indicated early in the first term that he was prepared to call another election if supply were blocked.

Apparently believing that Labor was destined to win control of both houses after the 1985 election, the Liberal Party was relatively accommodating in its approach to the government's reform agenda for the upper house during the first term. In late 1983, the Liberals announced an eight-point package of parliamentary reforms, including the removal of the power of the upper house to block supply. Hunt, the Liberal leader in the Council, said that it was a clear indication that 'a remarkable degree of movement' had occurred in reconciling the divergent views of the two major parties.³⁸ The Liberal package also proposed four-year fixed terms for the Legislative Assembly, basic constitutional alteration by referendum, and early elections only as a result of a successful no confidence motion or if a vital Bill is rejected twice in six months.³⁹ However, the Nationals were adamant of the need for the upper house to be able to block supply.⁴⁰

Opposition Leader Jeff Kennett vowed in 1983 that the Liberals would not use a majority in the upper house to force an election, saying the Liberal Party did not have to throw out a government to win office, and cited the 1975 federal imbroglio as reason enough for not prompting a constitutional crisis.⁴¹ Nevertheless, by 1985 he was not so sure, and appeared to be leaving open the possibility of forcing an early election. Given that constitutional reform in 1984 precluded an election normally being called within three years of the previous one, Kennett's options were limited to twice rejecting a Bill of 'special importance' (as determined by the government) or rejecting or failing to pass an appropriation Bill 'for the ordinary services of government'. The Cain government was not going to succumb to the former, and in regard to the latter had framed a budget so that budget bills were not appropriation bills as defined by the amended Constitution Act.⁴²

Hunt was adamantly opposed to blocking supply,⁴³ and he argued that he could not see a situation arising when supply would be blocked.⁴⁴ However, the National Party differed, with Peter Ross-Edwards refusing to rule out the possibility of supply being blocked.⁴⁵ Towards the end of 1990, with Alan Brown having won the Liberal Party leadership from Kennett the previous year, Kennett applied pressure from the backbench for the Liberals to block supply, even calling his colleagues 'wimps'. Pressure, too, came from the Young Liberals, who argued that 'it is a right of the upper house of a parliament to block supply to a government in the lower house'.⁴⁶

Despite the talk of blocking supply, the term of the Kirner government was fixed for a minimum of three years, until at least late 1991, and after that at the government's discretion up to a maximum four-year term.⁴⁷ Nevertheless, Kennett

announced in 1991, upon his return to the Liberal leadership, that supply would be blocked in order to bring about an election. He offered Labor ‘a way through the constitutional maze’ to engineer an early election without provoking a constitutional crisis by introducing a private member’s bill in the legislative council that would have effectively suspended the constitutional blockage of an early poll. He highlighted ‘reprehensible circumstances’ to justify this position and warned of a ‘quantum leap’ in his campaign if the Kirner Government did not acquiesce.⁴⁸ Supply was finally passed on the last sitting day of the session.

It was soon apparent that the government would not resign and constitutionally no election could be called within the first three years of the parliamentary term. When an attempt to dissolve the parliament via a Liberal-proposed Constitution (Dissolution of the Legislative Assembly) Bill in May 1991 failed, Kennett changed tactics. He announced that unless the entire Labor government resigned by midnight on 19 May 1991, retrospective legislation would be introduced by a future Liberal government to preclude resigning or defeated members from accessing government-funded superannuation benefits. Kennett was roundly attacked, by the state and federal governments, in the press, and by members of his own party.⁴⁹

Cabinet cohesiveness

While Cabinet meetings were excessively informal until 1982, and no minutes of meetings were kept, Cain’s approach was dramatically different. Indeed, it is speculated that before 1982, some ministers wrote notes of actions to take on the back of match boxes! Cain wanted Cabinet processes to be smooth and systematic, and set out some basic precepts to ensure that this was so.⁵⁰ Cain nominates his first Cabinet as the best,⁵¹ whereas Evan Walker rightly identifies the second Cabinet of 1985–88 as more balanced, in factional and gender terms.⁵² One problem that faced the government in its third term was the transfer of ministers from the upper house to the lower house. Just as both Rupert Hamer and Lindsay Thompson had moved to the lower house to pursue leadership ambitions within the Liberal Party, so did several Labor MPs. Cain was angered that in 1988 three ministers from the upper house decided to move to the lower house, concerned about the effect of denuding the upper house of talented MPs, and Cain blamed leadership ambitions and factional manoeuvrings.⁵³ Mathews sat in Cabinet for the first two terms, and rates the first as ‘outstanding’ and the second as being of a very good order, and cannot cite an occasion during those seven years when the notion of a Cabinet consensus did not work to perfection. He believes that there was enough experience, but that there was a dilution of overall quality in the third term, which was certainly not up to the standard of the original Cain Government.⁵⁴ Another former Cabinet minister explains that factionalism became very intense within Cabinet when people lost confidence in Cain’s ability to deal with issues such as the collapse of the Geelong-based Pyramid and Countrywide building societies, and the inner sanctum turned against him. Cain reportedly did not take a high profile role in defending the government. Opportunity for advancement was reduced and there was some fighting for what remained, although with electoral doom pending, individuals were

concerned with political survival. Other ministers simply tired, some became more interested in undermining others, and some in the ministry were just incompetent or lacklustre.

Factionalism prior to 1989 can be described as constructive — but certainly destructive thereafter. In 1988, Labor's Legislative Assembly majority was three and the factions negotiated an agreement concerning parliamentary positions in an attempt to ensure stability. However, the government was facing a range of internal and external problems. Cain's leadership had become destabilised and the factions did not allow the government to function in the steady way it had previously. This can be attributed largely to the factions becoming ideologically closer with no clear-cut differences. As a result, patronage became a higher priority than policy formation. By the end of Cain's tenure as Premier, strict observance of several of his key precepts for good government outlined in 1982 — including 'that Cabinet got corporate and quality decision-making'⁵⁵ — no longer occurred.

Factionalism

Political parties such as the ALP are born of different or varying views, rules, norms and dynamics. It is not surprising, therefore, that members of the party will have different perspectives and outlooks. Clusters of members of any organised group will often form cliques or factions. Highly structured and organised factions first emerged in the ALP after 1970, although factionalism has dominated the Labor Party since its genesis. While the party's foundation is based on certain core principles and guiding lights, its constituent parts have differed greatly at times on ideology (publicly), but more generally on personality (internally).⁵⁶ It is worth noting that, as with any organisation, political parties require a management system to maintain order and concentrate attention on goal attainment. Graham Hudson argues that in the Victorian branch of the ALP, the factions provide the effective management, and the existence of formalised factions is the conscious result of the reformation of the party following federal intervention in the early 1970s.⁵⁷

Since the 1980s, the ALP has engaged in open factionalism. James Jupp declared, somewhat prophetically in 1985, that the main threat to continued Labor domination in Victoria would be internal disunity and failure to meet the expectations of the electorate. There was no reason, he wrote, why Victoria should not be a natural Labor state: it had the biggest Catholic population and the Democratic Labor Party had effectively met its demise; two-thirds of the population live in Melbourne, with its manufacturing base and workforce and a strong ethnic background drawn from southern European migrants; and areas such as Geelong and the Latrobe Valley have large manual workforces (although these have diminished greatly in recent years).⁵⁸

By the end of the 1980s, the Labor Unity faction had lost numbers in caucus and Cabinet, and a deep split occurred in the Socialist Left faction in 1990 which saw the emergence of the breakaway Pledge group. Union amalgamations in the late

1980s did not have a dramatic political effect on the Victorian ALP. The unions had 60 per cent of delegates to the state conference, but very rarely voted as a bloc. Rather, they voted along factional lines, and Labor Unity managed to secure control of the Victorian branches of a number of key large amalgamated unions.

Prior to the 1982 election, the Liberals claimed Cain would be the puppet of the Socialist Left, and ran this as a campaign issue, but were unable to demonstrate the nature or effect of this apparent Socialist Left domination. Cain denied any influence existed, saying ‘I am answerable to no individual or faction within the Labor Party.’⁵⁹ Cain gives a lucid account of the effect of factions on the government he led,⁶⁰ and Hudson rightly highlights that ‘the management of the party’s affairs became an issue of critical importance during the life of the Cain and Kirner Governments’.⁶¹

The role of factions within Cabinet became a much bigger problem during the third term. It became unbalanced and Cain, who was non-aligned, was stranded without much influence over what occurred. As the factions solidified and became more rigid in both Cabinet and caucus, this left Cain with little room to manoeuvre. Even though the full effects were manifested after 1988, when ministers were foisted on Cain without him having much say, there is some evidence that destructive factionalism started in 1984 with the re-entry of four right-wing unions. During the Kirner premiership, factions had become dominant and demanding and, like Cain, Kirner was not able to exercise any real leadership to achieve a cohesive team and cohesive policy responses to issues as they arose.

Some of the problems experienced in the government’s third term were signalled when after the 1985 election Pauline Toner was dropped from Cabinet. There was bitterness and back-stabbing, with Labor Unity ministers undermining or making comments in the press about Left ministers and vice versa. While there existed some factional power players within Cabinet, the real players were non-parliamentarians with some operatives attending caucus faction meetings.

Managing external relations — the Commonwealth, the union movement and the public sector

More often than not, and especially at annual Premiers’ Conferences, Victorian Labor had a different outlook from federal Labor counterparts on policy direction, and the two administrations often clashed privately, although less often publicly. But underlying federal tensions remained throughout the course of the Cain government as they had in previous Liberal administrations. Fiscal federalism, the transfer of monies from the Commonwealth to the states (essential after states’ income-taxing powers were effectively removed after the Second World War), became an increasingly sore point throughout the 1980s between the Labor states and the Commonwealth Labor leadership. Each successive Premiers’ Conference became a cause for disgruntlement, as the states saw themselves receiving an even smaller share of the fiscal pie.⁶²

Victoria was the first state to be affected by the national economic downturn in 1989, and with its large manufacturing base and with a downturn in that sector and a greater reliance on the services sector, the state was vulnerable to interest rate rises. Another critical factor was that the federal government continually reduced the amount of money it was providing to the states. Victoria required more cash in order to manage the budget effectively. Tension between the state and federal administrations was palpable, with the economic advice from the Department of Management and Budget and the Commonwealth Treasury to their respective treasurers being vastly different.⁶³ Cain notes that while relations started out well with the federal colleagues, they had deteriorated by the mid-1980s. The poor nature of the relationship in later years meant that the Victorian government was not kept properly informed about the precarious position of some of the state's financial institutions.⁶⁴

Specific interest groups, when structured and organised, can apply significant pressure to government. Australian state governments are likely to be pressured by a wide variety of interests, including the Commonwealth government, the bureaucracy, unions (particularly the public sector unions), and many private interest groups. Labor's initial success can largely be attributed to the way in which the government was able to include all protagonists in a consultative way, including sections of the community that would not previously have been considered friendly to Labor, such as business groups. Pressure groups were most forceful during the Labor decade on issues such as prostitution, liquor, and gun-law reform, and on issues such as invitro fertilisation (IVF) and abortion. However, perhaps the strongest pressure group on a Labor government is the union movement. Trade unions are a key pressure group in Australian political life and, generally, are more problematic for Labor administrations than for conservative ones by virtue of the fact that they have more leverage over the party of which they are a fundamental part. Unions have two key strengths against a Labor government. First is the ability to withdraw labour in the form of strike action, which can embarrass the government through criticism that they cannot control workers. Second, with a substantial number of delegates to state and national conferences, and with key unionists on internal panels such as the Public Office Selection Committee, the trade union movement can exert influence over preselection decisions, policy decisions and a range of other internal party issues. Nevertheless, during the 1980s, when Labor was in power both in Victoria and at federal level, industrial disputation fell markedly in Victoria. This occurred despite industrial unrest being more prevalent around the nation. Disturbing to many union leaders and ALP insiders, however, was the disastrous and drawn-out tram blockade of Melbourne in 1990.

There were some issues on which the government was seen to closely mirror Trades Hall policy, and this was expressed via union involvement in the faction system and in the domination by union delegates at state conference. There were a number of instances in the later period of the government where the union movement forced government policy to reflect the input of the relevant unions rather than the interests of the community as a whole. For example, the union movement was much more

concerned about the industrial rights of teachers than it was about the outcomes in the education system. Thompson notes that there is a large body of research to indicate that relationships between ministers and the public servants are not simple and cannot be illustrated in classic Westminster terms. The relationship is made complex by the capacities and status of ministers themselves and the power of the bureaucracy as a whole and the relative power of individual departments.⁶⁵ The rise of ‘new public management’ in the 1980s saw a trend towards management consultants from the private sector adopting a key role in the policy-making process, a role formerly and traditionally the domain of the public sector bureaucracy.⁶⁶ Incoming governments have a tendency to want to overhaul the bureaucracy, in terms of both structure and personnel. Early in its first term, Labor initiated substantial public sector reform, creating a ‘reform-oriented bureaucracy’ characterised by increasing ‘managerialism’ and appointment of outsiders to the ranks of the bureaucracy.⁶⁷ Good policy making can be threatened by the overt politicisation of the public service.⁶⁸

One way in which the public service can be politicised is by policy-related politicisation, whereby people are appointed with well-known commitments to particular policy directions by one government that may render them unacceptable to a future alternative government.⁶⁹ Involvement by the legislature in the policy process has become increasingly irrelevant as consultants carry out much of the role of policy making. The legislature, it would appear, only exists now to vote into law policies presented to it by the executive — who themselves rely on external consultants.⁷⁰

Conclusion

The 1992 election was an emphatic termination of Labor’s decade in office, with the Coalition parties under Kennett’s leadership achieving a 34-seat majority.⁷¹ Accumulatively, the Government’s response to the monetary difficulties of a number of financial organisations in the early 1990s ultimately reversed the Labor government’s fortunes. This was compounded by the budgetary situation deteriorating as a result of the economic downturn and exacerbating and building on the perception that the Government was an incompetent economic manager. Another contributing factor that caused the government to fall heavily was high interest rates, although that was a fundamental that faced all states. After the Nunawading re-election in 1985 and the realisation that Labor would not have control of the upper house in its second term, the Liberal Party felt secure in using its numbers to block or amend legislation in the upper house.

The need for providing checks and balances against the excesses of government between elections is a crucial requirement in any liberal democracy. An effective upper house can well contribute to such a parliamentary function. However, there exist several impediments for reformist social democratic administrations in bicameral systems, and the lack of a government majority in a second chamber requires substantive and continual bargaining and negotiating for a policy agenda to be implemented. ▲

Endnotes

- ¹ Considine and Costar's work addresses the period 1982–92: see M. Considine & B. Costar (eds) 1992, *Trails in Power: Cain, Kirner and Victoria 1982–1992*, Carlton, Vic: MUP. The following texts are similarly useful: B. Costar & C Hughes (eds) 1983, *Labor to Office*. Blackburn, Vic: Drummond; and P.R. Hay, J Halligan, J. Warhurst & B. Costar (eds) 1985, *Essays on Victorian Politics*, Warnambool, Vic: Warnambool Institute Press. Cain's own book, a *quasi* memoir, also analyses some of the key commitments and events that shaped his government: J. Cain 1995, *John Cain's Years: Power, Parties and Politics*, Carlton, Vic: MUP
- ² H. Evans 1995, 'Citizen Initiated Referendums: Adjunct or Antithesis of Constitutional Government?', address to the Samuel Griffith Society Conference, *Upholding the Australian Constitution*, Carlton, Vic
- ³ L. Shackleton & G. Clark 1982, 'The Role of Second Chambers', *The Parliamentarian* 63(4), p. 204
- ⁴ D. Shell 1988, *The House of Lords*, London: Philip Allan, p. 2
- ⁵ B. Costar 2003, 'Accountability or Representation? Victorian bicameralism', Department of the Senate Occasional Lecture Series, 28 March
- ⁶ K.C. Wheare, 1963, *Legislatures*, London: Oxford University Press, p. 212. Stockley divides the check and balances into four distinct roles, and provides advantages and disadvantages of each: A. Stockley 1986, 'Bicameralism in the New Zealand Context', *Victoria University of Wellington Law Review* 16, pp. 383–5
- ⁷ Nevertheless, Hewitt questions whether an upper house provides any check on the lower house if the electoral system itself can be changed, as is the case in Australia: Hewitt, E.E. 1992. *Cameral Government: Unicameral and Bicameral Legislatures*. Melbourne: Viridia Books, pp. 191–2
- ⁸ Zelman Cowen, 1957, 'Historical Survey of the Constitution: 1856–1956' cited in C.E. Sayers, 1958. *One Hundred Years of Responsible Government*, Melbourne: Government Printer
- ⁹ A.F. Davies, 1960, 'The Government of Victoria', in S.R. Davis (ed.), *The Government of Australia*, London: Longmans
- ¹⁰ C. Sharman, 1987, 'Coping with the Future: The Political Apparatus of the States', in M. Birrell (ed.), *The Australian States: Towards a Renaissance*, Melbourne: Longman Cheshire, p. 48
- ¹¹ Rob Knowles, 28 March 2001, interview with author
- ¹² Steve Bracks, 27 April 2001, interview with author
- ¹³ Alan Hunt, personal communication with author. This material is also transcribed in K. Coghill, 1997, 'In Government but not in Power: Victorian Labor 1982–92' *Legislative Studies* 11(2), pp. 76–7
- ¹⁴ Ken Coghill, 1997, 'In Government but not in Power: Victorian Labor 1982–92' *Legislative Studies* 11(2), p. 75
- ¹⁵ Op cit., p. 78
- ¹⁶ Op cit., p. 78. The figures are slightly inflated because of a small number of Bills withdrawn and substituted with new Bills as a result of extensive revision
- ¹⁷ Paul Rodan, 1986, 'Victorian Labor and the Legislative Council 1982–1985', *Australian Quarterly*, Autumn pp. 76–78
- ¹⁸ n.a. 1983. 'Beer Bill watered down', *Sun*, 17 June
- ¹⁹ n.a. 1983. 'Labor's Upper House rebuff', *Sun*, 17 March
- ²⁰ Walsh, G. 1983. 'Libs claim win on estate Bill', *Sun*, 16 June
- ²¹ P. Chubb & L. Carbines. 1982. 'Cain beaten in Council vote on payroll tax', *Age*, 16 June

- ²² A. Brouwer, 1982. 'Cain fights for reform', *Sun*, 21 June
- ²³ D. Withington, 1982. 'We may block Labor: NP chief', *Herald*, 16 April
- ²⁴ P. Chubb, 1982. 'Supply: wild card in Libs' hand', *Age*, 2 April, p. 10
- ²⁵ D. Broadbent, 1984. 'Libs threaten to delay parlours bill', *Age*, 26 April, p. 3
- ²⁶ R. Dixon, 1990, 'Liberals to block SIO', *Age*, 30 August; editorial, 1990, 'Blocking SIO sale won't help state', *Age*, 1 September; D. Porter, 1990, 'SIO is a sound investment, says accident commission chairman', *Age*, 31 August; A. Stockdale, 1990, 'Merger is a bad deal all round', *Age*, 4 September; S. Burke, 1990, '\$300m jolt as Libs fight sale', *Sun*, 30 August. The *Herald* newspaper was very much in favour of the sale being blocked: editorial, 1990, 'Enter, a real Opposition', *Herald*, 30 August; P. Rodan, 1984, 'Political Chronicle — Victoria', *Australian Journal of Politics and History*, January–June, p. 424
- ²⁷ For a more detailed investigation of the role of upper houses in responsible government, see: S. Ratnapala, 1990. 'Australia's Upper Houses and their Role in Responsible Government', *Policy*, Summer, pp. 48–52
- ²⁸ Since the 2003 reforms, a deadlocked non-appropriation bill is referred to a Dispute Resolution Committee which can allow the Bill to pass unchanged, pass with amendments, or fail to pass. Continued deadlock can result in a double dissolution election or the Bill withdrawn until the following election.
- ²⁹ Much of the research on mandate theory that follows was undertaken by the author: A. Harkness, 1997, 'Mandate — Rhetoric or a Right to Govern: Mandate Theory in Contemporary Australian Politics', Honours thesis, Politics Department, Monash University. Nethercote also provides a useful discussion of mandate theory: J.R. Nethercote, 1998–99, 'Mandate: Australia's Current Debate in Context', Research Paper 19, Commonwealth of Australia Parliamentary Library
- ³⁰ Dean Jaensch, 1994, *Parliament, Parties & People: Australian Politics Today*, (2nd edn). South Melbourne: Longman Cheshire, pp. 87–8
- ³¹ H. Emy, 1997, 'The Mandate and Responsible Government', *Australian Journal of Political Science*, 32(1), p. 66
- ³² Federal electoral behaviour in 1996, and again in 1998, provides strong evidence that many voters cast one vote for formation of government in the House of Representatives and a separate vote to elect senators.
- ³³ The House of Representatives has a maximum term of three years, compared with six for the Senate, and this reflects the more recent popular mandate of the House. However, the Constitution makes it clear that the Senate has what it terms 'equal power' with the House of Representatives, subject to some qualifications. The Senate may not institute or amend money bills, but may return any Bill to the House with 'requests' for amendment. The Constitution, anticipating conflict between the two chambers, stipulates double dissolutions as a conflict-resolution measure. If, after a three-month interim, a Bill is rejected by the Senate twice, the government can suggest the Governor-General dissolve both houses, and full elections be held for each. After the election, the rejected Bills are voted upon in a joint sitting of the two houses.
- ³⁴ P. Ellingsen, 1979, 'Supply warning to ALP', *Herald*, 30 April
- ³⁵ G. Walsh, 1982, 'Cain: It's always time for Supply', *Sun*, 28 May
- ³⁶ Editorial, 1982, 'A step towards democracy', *Age*, 27 May
- ³⁷ Editorial, 1982, 'No Supply block', *Herald*, 26 May
- ³⁸ A. Brouwer, 1983, 'Libs agree on Supply power', *Sun*, 4 November

- ³⁹ B. Guthrie, 1983, 'Upper House deal nearer', *Herald*, 15 November; P. Chadwick, 1983, 'Libs offer to end MLCs' power to reject Supply', *Age*, 4 November, pp. 1, 3; J. Lyons, 1983, 'Libs trying to bail out, says Cain', *Herald*, 4 November
- ⁴⁰ P. Chadwick, 1983, 'Nationals stay solo in right to stop Supply', *Age*, 5 November
- ⁴¹ n.a. 1983. 'We will not block Supply', *Sun*, 21 November
- ⁴² C. Forell, 1986, 'The prince is not wearing any clothes', *Age*, 15 October. See also S. Clarke, 1986, 'We must be ready, Kennett tells Libs', *Age*, 11 October; J. Howard, 1986, 'Kennett signals early poll', *Australian*, 10 October; Clarke, S. 1986, 'Kennett: the prince or pauper', *Age*, 11 October, p. 10; S. Freeman-Greene, 1986, 'Kennett hedges promise on supply', *Age*, 6 October; Editorial, 1986, 'A smoking gun, or a wounded foot?', *Herald*, 7 October, p. 6; P. DeBelle, 1986, 'Supply pledge will change, says Kennett', *Herald*, 6 October; S. Clarke, 'Kennett shifting stance on supply', *Age*, 6 October
- ⁴³ R. Purchase, 1982, 'Cain's great supply gamble', *Sunday Telegraph*, 30 May; A. Stephens, 1986, 'Supply won't be blocked — Hunt', *Sun*, 9 October
- ⁴⁴ P. Chubb, 1982, 'State Liberals unlikely to block Supply, says Hunt', *Age*, 27 April, p. 3.
- ⁴⁵ A. Brouwer, 1982, 'We won't be rubber stamps: Nationals', *Sun*, 19 April; L.S. Boon, 1982, 'Vic Libs decry National stand', *Australian Financial Review*, 19 April; A. Brouwer, 1982, 'Cain hits back on NP threat', *Sun*, 17 April; S. Freeman-Greene, 1986, 'Nats might rethink attitude to supply bill', *Age*, 13 October
- ⁴⁶ D. Wilson, 1990, 'Brown faces push to block supply', *Sunday Sun*, 11 November
- ⁴⁷ Symonds, S. 1990, 'Poll: it can't happen for three years', *Sunday Age*, 9 September, p. 5
- ⁴⁸ Shamsullah, Ardel. 1991, 'Political Chronicles — Victoria', January–June, *Australian Journal of Politics and History*, p. 481
- ⁴⁹ Costar, Brian. 1992, 'Constitutional Change', in M. Considine and B. Costar (eds), *Trials in Power: Cain, Kirner and Victoria 1982–1992*, Carlton, Vic: MUP, p. 210
- ⁵⁰ J. Cain, 1995, *John Cain's Years: Power, Parties and Politics*. Carlton, Vic: MUP, pp. 52–3; J. Cain, 2 April 2001, interview with author
- ⁵¹ Op. cit.
- ⁵² E. Walker, 29 March 2001, interview with author
- ⁵³ J. Cain, 2 April 2001, interview with author
- ⁵⁴ R. Mathews, 9 April 2001, interview with author
- ⁵⁵ J. Cain, 1995, *John Cain's Years: Power, Parties and Politics*, Carlton, Vic: MUP, pp. 52–3.
- ⁵⁶ Lloyd and Swan provided the first real analysis of ALP factions: C. Lloyd, and W. Swan, 1987, 'National Factions and the ALP', *Politics*, 22(1), pp. 100–10; 22(2), pp. 103–4
- ⁵⁷ G. Hudson, 1999, 'Political Party Organization, Management & Factions: A Study of the Victorian Branch of the Australian Labor Party', PhD thesis, Politics Department, University of Melbourne, p. 7
- ⁵⁸ J. Jupp, 1985, 'The Australian Labor Party: Past, Present, Future', in P.R. Hay, J. Halligan, J. Warhurst and B. Costar (eds), *Essays on Victorian Politics*, Warrnambool, Vic: Warrnambool Institute Press, p. 129
- ⁵⁹ n.a. 1981, 'Cain: I'm not influenced', *Sun*, 2 December; n.a. 1982 'Left' is no threat — Cain', *Sun*, 9 March
- ⁶⁰ J. Cain, 1995, *John Cain's Years: Power, Parties and Politics*, Carlton, Vic: MUP, p. 81
- ⁶¹ G. Hudson, 1999, 'Political Party Organization, Management & Factions: A Study of the Victorian Branch of the Australian Labor Party', PhD thesis, Politics Department, University of Melbourne, pp. 60–1
- ⁶² Stewart investigates issues relating to fiscal federalism, its issues, and governmental relations: J. Stewart, 1991, 'Fiscal Dependence, Policy Autonomy: Some Problems in

- Intergovernmental Relations in Australia', *Australian Journal of Political Science*, 26, pp. 535–44. See also R. Lane, 1992. 'The Rationale for Fiscal Equalisation', *Australian Quarterly*, Spring, pp. 262–74; R. Gerritsen, 1990, 'A Continuing Confusion? A Comment of the Appropriate Dispersal of Policy Powers in the Australian Federation', *Australian Journal of Political Science*, 25, pp. 228–40. Federal theory, according to Fletcher, remains largely undeveloped, as opposed to American federal theory: C. Fletcher, 1991, 'Rediscovering Australian Federalism by Resurrecting Old Ideas', *Australian Journal of Political Science*, 26, pp. 79–94
- ⁶³ G. Jungworth, 29 March 2001, interview with author
- ⁶⁴ J. Cain, 2 April 2001, interview with author
- ⁶⁵ E. Thompson, 1986, 'The Bureaucracy', in Galligan, Brian (ed.), *Australian State Politics*, Melbourne: Longman Cheshire, pp. 178–92
- ⁶⁶ D. Saint-Martin, 1998, 'The New Managerialism and the Policy Influence of Consultants in Government: An Historical-Institutionalist Analysis of Britain, Canada and France', *Governance: An Institutional Journal of Policy and Administration*, 11(3), pp. 319–56. See also Zifcak, who analyses the extent of managerialism during the first term of the Kennett Government in Victoria, 1992–96: S. Zifcak, 1997, 'Managerialism, Accountability and Democracy: A Victorian Case Study', *Australian Journal of Public Administration*, 56(3), pp. 106–19. Head also investigates the degree of outsourcing and contractualisation that has occurred in recent years: C. Head, 1997, 'Which Contract State? Four Perspectives on Over-Outsourcing for Public Services', *Australian Journal of Public Administration*, 56(3), pp. 130–1. An alternative view comes from Elizabeth Proust, head of the Department of Premier and Cabinet under Kennett: E. Proust, 1997, 'Implementing the Contract State', Address to the National IPAA Conference 20–22 November 1996, in *Australian Journal of Public Administration*, 56(3), pp. 132–4
- ⁶⁷ R. Murray and K. White. 1992, *The Fall of the House of Cain*, Melbourne: Spectrum, p. 134. See also R.L. Wettenhall, 1985, 'The Public Sector in Victoria: How Different?', in, P.R. Hay, J. Halligan, J. Warhurst and B. Costar (eds). 1985, *Essays on Victorian Politics*, Warrnambool, Vic: Warrnambool Institute Press
- ⁶⁸ R. Mulgan, 1998. 'Politicising the Australian Public Service?', *Research Paper 3*, Department of the Parliamentary Library, 10 November. For discussion of the first Howard government's treatment of the public service, see S. Prasser, 1997, 'Howard and the Commonwealth Bureaucracy', in S. Prasser and G. Starr (eds), *Policy and Change*, Sydney: Hale & Iremonger, pp. 71–84; and P. Schroder, 1997. 'The Impact of the Coalition Government on the Public Service', *Australian Journal of Public Administration*, 56(2), pp. 12–17
- ⁶⁹ R. Mulgan, 1998. 'Politicising the Australian Public Service?', *Research Paper 3*, Department of the Parliamentary Library, 10 November. See also R.S. Parker, 1989, 'The Politics of Bureaucracy', in G.R. Curnow and B. Page (eds), *Politicization and the Career Service*, Canberra College of Advanced Education and NSW Division of RAIPA, Canberra; and P. Weller, 1989, 'Politicisation and the Australian Public Service', *Australian Journal of Public Administration*, 48, pp. 369–81
- ⁷⁰ Background Briefing, 1999, *The Consultocracy*, produced by Stan Correy, Radio National, Sunday 20 June
- ⁷¹ B. Costar, and N. Economou. 1992, 'The 1992 Victorian Election: Emphatically Ending the Labor Decade', *Current Affairs Bulletin*, 69(7), December, pp. 27–31

**AUSTRALASIAN STUDY OF PARLIAMENT GROUP
CONFERENCE 2011 —
THE EXECUTIVE VERSUS THE PARLIAMENT:
WHO WINS?**

Victorian perspectives

Tony Lupton is Professorial Fellow, Innovation and Public Policy, Monash University. He was Member for Prahran in Victoria's Legislative Assembly from 2002–10, Parliamentary Secretary for Industry and Innovation 2006–07 and Victorian Cabinet Secretary from 2007–10.

Cabinet confidentiality and parliamentary scrutiny in the information age

Tony Lupton

Introduction

The traditional concept of Cabinet confidentiality is increasingly at odds with the prevailing attitudes of the Information Age. In this atmosphere there will likely be increasing pressure on Executive Government to release more information and release it earlier than ever before. There is, however, an important public policy imperative in developing coherent rules around what should remain confidential and what should not. If we act to develop these rules for the age we live in, both parliament and the executive can benefit and the people will be the real winners. This paper presents a practical political view, from a recent practitioner, of the challenges the Australian system of Cabinet Government faces in the Information Age. Although my views are drawn from my Victorian experience as a member of parliament from 2002–10 and Cabinet Secretary between 2007 and 2010, it is hopefully broadly applicable to our other jurisdictions.

One of the first things I realised upon taking up the office of Cabinet Secretary was that security of information was an important element of the role. Under the authority of the Premier, the Cabinet Secretary is the effective custodian of the government's records, which are stored in the Cabinet Secretariat. In systems derived from Westminster, keeping things secret seems to be part and parcel of Cabinet Government because that is the way it has always been. Cabinet itself came into existence and developed in Britain while shrouded in secrecy. It still doesn't officially exist in our Australian or Victorian constitutions. Yet it is the centre of political and governmental power.¹ The traditional view has always been that

¹ Cabinet confidentiality, Parliamentary Library Background Note, 28 May 2010, Dr Mark Rodrigues, Politics & Public Administration Section, Dept of Parliamentary Services, Canberra

ensuring frank advice from the bureaucracy and the free exchange of opinions in the Cabinet room demand that all discussions and a very broad range of documents must be kept private. And for a long time. This is generally referred to as the 30 year rule, although its legal basis and application differ between jurisdictions.

In Victoria the Public Records Act 1973 states:

10. Records may be withheld for 30 years
 - (1) Subject to subsection (2), the Minister by notice published in the Government Gazette may declare that any specified records or records of a specified class transferred or to be transferred from a public office to the Public Record Office shall not be available for public inspection for a period specified in the declaration, being a period of not more than 30 years, after the date of their transfer to the Public Record Office.
 - (2) A declaration under subsection (1) may only be made with the agreement of the Minister responsible for the administration of the public office concerned.
 - (3) A declaration under subsection (1) may not be varied or revoked.

Unlike in Canberra, the practice in Victoria has not been for any formal unveiling of these records each year. Perhaps this has led to a general lack of interest in these documents and the ability to gain access to them earlier. I will return to this point shortly.

Freedom of Information Legislation

Freedom of Information legislation enacted since the 1980s and a growing sentiment about the 'right to know' began to challenge that traditional view. The emergence of the Information Age, with globalisation demanding easy information flows and ICT and the internet providing the technological base, cemented the view that instant knowledge was an entitlement.² As a consequence the amount of government information in the public domain has increased markedly over the years. However, as more becomes available, more is demanded. Cabinet documents are a central focus of interest. Our legislative response was based on the traditional view of Cabinet confidentiality. The Victorian Freedom of Information Act 1982 (the FOI Act) was landmark legislation but it still approached Cabinet confidentiality from the traditional position. The 30th anniversary of this legislation in 2012 would be a fitting time to see this approach modernised. The relevant section of the FOI Act reads:

28. Cabinet documents
 - (1) A document is an exempt document if it is-
 - (a) the official record of any deliberation or decision of the Cabinet;

² Freedom of Information Practices, Rick Snell, *Agenda*, 13(4), 291–307, 2006. This valuable article provides a useful review of social developments, Australian and New Zealand case law and legislation.

- (b) a document that has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet;
 - (ba) a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;
 - (c) a document that is a copy or draft of, or contains extracts from, a document referred to in paragraph (a), (b) or (ba); or
 - (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.
- (2) Subsection (1) shall cease to apply to a document brought into existence after the day of commencement of this section when a period of ten years has elapsed since the last day of the year in which the document came into existence.

Notably, section 28 has only been amended once, in 1993 when the Kennett Government broadened the definition of exempt document by inserting sub-section (1)(ba) to include Ministerial briefing papers. What has not been widely recognised or utilised is that s.28(2) undercuts the 30 year rule and effectively provides access 10 years after the year a document came into existence. To the best of my knowledge, s.28(2) was not used to seek a Cabinet document until late 2010, when an application was made for Cabinet documents from the first months of the Bracks Government in 1999. Apparently the documents of the Kennett Government 1992–1999 were and continue to be of no interest to anyone.

Consequences for governments

In a democracy there should be a mature understanding of how Cabinet works and what debate in Cabinet is about, but this is hampered by the secrecy surrounding the process. It should not be surprising that different departments and ministers have different priorities and different views about matters of policy. It should be understood that robust debate about different options is a sign of a healthy system. Unfortunately, too often such debate is characterised as division by the media. Cabinet submissions are circulated among Ministers and departmental views are sought. It would be surprising if they all agreed with every policy option. This process allows the Cabinet to test different points of view and decide which it prefers. As the government of the day, it is responsible for decision making and is not bound to follow one particular piece of advice over another. Nonetheless, the secrecy of the process often puts governments on the defensive when limited information becomes public.

Another consequence of excessive confidentiality is the time-honoured leak to the media. I see three basic categories of leak: (1) leaks that seek to influence or undermine a policy or program; (2) leaks from someone in the government itself, hoping to get a good story published; and (3) leaks that seek to expose some supposed wrongdoing. It would be naive to attempt to construct a system that would

prevent leaks from occurring. Nonetheless, it is axiomatic that where more of the potential material for leaks is in the public domain, there is less remaining to leak. In particular, categories 1 and 2 above would be impacted to some extent by earlier and broader disclosure. When a leaked document is the only evidence presented to the public, it carries far more authority than it is often worth. It will generally be leaked to progress an agenda and will be unlikely to tell the full story. The way it is presented will often refer to the government ignoring departmental advice.

One such example among many is provided by an article in the *Melbourne Age* headlined 'Solar power advice ignored'.³ This article involved a leaked Cabinet submission concerning a solar feed-in tariff for Victoria. There was considerable agitation between proponents of gross (such as in New South Wales) versus net feed-in schemes. The leaked submission supported a gross tariff. This leak and the media stories around it were intended to pressure the government at the expense of sound policy. The government nonetheless decided to implement a net tariff. The type of gross scheme that was touted as superior via the leaked submission turned out to be shockingly expensive in New South Wales, whereas Victoria's scheme turned out to be economically viable while effective in encouraging take-up of solar power by households, non-profits and small business. The leaked submission proved to be wrong in its forecast. The government's decision was justified. But a normal process of departments putting strong views about policy options, which should be encouraged, was viewed in the media as a good way to pillory the government. A different and more open approach to dealing with such documents may have meant that the leak was less likely in the first place or the government would have been better placed to explain its decision. The result would be a better informed public.

Blue books and red books

All governments eventually feel the consequences of secrecy and leaks. The current Victorian Government has recently been dealing with the leaking of the Department of Treasury and Finance 'Blue Book' to *The Age* newspaper. Some examples of stories include the article headlined 'Slash state taxes, says Treasury'⁴ and another headlined 'Pay teachers more: Treasury'.⁵ A nice predicament of paying more with less revenue has been established. These Red and Blue books, prepared by departments prior to elections as briefs for incoming ministers, contain a broad range of departmental and policy information. Red books are prepared for a re-elected government. Blue books are prepared for the then Opposition if it is elected. Much of the material in these books need not be kept confidential. Where they deal with policy, it is a blend of departmental objectives and the government's announced election policies and programs. Surrounding these documents with secrecy allows them to be used selectively by those in receipt of them if they are

³ *The Age*, Royce Millar, 28 January 2009

⁴ *The Age*, Josh Gordon, 14 September 2011

⁵ *The Age*, Josh Gordon, 17 September 2011

leaked. It is of some interest that the newspaper has not published the entire document for people to read and consider for themselves. The Commonwealth Government has begun releasing the relevant Red or Blue book in recent years. For example, Treasury⁶ and Department of Foreign Affairs and Trade⁷ Red books were posted on the Departments' websites within months of the 2010 federal election. Although redacted, they give a comprehensive outline of the issues facing the government.

Consequences for legislatures

While confidentiality issues seem more pertinent to the executive government, the way issues play out also have consequences for legislatures. These arise from the powers and processes legislative chambers have at their disposal for seeking information from the Executive. Apart from the unusual circumstances of minority government, it is naturally an upper house in which the government does not command a majority of votes that is most interested in holding the executive to account. Methods include the commonly understood question time, questions on notice and questioning Ministers and departmental representatives at parliamentary committee hearings.

An approach that has gained popularity in recent years is the Opposition-dominated upper house demanding documents from the government. This led to suspensions of a Minister and protracted litigation in New South Wales in the 1990s⁸ and was repeated without the litigation in Victoria between 2006 and 2010. The documents sought by Victoria's Legislative Council were wide ranging and numerous, including Cabinet-in-Confidence material.⁹ The government established a robust process for assessing each request to determine if any documents were Cabinet documents and acted according to legal advice provided in deciding whether or not to claim exemption. A vast number of documents were released to the Council, most of which were never heard about again.¹⁰ Notwithstanding this process, the Council repeatedly censured and suspended the Leader of the Government in the Legislative Council for failure to comply fully with the Council's order.¹¹ It was an unedifying spectacle and arguably did the Parliament no good service in the eyes of the community.

With a new government in Victoria that also has a majority in the Legislative Council, that chamber has become far less interested in demanding government documents, at least those of the current government. For as long as political parties exist, this situation will continue.

⁶ www.treasury.gov.au

⁷ www.dfat.gov.au

⁸ *Egan v Chadwick* (1999) 46 NSWLR 563; *Egan v Willis* (1998) 73 ALJR 75

⁹ e.g. List of documents sought, Minutes of Proceedings, Victorian Legislative Council, May5, 2010

¹⁰ See Victorian Legislative Council Hansard, 27 July, 2010, pp. 3225–8

¹¹ See e.g. Victorian Legislative Council Hansard, 1 September, 2010, pp. 4366–78

A new approach

A new approach to what is an exempt document, that clarifies the process for assessment and disclosure, would take some of the heat out of these issues and take many of them out of the political arena where there is too much potential for abuse. The blanket Cabinet exemption in freedom of information legislation, and its interpretation by the courts, has meant much material that could be made public has not been.¹² It has led to a piecemeal approach where the peculiar circumstances of a documents creation, its subsequent handling and whether it fortuitously saw the inside of a Cabinet room are more important than its contents or its consequence. In this case we may be able to learn from experience in New Zealand. The approach to freedom of information has taken a very different course across the Tasman and this is particularly so in relation to Cabinet documents. Unlike in Australia, where there is a blanket exemption from disclosure, the New Zealand Official Information Act 1982 (OIA) allows access to cabinet documents if it can be demonstrated that the consequences of releasing the information do not outweigh the public interest in keeping the information confidential. The general principle is set out in section 5 of the OIA, which states:

Principle of availability

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

Exceptions include these set out in section 9, which states in part:

- (f) maintain the constitutional conventions for the time being which protect—
 - (i) the confidentiality of communications by or with the Sovereign or her representative;
 - (ii) collective and individual ministerial responsibility;
 - (iii) the political neutrality of officials;
 - (iv) the confidentiality of advice tendered by Ministers of the Crown and officials; or
- (g) maintain the effective conduct of public affairs through—
 - (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; or
 - (ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment;

Examples of Cabinet documents released until 2006 under these provisions in New Zealand indicates the difference between our jurisdictions:

- Cabinet papers for \$14 million funding for Maori development (*The Dominion Post* 17 Aug 2004)

¹² *Commonwealth v. Northern Land Council* (1991) 103 ALR 415; *McKinnon v Secretary, Department of Treasury* [2006] HCA 45

- Cabinet papers for a \$2.3 million government programme for a cultural diplomacy international programme, launched by Prime Minister (*The Dominion Post* 3 May 2005)
- Cabinet papers revealing that the NZ government had ordered an urgent review of New Zealand's patchy tsunami-readiness systems because of concerns they were not adequate (*The Dominion Post* 28 February 2005)
- Access given to Cabinet discussions about New Zealand's aid contribution. Bob Geldorf criticised New Zealand's aid efforts. An access request revealed that two years earlier two Labour cabinet ministers had raised similar arguments in Cabinet (*Sunday Star Times* 23 July 2006)
- The *Sunday Star Times* was given the financial breakdown under the OIA of the cost of New Zealand's defence commitment to East Timor and also received cabinet papers showing April's violence left the UN undecided about its future in East Timor (*Sunday Star Times* 6 August 2006)
- Information released under the OIA revealed that high-risk paedophiles could be chemically castrated under a radical plan being considered by the government. The Cabinet papers revealed government departments here are divided over the proposal, amid fears it would breach the Bill of Rights and medical ethics (*Sunday Star Times* 11 January 2004)
- Cabinet papers reveal that due to manufacturing constraints and CSL's priorities, bird flu vaccine it would not be available in New Zealand for 15 to 27 weeks after the World Health Organisation declared a pandemic and New Zealand placed its order. New Zealand is third on CSL's list, after Australia and a small country in the region that neither CSL nor the ministry would name (7 February 2006)
- Cabinet papers, obtained by Radio New Zealand under the Official Information Act, show Treasury has deep concerns about the effectiveness of the public service's spending (20 April 2006)¹³

Conclusion

Such an approach based on the principle of availability, which balances the consequences of release against the public interest in disclosure, has the potential to transform an important way in which our executives and legislatures interact. There do not appear to have been any dire consequences suffered in New Zealand as a result of this approach. We spend too much time on the quest for information. Too little is spent on a genuine debate about the merits of policy alternatives. As a supplementary benefit, such a change might induce some in the media to raise their sights also. If the question remains 'The executive versus the parliament: who wins?', the losers will continue to be the people they serve. Steps toward a more informed and engaged electorate may produce a win-win. In Victoria the 30th anniversary of Freedom of Information would be a good time to take such a step. ▲

¹³ Freedom of Information Practices, Rick Snell, *Agenda*, 13(4), 291–307 at 296, 2006

Philip Davis MLC is Member for Eastern Victoria Region & Chair,
Victorian Public Accounts and Estimates Committee

Victoria's dispute resolution committee and its implications for an effective bicameral system

Philip Davis

As a result of the constitutional reforms of 2003, the Victorian Parliament now fails to meet the most basic tests expected of all Commonwealth nations including developing countries. In 2003, Commonwealth Heads of Government fully endorsed the Latimer House principles on governance relating to accountability and the relationship between the three branches of government, of which Secretary-General of the Commonwealth Don McKinnon said:

I have stated earlier that the Commonwealth commitment to democratic principles is more than rhetoric since it seeks to ensure that all of a country's democratic institutions reinforce one another. These institutions, whether legislative, judicial or executive, must always have the confidence of their people in that they must be transparent in their deliberations and accountable for their decisions.¹

The introduction of a new procedure to manage the legislative process in the Victorian Parliament which deals with disputes between the two houses has led to questions arising about the relevance of the upper house in its capacity to properly hold the executive to account. The procedures which were not tested until 2009 and are unlikely to be tested again before 2014, depending on the fixed term election result, taken with surprising rulings by the Speaker of the Legislative Assembly in the 56th Parliament have significantly restrained the capacity of the Council to function as an independent legislative chamber. In particular, the rulings of the Speaker appeared to serve the will of the executive in a manner which has effectively overturned the basic understanding of the equal but independent roles of

¹ Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003, Introduction excerpt, H.E. Rt Hon. Don McKinnon, Commonwealth Secretary-General pp. 1, 2.

chambers in a bicameral system. That is, the effect of these matters taken together have denied the legislative authority of the Victorian upper house, to the extent that it is apparent that the executive can now be confident that virtually any legislative proposal will receive royal assent. Further, the electors and more than 90% of all parliamentarians will be left in the dark, as any discussion or negotiation within the Dispute Resolution Committee (DRC), a joint committee of the two houses, will be secret, as the committee will meet in private and other than a take-it-or-leave-it recommendation, provided in a report to the houses, there will be no discussion about the details of the negotiations within the committee.

The DRC was established as part of the raft of changes to the *Constitution Act 1975* by amendments moved early in 2003, when the Victorian Parliament passed changes that amended Parliamentary terms, the number of members, and the electoral system, including establishing a proportional representation in the Upper House. The DRC was formed to resolve 'disputes concerning the passage of legislation between the Legislative Assembly and the Legislative Council'.²

This particular amendment was given little consideration during the parliamentary proceedings, as presumably most members thought it was of less account than the more substantive reforms to the electoral system, number of members and fixed four year terms. However, the underlying assumption seemed to be that this was just reinstating a formal mechanism reflecting the earlier arrangements relating to managers conferences which have fallen into disuse, but were taken to be given a new life under the new constitutional arrangements. The other changes were much more in focus and it is likely this was because these changes were indeed the most significant reforms since the passage of the Victorian Constitution through the House of Commons in 1855.³

It must be noted that the Constitutional Commission, in its consideration, concluded that the Committee of Managers, which had fallen into disuse, was a viable mechanism to resolve disputes or deadlocks on particular bills between the houses. It was a solution which was proposed in recognition of the inevitability that future parliaments would comprise of diverse parliamentary representation elected under the new arrangements. So therefore, establishing the DRC was a recommendation by the Commission to ensure that any dispute on a bill between houses could be resolved outside the chambers, avoiding the potential for bills to pass endlessly back and forward between houses. In the event that no agreement could be achieved in terms of resolving a dispute, then a dissolution mechanism was proposed similar to other Australian parliaments, allowing the Premier to advise the Governor to dissolve both houses, so that an early election could be achieved, but notwith-

² *Constitution Commission, A House for Our Future*, Constitution Commission, Melbourne, 2002, p. 57.

³ B. Costar, 'Reformed Bicameralism', in N. Aroney, S. Prasser & J.R. Nethercote (eds), *Restraining Elective Dictatorship*, University of Western Australia Press, Crawley WA, 2008, p. 196.

standing, a bill which has become a deadlocked bill, a solution having failed to be reached by the DRC, which was acceptable to both houses would be able to be put to a joint sitting of the parliament following an election, whether or not an early election were obtained.

The dispute resolution committee process

The provisions of a DRC contained in s65B attached, *Appendix 1*, set out clearly that the committee will comprise of 12 members, of whom seven will be appointed by the Assembly, five by the Council, and the chair will have a casting vote. The effect of this is that the executive will have control of the committee. The committee meets in private, but otherwise determines its own rules of procedure, and the outcome of deliberations remain private and a resolution, once achieved, must be tabled in both chambers of parliament on the first available sitting day. That resolution should advise of the course of action to be taken to resolve the dispute, being to pass the bill unamended, suggest amendments, or suggest that the bill not be proceeded with. If either house fails to give effect to the resolution, the bill becomes known then as a deadlocked bill, and it may become the trigger for the premier to seek to dissolve the parliament, nevertheless, that deadlocked bill may be considered at a joint sitting of the parliament after an election, whether it be by way of a dissolution or a general election. In other words, the bill can be stored up if required, that is, if required by the premier, which gives the premier significant leverage potentially over the parliament, and it remains an underlying threat to the members of the upper house to be compliant with the will of the government.

Issues that have arisen regarding the operation of the DRC

In the 56th Parliament (2006–10), the Committee was used on three occasions. The procedures followed by the committee on these occasions have exposed a number of major concerns with the operation of the committee.

Defeated bills

Three bills were referred to the Council from the Assembly, which in turn were defeated by the Council, however, the Assembly insisted on returning them to the Council by reference to the DRC. The bills in turn were:

- The Planning Legislation Amendment Bill 2009, defeated in the Council on 11 June 2009;
- The Planning and Environment Amendment Growth Areas Infrastructure Contribution Bill 2009, defeated in the Council on 23 February 2010; and
- The Transport Legislation Amendment Ports Integration Bill 2010, defeated in the Council on 22 June 2010.

Without elaborating on the detail of the referrals and consideration of recommendations by the DRC, it suffices to say that the Assembly insisted upon the

re-presentation of the bills in essentially the same form as the bills which had been defeated in the Council. The Speaker made her own position clear in a conference paper in 2010. It is best for her words to speak for themselves.

Disputing the dispute resolution process — challenges facing the speaker

In July 2009 ... an attempt was made to move a motion referring the Planning Legislation Amendment Bill 2009 to the Committee. ... [T]he Bill had passed the Assembly earlier in the year but the second reading had been defeated by the Council in June.

This time, as soon as the motion to refer the Bill to the Committee was called on, and before the Leader of the House even had a chance to move the motion, a point of order was taken. The Opposition argued that the motion was incompetent because the bill it sought to refer to the Committee no longer existed. Arguments put forward to support this claim included:

- The Bill had been defeated and was therefore dead.
- The Bill was not on the notice paper of either House.
- The meaning of a bill is 'The draft of an act of Parliament submitted to the legislature for discussion and adoption as an "act"'. One of the houses had refused to adopt the bill and therefore it was finished.
- The Premier had remarked that the Government planned to reintroduce the Bill unaltered, thereby admitting that the Bill no longer existed. The argument claimed that, as the Premier could not reintroduce the same bill due to the same question rule, he was attempting to use the dispute resolution process.
- A comparison with the Australian Constitution leads to the conclusion that the definition of a disputed bill in Victoria was not intended to include a defeated bill. The 'disagreement between the Houses' provisions of the Australian Constitution (s57) specifically refer to the Senate *rejecting* a proposed law. The omission of similar language in the Victorian provisions — no reference is made to a defeated bill — must therefore mean that there is a difference and the definition of disputed bill does not include a defeated bill.

The authorities of the Parliament do not canvass the concept of a defeated Bill and, in particular, the revival of a bill once it has been defeated. The *Constitution Act 1975* does not include the term defeated bill or any similar term. The standing orders do not contemplate the notion of a defeated bill. Finally, there are no speakers' rulings about how bills may be revived once they have been defeated; rather the rulings are about reintroducing bills and when this may happen.

Two weeks later, in the next sitting week, I gave my ruling. I ruled that the Planning Legislation Amendment Bill 2009 was still a bill and therefore was not precluded from being a disputed bill. I felt that rejection of a bill by an upper house was not necessarily fatal to its progress.

- *Odgers'* states that 'A bill can be revived at any stage and its consideration resumed by the Senate even if it has been negatived at any stage'.
- The *Parliament Act 1991* of the Westminster Parliament established procedures which are available to the House of Commons should the House of Lords reject a bill. The procedures provide for such a bill to be presented for royal assent despite its rejection by the House of Lords.
- The Victorian Constitution includes a process whereby the failure of the Council to pass an appropriation bill does not lead to the extinction of the bill.

Section 65(5) sets out the circumstances where a bill remains a bill and can be presented for royal assent, even though the Council has rejected it.

I also ruled that a bill can exist even if it is not on the notice paper of either house — it could be that the bill is being transmitted between houses. My ruling having been given and the bill called-on, the opposition immediately took another point of order. This time the arguments were wide ranging but still proposed that the bill could not be competently referred to the committee. The issues raised included:

- There was no dispute between the Houses. The Planning Legislation Amendment Bill 2009 was only considered by each House once. When the constitutional changes were made the Minister for Finance indicated that the procedures would only be used when there was a genuine dispute between the Houses. Dispute resolution systems throughout the Westminster system involve the concept of a bill bouncing between the Houses over a long period of time giving both Houses an opportunity to revisit and perhaps modify their decisions before the dispute mechanisms come into play. This did not happen with the bill in question.
- Nor was there a dispute between the parties, even though the Bill had been rejected in the Council. Usually when there is a dispute about a bill it becomes the subject of ongoing and substantial discussions and remains on the notice paper until the dispute can be resolved.
- The definition of a disputed bill in the Constitution refers to the bill having been received by the Council not less than two months before the end of the session. There was some argument over the definition of the word session and whether or not the Bill had been transmitted and received within the session.
- A comparison was made with the provisions in the Constitution that deal with the passage of the appropriation bill. That section (s 65(4)(a)) refers to when the Council ‘rejects or fails to pass’ the appropriation bill. It specifically includes the rejection of a bill. The definition of a disputed bill, on the other hand, only states ‘not been passed by the Council’. The absence of the word ‘rejects’ in the definition of disputed bill should be taken to mean that it is not intended to include a defeated bill.
- The *Interpretation of Legislation Act 1985*, which sets out the principles and aids to interpretation, states that interpretation should be based on a construction that would promote the purpose or object underlying the Act. The purpose of the constitution reforms was to have fixed four-year terms unless extraordinary circumstances exist. These circumstances do not exist as there isn’t genuine dispute.

I did not uphold the point or order. I considered that the Planning Legislation Amendment Bill 2009 met the definition of a disputed bill under the Constitution, which is all that is required for a bill to be referred.⁴

⁴ 41st Conference of Presiding Officers and Clerks of Australia and the Pacific, Darwin, Wednesday 7 July 2010, ‘Disputing the Dispute Resolution Process — Challenges Facing the Speaker’, paper presented by Hon Jenny Lindell, MP, Speaker of the Legislative Assembly, Parliament of Victoria.

The following year the President of the Legislative Council in the 57th Parliament made a significant contribution reflecting the Council's concern. Again, his conference paper speaks for itself.

Victoria's Dispute Resolution Committee — Referral of defeated Bills to the Committee

The Committee met for the first time in 2009 and has been used twice since. On each occasion the Committee has been used, it has been for the consideration of bills that have been defeated in the Legislative Council. This is a deeply concerning development and contradicts the principles that underpin the Westminster system. A basic function of a bi-cameral Parliament is the ability of the democratically elected Upper House to reject prospective legislation. This basic function has now been compromised.

In June 2009 the Legislative Council defeated the Planning Legislation Amendment Bill 2009, a bill that would create new committees comprised of state and local government representatives to make decisions on the issue of planning permits. The Opposition and Greens parties joined forces in the Council to defeat the bill at the second reading stage, both taking issue with the power over planning decisions being taken away from local government. The following month, the Legislative Assembly passed a motion to refer the Bill to the Dispute Resolution Committee, despite the bill being considered by most to be 'defeated'.

Debate in both Houses throughout this process became heated at times and highlighted the Governments defence of the dispute resolution process, and the staunch opposition to it by non- Government parties. The two opposing views held by each side appeared to be that on the one hand, the committee functioned and adhered to the provisions relating to it in the Constitution Act 1975, but on the other hand, that the Bill in question had been defeated, and therefore no longer existed and could not be referred to the Committee. This highlighted one of the main issues at the centre of the argument surrounding the operation of the Dispute Resolution Committee in Victoria, the term 'disputed bill'. The Constitution Act 1975 gives the term an ambiguous definition, principally a bill that 'has not passed the Council' within the required timeframe. Controversially, this wording does not explicitly exclude defeated bills from being referred to the Dispute Resolution Committee.

In light of the ambiguities posed by the definition of a 'disputed bill', the question can also be asked, what then is a defeated bill? What constitutes a defeated bill is not stipulated in the Constitution Act

1975, nor is it outlined in the Standing Orders of either House of Parliament. Traditionally it has been widely held that a defeated bill is a bill defeated in either house of parliament. Questions have been raised concerning whether or not a bill that has been defeated ceases to exist. And if the defeat of a bill in one House is not fatal to the progress of a bill, what is. Under new interpretations of what constitutes a defeated bill, traditional understandings of what a defeated bill is may no longer be accurate.

A Member of the Legislative Assembly called upon the Speaker to make a ruling in relation to the validity of the process of referring the Bill in question to the Committee. Numerous Members had raised concerns, questioning whether the bill, having been defeated, was actually in dispute and therefore if it could be referred to

the Committee, another Member noting that the Bill did not appear on either Houses Notice Papers, evidence that the Bill no longer existed. It was also noted that the Bill had only been considered by each House once. A few Members pointed out in the parliamentary debates that they thought the term ‘disputed bill’ would refer to a bill that had been bouncing back and forth between the two Houses in an attempt to pass it. This Bill had simply been defeated.

The Speaker informed the House that she had not been persuaded there was any reason why the Bill in question should not have been referred to the Committee. To support her decision, she noted that a Bill not listed on the Notice Paper does not in itself signify that the Bill no longer exists, sighting an earlier example in the Victorian Parliament in which a Bill passed the Legislative Council with amendments, however the message was not provided to the Legislative Assembly before the House rose on that day and as a consequence the Bill did not appear on the Notice Paper of either House, a tenuous example at best.

More significantly however, the Speaker defended the ability of the Assembly to revive a bill that had been defeated, sighting a practice in the Australian Senate in which a Bill can be revived after having been defeated, through the passing of a motion in the Senate. It should be noted however that this procedure as used in the Senate allows only the Senate to revive Bills that it itself has defeated. There is no practice that allows the House of Representative to revive Bills that have been defeated in the Senate, which would be more comparable to what the Legislative Assembly was doing.

The Speaker also made reference to the Parliament Act 1911 of the Westminster Parliament which allows the House of Commons to provide a Bill for royal assent regardless of it having been defeated by the House of Lords. This, she determined, was evidence that the defeat of a Bill in one house is not necessarily fatal to its progress. Of course though the Speaker failed to mention or comprehend that the relationship between the two Houses of Parliament in the United Kingdom are dramatically different from the two Houses in Australian bicameral parliaments, who retain equal powers to consider and pass legislation, with the exception of appropriation Bills. The powers of the House of Lords are substantially different to the powers of the Victorian Legislative Council, therefore it is problematical to compare the two.

Finally, the Speaker referred to section 65 of the Victorian Constitution Act 1975 which details that an annual appropriation bill can be provided for royal assent, regardless of it having been passed by the Legislative Council or not. The Speaker noted that the failure of an annual appropriation bill to pass the Legislative Council does not lead to the extinction of the bill, and therefore the bill remains a bill despite its failure to pass both houses. This was a final desperate attempt to justify the process the Government was proceeding with. It is well known that an annual appropriation bill is a specific and distinct type of bill that is constitutionally recognised in Victoria, it is incongruous to try and compare it with other types of legislation.

With these three pieces of evidence in mind, the Speaker claimed she had not been convinced that the defeat of the bill in the Upper House meant that the bill no longer existed, and therefore considered it a suitable bill to be referred to the Dispute Resolution Committee.

Clearly this situation demonstrates the fulfilled potential of the lower house for this system to be abused and stifle debate, furthermore in the future it is entirely possible to see a situation where a government could manipulate this process as an election trigger for a double dissolution election — not a hospitable situation for stable government, as this process is clearly open to manoeuvring and uncertainty. The issue here is was this 'disputed bill' reference in the Constitution a result of poor drafting or was it deliberately written that way for a government to elect to use it as a double dissolution trigger.

Upper and Lower Houses hold equal powers in bicameral parliaments in Australia. Although the Assembly is clearly the House where Government is formed in Victoria, as in all bicameral parliaments, the Victorian Constitution provides no indication that this alone should assure passage of any Bill, with the exception of the Budget. The Dispute Resolution Committee however has expanded the power of the Legislative Assembly at the expense of the Legislative Council, and has undermined the ability of the Legislative Council to defeat legislation.⁵

Committee must meet in private

A further major and obvious concern is the lack of transparency the DRC process affords. To require a committee to conduct its proceedings entirely behind closed doors, added with the fact committee members can't speak about the proceedings, is deeply troublesome in a parliament that is based on openness and transparency. To add to this, the 'resolutions' that are tabled offer no insight whatsoever into the proceedings of the committee. For vital legislation to be decided upon behind closed doors contradicts our history of accountable process and is offensive to our democratic principles. Following the first use of the Committee in 2009, the non-government members raised these concerns in the Legislative Council, and the house ultimately agreed to the following motion:

That this house believes that as much of the proceedings of the DRC as possible should be conducted in a way that is transparent to both chambers of the Victorian Parliament and to the Victorian community and request that regular reports, including interim reports of the deliberations of the committee, be made public.⁶

Ultimately, such a resolution has little effect due to the Constitutional requirement for the committee to meet in private, nonetheless the concerns of members is clear.⁷

⁵ 42nd Conference of Presiding Officers and Clerks, Brisbane, Queensland, July 2011, 'Victoria's Dispute Resolution Committee' — paper presented by Hon Bruce Atkinson, MLC, President of the Legislative Council, Parliament of Victoria.

⁶ LC Minutes (Vic), no. 134, 2 September 2009, p. 781.

⁷ Victoria's Dispute Resolution Committee and Parliamentary Involvement in the Appointment of Independent Statutory Officers, 42nd Conference of Presiding Officers and Clerks Brisbane, Queensland July 2011, presented by Hon Bruce Atkinson MLC, President of the Legislative Council Parliament of Victoria pp 3, 4.

Constitution commission — terms of reference and recommendations

It is worthwhile noting that there is no consideration in the Terms of Reference, attached herewith, *Appendix 2*, requiring the Constitution Commission to propose any matter in relation to a restraint on legislative authority, other than reviewing powers in relation to Appropriation Bills, and of course, recommendations were made and implemented in relation to ensuring that the executive can obtain parliamentary approval for its appropriations. The capacity to refer a bill to the DRC rests entirely with the Assembly, and it is important to note that the Council has no capacity to refer any bill to the DRC, even bills which are initiated in the Council.

It is clearly argued in commission's report that while the creation of the DRC was significant, it was not deemed to be a mechanism by which the executive should obtain and wrest legislative control from the Council.

The commission observed:

Upper houses have only one hold over governments — their ability to withhold assent from government legislation. This is the only reason for governments complying with accountability measures of upper houses. A reviewing house without power over legislation would be ineffective. The Commission favours the reintroduction of a mechanism that would assist resolution of deadlocks between the two houses. The method proposed is the revival of procedure similar to the Committee of Managers that existed in the past but has fallen into disuse. ... It should meet in private and its charter should be to find a sensible solution for the deadlock in the interests of Victoria and Victorians overall. ... The Commission believe that these processes would operate as powerful constraints and deterrents against forcing of an election for a short term Parliament, but that they do provide necessary safeguards and incentives for dispute resolution. ... It is recognised that this procedure would not guarantee passage of Government legislation. It would, however, give the electors an opportunity to voice an opinion on the Government and to indicate the voters' view as to a solution to the deadlock, either for or against the Government.⁸

This led to the **Major recommendation 11**. 'A system for resolution of "deadlocks" between the Legislative Council and the Legislative Assembly to be established',⁹ which was adopted in the government's response, *Appendix 3*, and the procedure, *Appendix 4*.

The executive and parliament

The former Clerk of the Senate, Harry Evans, had much to say on the reform of parliament, in particular he made the point that proposals for amendments to the operation of parliament were premised on an electoral college theory, which of

⁸ A House For Our Future, A Report, Constitution Commission Victoria 2002, pp 58, 59.

⁹ Op. cit., p 71.

course, is a view which inevitably most executives will hold, simply because of the desire to progress the policy agenda unimpeded.

These orthodox proposals for changing parliament are based on what might be kindly called the electoral college theory of parliament. According to this view, the electors elect a party (or a party leader) to govern. The government governs with the total power to change the law and virtually do what it likes between elections. The purpose of parliament is to register the voters' choice of a government, that is, to act as an electoral college. Parliament must not interfere with the government governing, as that would be a violation of the system. In particular, for an upper house with a different electoral basis and party composition to interfere with the government is a violation of democracy. In other words, to use a less kindly term, parliament should be a rubber stamp.

Evans goes on to say

... if we choose a government and give it absolute power, what is the purpose of having a parliament at all? It is a very expensive institution to keep, if it is only an electoral college. We could save a lot of money by dismissing all its members after the election, as with the American electoral college.

The concept which contemporary voters are familiar with, is informed largely by the media and dramatic portrayal of government through the eyes of the American model, where the executive in fact sits outside the parliament. It is something that most ordinary Australians would be more familiar with than the reality of the parliamentary system with which we are dealing. It is clear that the concept of executives being accountable to parliament is now not well understood in the public mind, but it will be well understood in the minds of parliamentary practitioners and observers.

Evans treats this discussion in the following manner:

Responsible government was a system which existed from the mid 19th century to the early 20th century, after which it disappeared. It involved a lower house of parliament with the ability to dismiss a government and appoint another between elections. This system has been replaced by one whereby the government of the day controls the lower house by a built-in, totally reliable and 'rustled on' majority. Not only is the government not responsible to, that is, removable by, the lower house, but it is also not accountable to it. The government's control of the parliamentary process means that it is never effectively called to account in the lower house.

Evans makes it clear, as concisely as can be made clear, by his following comment 'Upper houses have only one hold over governments, their ability to withhold assent from government legislation.' The effect of which is well understood that without a capacity to effectively challenge the executive's legislation, given the assumption that any legislation coming from the Assembly is a reflection of the

executive's view, then upper houses will be ineffective. 'A reviewing house without power over legislation would be ineffective'.¹⁰

While the drafters of the provisions to amend the Constitution and establish the DRC may have been inspired, it is hard to determine whether the provisions are designed by co-mission or omission in their ambiguity, because it is evident that the provisions do not reflect the view of the Constitution Commission.

In its report, the Constitution Commission 'recognised that this procedure would not guarantee passage of government legislation.' Nor should it! If the government were guaranteed passage of its legislation, we would not need an upper house. In fact we could dispense with parliament altogether and allow the government to legislate by decree.¹¹

Whether by design or by default, it is clear now that there is an incentive for executives to find a way of exploiting the Disputes Resolution Committee mechanism, to give premiers an advantage in relation to the calling of an early election, notwithstanding there are fixed four year terms in the state.

In Victoria, under the fixed term system adopted in 2003, the failure of the joint DRC to resolve a dispute between the house allows the calling of an early election at any time for the remaining life of the parliament. This gives the government an incentive to use the deadlock mechanism — but also, paradoxically, an incentive to fail to reach a compromise on at least one blocked bill during each term of parliament, in order to give the Premier a free hand with election timing.¹²

It was evident at the time of the drafting and passage of the constitutional amendments that the view of commentators and parliamentarians was that the mechanism for resolution was simply a facilitation to resolving policy differences in relation to the detail of bills. It is somewhat meaningful to consider the prospect of governments having their legislative program delayed. The commission intended utilising the DRC for the benefit of finding a compromise. Given that there are now extended parliamentary terms of fixed four years in Victoria, the DRC hypothetically provides a mechanism for coming to some agreement.

This was summed up in the assessment of Brian Costar (2008: 205):

The question then arises: have the powers of the Victorian Legislative Council been so reduced as to compromise its capacity for genuine review? Only time will tell, but the Council, while ceding its veto power, still retains legislative influence. First, the policy issue at stake would have to be substantial indeed to encourage a

¹⁰ National Press Club Address 24 April 2002; The Australian Parliament: Time for Reformation Harry Evans, Clerk of the Senate.

¹¹ *The Constitution of Victoria*, Greg Taylor, Federation Press, Sydney, 2006, pp 338–9.

¹² See John Waugh (2006: 196–7), 'Deadlocks in State Parliaments', in *State Constitutional Landmarks*, G. Winterton (ed.), Federation Press, Sydney.

Premier to go to an early election over a single bill. Second, the delay power of the Council is much greater, say, than that of the House of Lords and it is unlikely that governments would be willing to have legislation held up for perhaps three years or more. Compromise would present a much more attractive option, as it has sometimes in the past.¹³

Resolution of the intractable dispute

As can be seen below, the new section 65A defines a disputed bill:

Disputed Bill means a Bill which has passed the Assembly and having been transmitted to and received by the Council not less than 2 months before the end of the session has not been passed by the Council within 2 months after the Bill is so transmitted, either without amendment or with such amendments only as may be agreed to by both the Assembly and the Council.¹⁴

This fails to clarify what can be deemed by members of the Legislative Council to be a defeated bill rather than a disputed bill and how a defeated bill should be dealt with. This ambiguity should be resolved. To resolve the ambiguity in regard to defeated bills I propose a definition be inserted in the Constitution Act at Section 5 — Definitions, so as not to be in conflict with the entrenched provisions of Division 9A — Provisions, relating to disputes concerning Bills. Therefore, as a 'bush' lawyer and with apologies to Parliamentary Counsel, I propose the new definition to be something like:

Defeated Bill means a bill which has been proposed to either house and the question has been negatived and therefore the proposed law has been annulled or extinguished, i.e. has been put to an end (*Macquarie Dictionary 5th edn*).

Given that the Constitution Act may be amended by an absolute majority in both Houses, other than the entrenched provisions, this clarification may be achieved during the course of the 57th Parliament, relatively simply, and therefore resolve the extreme tension that occurred between the Houses in the 56th Parliament and inevitably which will reoccur in future parliaments. Perhaps this proposal will be received with favour by those who are committed to a bicameral parliament which can hold the executive to account. ▲

¹³ 'Reformed bicameralism? The Victorian Legislative Council in the twenty-first century', in *Restraining Elective Dictatorship, The Upper House Solution?*, N. Aroney, S. Prasser & J.R. Nethercote (eds), University of Western Australia Press, Crawley, WA.

¹⁴ Constitution Act 1975, Victoria, p 74 — inserted 2003.

Appendix 1

65B Dispute Resolution Committee

- (1) A Dispute Resolution Committee is to be established as soon as conveniently practicable after the commencement of each Parliament.
- (2) The Dispute Resolution Committee holds office for the Parliament during which it is appointed until the dissolution or other lawful determination of the Assembly.
- (3) The Dispute Resolution Committee is to consist of 12 members of whom —
 - (a) 7 are to be members of, and appointed by, the Assembly; and
 - (b) 5 are to be members of, and appointed by, the Council.
- (4) When appointing members under subsection (3), each House of the Parliament must take into account the political composition of that House.
- (5) The Dispute Resolution Committee cannot meet until both the Assembly and the Council have made the appointments referred to in subsection (3).
- (6) A member of the Dispute Resolution Committee is to be appointed by the Dispute Resolution Committee as the Chair.
- (7) Each member of the Dispute Resolution Committee is entitled to 1 vote.
- (8) In the event of an equality of votes, the Chair also has a casting vote.
- (9) The Dispute Resolution Committee —
 - (a) must meet in private; and
 - (b) subject to this Division, may determine the rules to be adopted for the conduct of meetings.

Constitution Act S.65B, 1975 — inserted 2003

Appendix 2

II. Terms of Reference

Professor, the Hon George Hampel QC, the Hon Ian Macphée AO and the Hon Alan Hunt AM are appointed to comprise a Constitutional Commission, and Professor, the Hon George Hampel QC is appointed as Chairperson of that Commission.

The purpose of the Commission is to research, investigate, consult, report on and make recommendations concerning the following issues.

Whether the governance of Victoria would be improved by any, and, if so, what, reforms of and/or changes to the *Constitution Act 1975*, *The Constitution Act Amendment Act 1958* and associated legislation that:

- (a) Enable the Legislative Council to operate effectively as a genuine House of Review. In considering this term, the Commission is to consider:
 - (i) the responsiveness and responsibility of the Upper House to the Victorian people;
 - (ii) the role of and accountability of the Upper House in relation to Executive Government;
 - (iii) whether the Legislative Council should retain the power to reject appropriation bills, and, if so, whether any or what limitations should be placed on that power;
 - (iv) whether the Members of the Legislative Council should be elected one half at each election or should all be simultaneously elected;
 - (v) whether the Legislative Council should be elected on the basis of proportional representation and, if so, whether this should be on the basis of multi-member electorates or on any other and what basis.
- (b) Give effect to any, and, if so, what, of the following further measures:
 - (i) a fixed, four-year term of Parliament.
 - (ii) the reduction, to any and what extent, of the total number of Members of either House of Parliament.
 - (iii) the removal or modification in any way of the nexus between the Houses which is provided by sections 27 and 28 of the *Constitution Act*.

That nexus is comprised of the following elements:

- each Legislative Council province consists of four complete and contiguous Legislative Assembly districts;
- each Legislative Council province returns 2 members, elected on rotation, with a term equal to two Legislative Assembly terms; and
- requiring half of the Members of the Legislative Council to be elected at the same time as the Members of the Legislative Assembly.

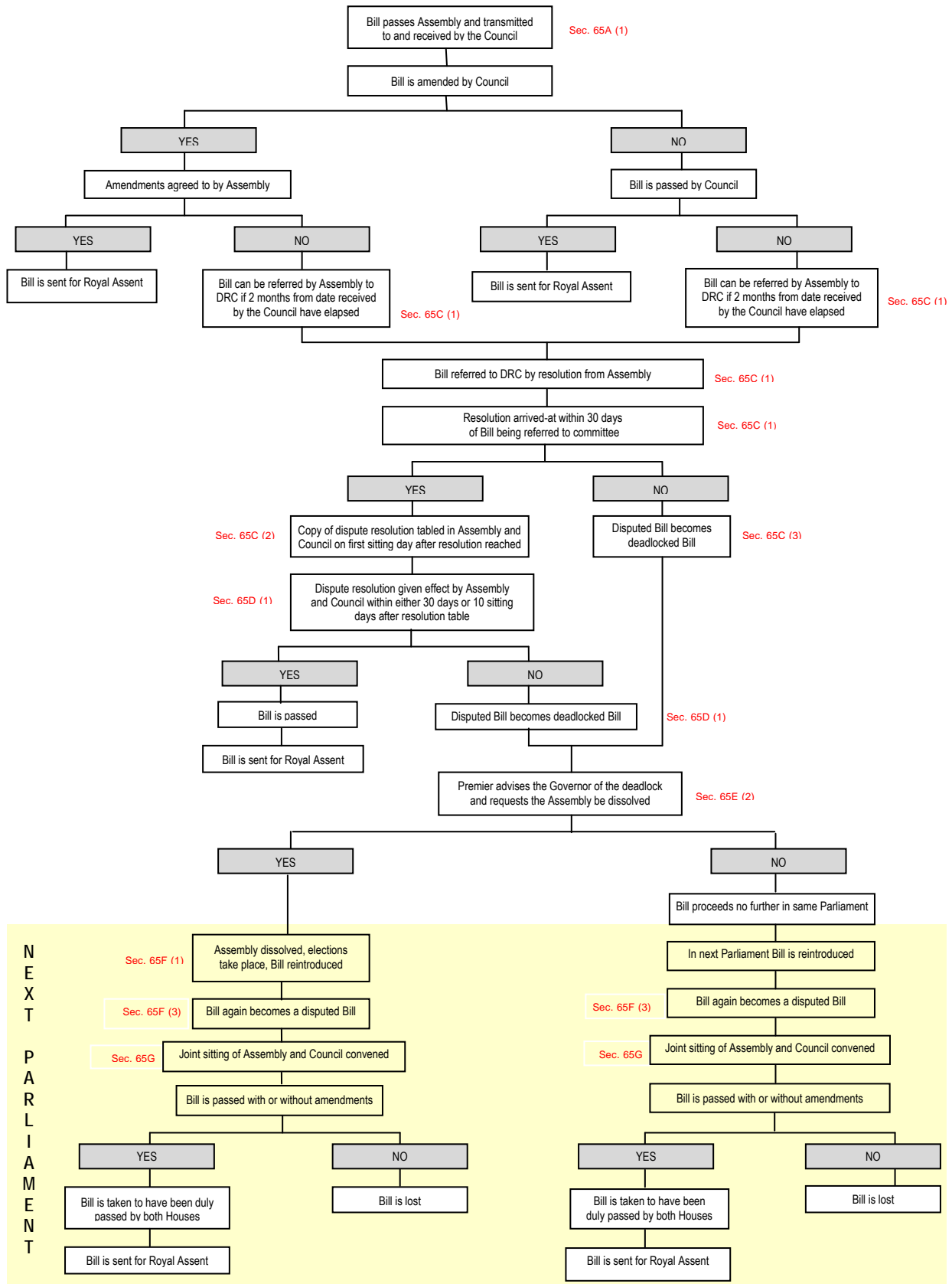
In making the research and investigations referred to above, the Commission is to seek and consider submissions from the public in any manner it considers appropriate.

Appendix 3

[Rec 11] A system for the resolution of ‘deadlocks’ between the Legislative Council and the Legislative Assembly to be established.

26. The Government accepts this recommendation.
27. The method proposed by the Report involves a requirement that a Dispute Resolution Committee of 7 Assembly members and 5 Council members be established at the start of each Parliamentary session.
28. In the event of a deadlock between the Houses over a Bill, the committee will meet and attempt to develop a compromise resolution.
29. If any resolution of the committee is not acceptable to the Assembly the Bill in question then becomes a Deadlocked Bill. The Premier may advise the Governor to dissolve both Houses or the Bill(s) may be held over until the next election.
30. If the resolution is accepted by the Assembly and rejected by the Council it becomes a Deadlocked Bill and the procedure referred to above may be followed.
31. Following an election, either a normal electoral cycle or following a dissolution of both Houses, if the Assembly again passes the Deadlocked Bill(s) in either its original form, or in the Dispute Resolution Committee form if that is acceptable to the Government, and it is again rejected or not passed by the Council, the Premier may recommend to the Governor a joint sitting at which the Bill(s) will be dealt with.. At the joint sitting an absolute majority would be required for ordinary bills, and a 3/5 majority for entrenched provisions (see below).
32. The Government accepts the Report’s recommendation to adopt the NSW model for dealing with a double dissolution in the context of a fixed four year term. This ensures if a double dissolution is called, the Government elected runs a full four year term.

PROVISIONS RELATING TO DISPUTES CONCERNING BILLS



Des Pearson is Auditor-General of Victoria

Trends in public sector audit legislation: from federation to follow-the-dollar

Des Pearson

I am a fairly recent participant in the ASPG and I must say that it has already opened my eyes to a few things — perhaps most immediately to how many of the issues that my audit office works through on a day to day basis are common to all of the interactions between the Parliament and the Executive. The tensions and balance between autonomy and oversight, between flexibility and accountability, between working together and remaining independent...in many ways, these issues lie under what we have heard at this conference, and certainly dictate many of the day to day challenges of delivering our audit program. Right now, I am pleased to round off this session of ‘Victorian perspectives’ with a quick run-down of how one key instrument in Parliament’s interaction with the Executive has changed over the past century and where — and why — it is continuing to change. The ‘instrument’ I am referring to is, of course, the office of the Auditor-General — an independent officer of the Parliament of Victoria, charged with the external audit of more than five hundred and fifty public sector entities. Whilst not a part of Parliament itself, Auditors-General are inextricably intertwined with the Parliaments they serve. In Victoria, Parliament guides the development of our audit program and oversees the Office budget and the appointment of the Auditor-General. The Parliament, in turn, makes good use of the assurance and commentary we provide, using Auditor-General reports as one of their chosen sources of advice to inform new legislation, Committee inquiries, petitions, statements and debate. Auditors-General are, indeed, part of the Parliamentary infrastructure and a key instrument for Parliament’s oversight of the Executive.

So, to turn to the legislation underpinning the role of Auditor-General — what changes have we seen? Are we likely to see? First, a quick look back. Australian public sector audit legislation, and the practices and policies that underpin it, has passed through several distinct historical ‘phases’ since the turn of the nineteenth century. Soon after Federation, a single Auditor-General was created in Victoria, with a permanent tenure and a direct reporting line to Parliament. This role provided ‘attest audits’ of transactions, working year-round, and often with auditors based directly in agencies — a kind of ‘institutional audit’ service, without the guidance of consistent national accounting and reporting standards. Although

appointed by the Parliament, this kind of audit approach was vulnerable to capture, and was at risk of being ‘mired in the detail’ of thousands of transactions. In 1958, the *Audit Act* introduced the discretion for the Victorian Auditor-General to determine the ‘extent of check’ — in other words, he could set his own scope for audit activities. This was the fledgling beginnings of a more risk-based approach to audit, and gave the Auditor-General additional independence from the Executive. In the 1980s, an activist Victorian Auditor-General began to use this section of the Audit Act to do what we now see as early ‘performance audits’, undertaking special audits focussed on particular issues and risks within public sector financial activity. Eventually, this led to the introduction in 1990 of amendments to the Audit Act — followed in 1994 by an entire new Audit Act, one that now explicitly gave the Auditor-General the mandate to audit the ‘efficiency, effectiveness and economy’ of public sector activities.

Coinciding with this, a new approach to financial auditing was introduced to the public sector. In line with changes in the accounting and auditing profession more broadly, the Auditor-General moved away from year-round audits of transactions to more risk-based audits of systems and assurance on year-end reports. These major shifts in Victoria’s audit legislation across the 1970s, 80s and 90s gave rise to the kinds of modern audit reports that Parliament now use — the distillation of targeted audits of systemic issues, and the provision of opinions on the reliability and accuracy of agencies’ own financial reports. For the first time, Parliaments could ask their auditor to report to them not just ‘how much’ — but ‘how well’. How well was government doing its job? How well was money spent? How well was the public interest guarded in major investments and dealings with the private sector? With this shift in mandate came, obviously, a more contentious role for the Auditor-General. The Executive now came within the purview a new kind of critique, one with special powers to access any operational information and report directly to the elected legislature. I think of this second major phase as being the ‘performance audit’ reforms. This shift to a more active, and more controversial, role for Auditors-General made necessary the third phase of public sector audit legislation in Victoria — the ‘independence reforms’. Many of you here will recall the controversy of the 1990s when a past Victorian Premier privatised, and opened up to competition, large sections of the audit activity of the then Auditor-General, effectively removing all but a handful of the staff supporting Parliament’s auditor. There was a public outcry at the perceived ‘muzzling’ of this key Parliamentary watchdog, and much talk of the importance of public sector audit being undertaken by a truly independent auditor. The need to tender to Government, year in and year out, was seen as sorely undermining the possibility of such independence — how could you deliver robust and public critiques of the public sector to the very Government whom you hoped would re-engage you at the end of your tender?

Following this outcry over independence, a new Government embarked on the most recent wave of reforms to sector audit legislation. In 1999, historic amendments to Victoria’s Constitution Act introduced special protection for the independence of the Auditor-General. Section 94B now states that the Auditor-General ‘has

complete discretion in the performance or exercise of his or her functions or powers and, in particular, is not subject to direction from anyone.’ Balancing these profound new protections were a suite of new accountability requirements for the Auditor-General and his office, most notably the introduction of mandatory natural justice procedures for performance audits and the requirement for the Auditor-General to consult extensively with a committee of the Parliament in determining his audit program. This brief history brings us to today — and the final question we ask — what reforms lie ahead for this critical instrument of Parliamentary oversight of the Executive? What further changes are in the wind?

Two years ago I spoke before the Australasian Council of Public Accounts Committees, in Wellington, New Zealand. In front of representatives from more than two dozen Parliaments, I shared the results of research undertaken across all Australian jurisdictions, benchmarking their public sector audit legislation against recently released Independence Standards from the international association of Auditors-General, INTOSAI. These Standards measure how effective a Parliament’s external audit function is, by how well it meets some basic criteria for being truly independent from the Executive. Whilst we scored well on many counts, the news for Victoria was not all good. There were significant gaps in our ability to cover the use of all public funds, due to the erosion of Parliamentary accountability arising from Victoria’s increasing use of private sector service delivery — these activities are increasingly ‘off radar’ for the Auditor-General and therefore for the Parliament. Troublingly, significant areas of audit of public sector entities still relied on voluntary protocols — in particular, the administration of courts and the Parliament itself remained ‘off mandate’, contrary to legislation in many other States. The rights of audited government agencies and departments to include comments in the Auditor-General’s reports to the Parliament, with no restrictions, abrogated some fundamental INTOSAI standards relating to the freedom for Auditors-General to report to Parliament. Finally, Victoria’s legislation leaves the Auditor-General vulnerable to Executive interference through the finances and staffing of the office that supports him or her. VAGO is subject to much administrative legislation and policy, as it employs public servants, and the Office budget is determined by and reported upon the Executive — an obvious conflict of interest. Thankfully, these drivers for change have been picked up on by the current government, and we understand a new wave of legislative reform is now underway for Victoria’s audit legislation. I hope these reforms will lead to an Auditor-General’s office which can better meet the needs of the Parliament we serve through:

- reports that range across the gamut of major public services, not hemmed in by outsourcing and public private partnerships
- robust audits undertaken in line with professional standards, of *all* public sector entities
- high quality and peer assessed reports that stand apart from the comment and counter claims of the entities we audit
- a sustainable office that is safeguarded from Executive influence, and free to report unhindered to Parliament. ▲

**AUSTRALASIAN STUDY OF PARLIAMENT GROUP
CONFERENCE 2011 —
THE EXECUTIVE VERSUS THE PARLIAMENT:
WHO WINS?**

*Parliamentary committees and the scrutiny of the
executive*

Dr Paul Lobban is Executive Officer, Economic and Finance Committee
House of Assembly, Parliament of South Australia

Who cares wins: parliamentary committees and the executive

Paul Lobban

At the recent Australasian Council of Public Accounts Committees (ACPAC) conference in Perth, Andrew Murray, former Democrats Senator, presented a paper entitled ‘Parliamentarians, Politicians and Accountability’. Part of that paper asserted a basic dichotomy at the core of political representation in our system of government — the choice each member of parliament faces with respect to how they identify themselves:

A parliamentarian supports parliament, its institutions, its power, its purpose. A politician is more concerned with government.¹

I suspect many people in the room that day, like me, experienced a flicker — or perhaps a surge — of reflexive cynicism on hearing those comments: it is hard not to. Cynicism is an easy disease to contract and debilitating once established and no one could deny the power of Senator Murray’s appeal to, if not the better angels of our nature then at least that part of us that understands and sympathises with the idea of the ‘parliamentarian’ implicit in his description. However, cynicism does not — or should not — materialise from thin air: it is conceived in behaviour that first questions and then wounds our belief in the ideas and institutions to which we once subscribed. Feeling cynical about calls for members of parliament to behave in ways not fundamentally directed by political imperative or compulsion is a direct response to having seen such behaviour on such a constant basis it no longer feels so much out of the ordinary as chronic.

This feeling is well captured by the 2nd Earl Baldwin of Bewdley:

The House of Commons is a heart-breaking place. The wasted hours; the old-fashioned machinery of government; the opposition for the sake of opposition; the interminable talking that has not the slightest effect, and the pile of legislation that need never come to us for decision throws a pall on all and sundry. The deadening

¹ Andrew Murray, ‘Parliamentarians, Politicians and Accountability’, *Australasian Council of Public Accounts Committees (ACPAC), Eleventh Biennial Conference, Perth WA, 28 April 2011*.

effect of the comfort and warmth so easily enable one to forget the purpose of one's presence, and the vain endeavours to seek justice for a constituent make one wonder at the life one is leading, and deplore the ineffectiveness of one's labours.²

I make these initial observations because they form a backdrop to my discussion about the Parliament versus the Executive, particularly in the context of parliamentary committees in the SA Parliament. In their article, 'What's In It for Us? Why Governments Need Well Resourced Parliaments', Jordan Bastoni and Clem Macintyre, as part of a wider discussion on the condition of parliaments and their committees, make the following remarks:

In parliaments that are small and especially when the government of the day is in a commanding position, there is an inevitable temptation to treat the parliament with disrespect, and to begin to evidence complacency and hubris not only in dealings with the parliament, but also with the people. Recent events in [...] SA politics can be seen to illustrate this point.³

Rather than proceed to the particular examples in the article (which centre on behaviour in the chamber), I would assert that the condition of committees in the SA Parliament, particularly but not exclusively in the House of Assembly, is illustrative of the attitudes of which Bastoni and Macintyre speak.

I suppose the theme of this conference has come at an opportune time for me as it comes in the year I mark ten years in parliamentary committees. It also comes on the twentieth anniversary of the introduction of the current committee system in SA. I am, if I say so myself, a sort of barometer of where the system has gone in its second decade. Indeed I wondered at various times while preparing this paper whether the idea of the parliament versus the executive had strayed into uncertain philosophical waters. Was the proposition so undermined it now constituted a category error? After all, the parliament versus the executive implies a contest between two entities capable of having a contest, which in itself implies a kind of equivalence of power or standing by which parliament or the executive might contend with each other to have influence over a course of action. This, of course, does happen in the SA House of Assembly to the extent that there are things called parliamentary committees which meet, have memberships and publish reports. If we are to extrapolate from this that these committees, which consist of members of parliament many of whom form part of the party holding power, are receptacles of some kind of authority, derived from the Parliament, that might contest with the imperatives of the executive branch of government in which members also have an interest then, I contend (and other committee staff might agree) we would be in danger of committing the same kind of error as assuming Daniel Radcliffe can fly on a broomstick because he played a wizard in a film.

² Oliver Baldwin, *The Questing Beast*, Grayson & Grayson, 1932: 141.

³ Jordan Bastoni and Clement Macintyre, 'What's In It for Us? Why governments need well resourced parliaments', *Australian Parliamentary Review*, Autumn 2010, 25(1): 178.

So, to paraphrase Tolstoy, if effective committee systems are all alike but ineffective committee systems are ineffective in their own way, what characterises the SA committee system's ineffectiveness?

In SA, the committee system is established under the *Parliamentary Committees Act 1991*. When the Act was introduced into the Parliament it was accompanied by a squall of high-minded rhetoric about the place of committees in the parliamentary system:

It is important that all the decisions of Government, no matter how complex and irrespective of their size and consequence, are able to be put under scrutiny. In a democratic society with a system of government responsible to Parliament, that scrutiny to a considerable extent is carried out by Parliament. These proposals will enhance that process. [...] The business of Government at the end of the twentieth century should continue to be accessible to the people; they should be able to influence and examine what their Governments do on behalf both directly and through their parliamentary representatives. The changes proposed in this Bill acknowledge the complexity of a modern urban industrialized community and of the right of citizens to hold their elected representatives to account for their decisions and for their actions. It is a sign of the health of a democracy that open debate is encouraged.⁴

From the point of view of the Economic and Finance Committee — the only committee I will deal with in detail in this instance — many of those principles didn't make it out of the twentieth century alive. Created to replace the previous Public Accounts Committee — as I have written at the top of every speech given by my committee at national public accounts conferences — the Economic and Finance Committee is unlike any other public accounts committee. It is primarily unlike public accounts committees in that it isn't one at all.

Section 6 of the Act provides the functions of the committee are to inquire into, consider and report on:

- i. any matter concerned with finance or economic development;
- ii. any matter concerned with the structure, organisation and efficiency of any area of public sector operations or the ways in which efficiency and service delivery might be enhanced in any area of public sector operations;
- iii. any matter concerned with the functions or operations of a particular public officer or a particular State instrumentality or publicly funded body (other than a statutory authority) or whether a particular public office or particular State instrumentality (other than a statutory authority) should continue to exist or whether changes should be made to improve efficiency and effectiveness in the area;

⁴ SA House of Assembly, *Hansard*, 13 August 1991: 85.

- iv. any matter concerned with regulation of business or other economic or financial activity or whether such regulation should be retained or modified in any area;
- v. to perform such other functions as are imposed on the Committee under this or any other Act or by resolution of both Houses.

In 1994 the Act was amended to create additional committees, one of which was the Statutory Authorities Review Committee (comprised entirely from the Legislative Council), which removed statutory authorities from the EFC's remit. In addition to this, under the Act's definitions of State instrumentality and publicly funded body the Economic and Finance Committee is prohibited from inquiring into Parliament or its Members, Courts and Tribunals or their Members, or Local Councils or their Members. All of these have perfectly sensible rationales: although the Membership of the previous Economic and Finance Committee thought otherwise in relation to local government and instructed me to provide Terms of Reference to enable some sort of investigation into local government (see the Committee's 62nd Report: *Local Government Audit and Oversight*).

When the *Parliamentary Committees Act* was debated, the Economic and Finance Committee was described in the following terms:

State finances are the most critical element of Government administration. Whether the focus is actual government operation, statutory authorities, or the regulation of economic and financial activity, this expanded committee represents the Government's commitment, first, to the importance of getting the fundamentals right and, secondly, to ensuring that good quality debate can emerge in the Parliament as a result of the reports and reviews undertaken by Members of the House of Assembly.⁵

The Committee has recently tabled its 76th report — the Annual Report for 2010–2011 — in which it records that in the last financial year it tabled two reports: the Emergency Services Levy 2011–2012 (a statutorily imposed obligation that if not completed does not prevent the aforementioned levy being imposed but makes the Committee appear indolent) and the Annual Report 2009–2010. These two reports are the default setting for every year since 2000, and between 1993 and 1999 there were regular Annual Reports. As a result, of the 76 reports of the Economic and Finance Committee, around 30 have been routine reports produced out of external or self-imposed compulsion, leaving 46 non-routine reports over 20 years.

To look at the first ten years of the Committee's activities shows the aspirations of the Act's supporters providing a certain momentum. Reports in the 1990s covered issues such as the commercial activities of State instrumentalities, the operations of the Adelaide Formula One Grand Prix Board, government consultants, public service executive salaries, Third Party Property Motor Vehicle Insurance, the Multi-Function Polis, Electricity Reform and the Energy Market and State Overseas Offices. While anyone familiar with the political history of SA will be able to

⁵ SA House of Assembly, *Hansard*, 13 August 1991: 87.

superimpose on the Committee's reports the varying fortunes and travails of the government during this period — and towards the end the nature of the reports reflects the exposure of the then government to political attack on account of its minority status, the loss of an effective majority in the Economic and Finance Committee, the strength of the Opposition Members on the Committee (comprising a future Treasurer and Leader of Government Business) and its own internal tensions — the issues at play broadly reflect the remit provided to the Committee in the Act.

From the 2002 election onwards, the Economic and Finance Committee, under a new government, quickly became a victim of that Government's previous successes in Opposition. In the 50th Parliament (2002–2006), the Committee's work was dominated by a controversial, heavily publicised inquiry into the use of a bank account in the Attorney-General's Department by the then Chief Executive. (Foreshadowing things to come, while the EFC initiated its inquiry on the premise of comments by the Auditor-General in his Annual Report of that year (2004), a parallel inquiry by a Select Committee into the same matter, the membership of which was not dominated by Government Members, was established in the Legislative Council.)

That inquiry aside, the trajectory of the EFC since 2002 has been away from an examination of public finances and towards broader policy or economic issues. Examples have been reports into consumer credit regulation, farm machine warranties and franchising; local government audit processes; tort reform; national competition policy. Where explicit government policies have managed to be made the subject of an inquiry (their defeat in a vote of the membership along party lines upon their being moved⁶) — such as with a proposed reduction in gaming machines or renewable energy policies — interim reports have been published providing a record of evidence without analysis or recommendations: final, substantive reports have never been produced.

Whatever the merits of the reports produced since 2002, and there have been interesting and at times influential reports produced, the clear trend is for issues that do not reflect on the government's economic management or the administration of public finances. Effectively, the majority position of the Committee has been to look for issues that constitute, in political terms, victimless crimes — or at least crimes where the government is not the victim or especially the accused. Consumer credit and franchising constituted good examples of this; areas where regulation was either entirely a commonwealth matter, or about to be, but where there were supplementary state responsibilities and the opportunity to air the (sometimes severe) grievances of individuals and organisations involved.

⁶ Sth Aust Liberal Party Media Release: 'Inquiry into ForestrySA forward sale rejected by Labor' www.isobelredmond.com.au/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1059/Inquiry-into-ForestrySA-forward-sale-rejected-by-Labor.aspx

Another variant of this form of inquiry was the report into local government audit which produced changes to the relevant Act and effected a new approach to council audit committees. On the face of it, this was perhaps one of the Committee's more successful inquiries of recent times. What is interesting to note is that it came despite the aforementioned exclusion of local government from the body of matters able to be considered by the Committee under the *Parliamentary Committees Act*. A prevailing opinion in the Committee that issues of financial integrity in local government, coming out of hearings involving the then Auditor General and a widespread attitude within the membership, needed to be examined caused a Terms of Reference to be constructed that if it didn't circumvent then at least fended off the provisions in the Act. Any report that begins with a 'jurisdictional clarification' and contains the gleeful line, '[l]ike all creatures of legislation, the operation and even the existence of local government is subject to change or extinguishment at the pleasure of the Parliament', is fairly evidently the product of a political calculation based on the premise that kicking local government is both desirable in and of itself and never unpopular.

The Committee's direction is not uncommon among standing committees, particularly those administered by the House of Assembly. The domination of memberships by government members with government chairs, with a government intent on managing its political profile, has caused committees to withdraw from the full reach of their capacities and instead seek out politically neutralised issues, or issues on which there is a clear government line to which they can cleave. The Opposition is also involved in this game — as it must be. Motions for inquiries are often aimed at issues currently in the political spotlight, for which Government members have little enthusiasm and the rejection of which is the subject of pre-prepared media releases, often authorised via mobile phone immediately following a vote. Areas of agreement are then marked out by their occupying a space within the remit of the Committee, which is conveniently enormous, and the distance of that issue from possible controversy.

Perhaps none of this is surprising. Committees comprise Members of Parliament, they are limbs of the Parliament, politics is inherent to their operation. But if we are trying to answer the question, 'Parliament vs the Executive: Who Wins?' the fact that most Opposition motions are met with the same initial response from the chair — 'I'll take it to Caucus (and the Minister, often) and get back to you about what they say' — I'm fairly confident my paper could have been a lot shorter with the answer no less definitive.

But I will continue, if only because there's more to say about it than the end result.

So, the Economic and Finance exists as the official public accounts-style committee in the SA Parliament: 'the powerful and influential' Economic and Finance Committee, to use the honorific provided by the media. But that honorific was earned in the years leading up to 2002 and earned largely thanks to the capacity of certain Members, often of the Opposition, to wield the powers and the image of the

Committee in the media to gain a reputation. This reputation has done much to ensure the Committee's conspicuous pitch for a low profile ever since 2002; indeed, it has not been unusual to have disputes over the Committee's agenda articulated in these terms: 'I remember what you as an Opposition did to us with this Committee when we were in government, now we're going to do it to you'. With the dynamics of the Committee thus established, its capacity to act in a manner reflecting a group of disinterested 'parliamentarians', using Senator Murray's formulation, is deeply compromised.

In SA the stakes on this game have been increased since 2007 when the Budget and Finance Select Committee of the Legislative Council — featuring a membership without a Government majority and the Opposition Finance Spokesman as chair — was appointed with a strangely familiar terms of reference, 'to monitor and scrutinise all matters relating to the State Budget and the financial administration of the State', a remit that includes 'any matter relating to past, current, proposed and future expenditure by the public sector'.⁷ After the 2010 election the Budget and Finance Select Committee was reconstituted and continues its work today: it is now, by virtue of its never publishing any discernible recommendations or final report and remaining perpetually active, a *de facto* standing committee. The nature of its work is to call before it senior officers and other parties connected to major government programs or government departments for questioning. In appearance it has some relation to the Senate Estimates Committees. In reality it most probably does quite a lot of good in terms of ventilating issues and areas of government financial administration not otherwise examined (by, say, the Economic and Finance Committee); but the purpose of the Committee is at least as much political as parliamentary. The Budget and Finance Committee does not produce reports or recommendations, rather it releases an annual report which, pro-forma paragraphs and membership information aside, has little but for a description of the committee's functions, a list of those called before it in the past year and a link to its webpage wherein Hansard of the various meetings is contained. There are no discernible findings produced by the Budget and Finance Committee other than the information revealed during the hearings which is then possibly reported in the media, who are always present (as opposed to the Economic and Finance Committee's often lonely proceedings), or else are certainly relayed via the chairman's Twitter account: if the Budget and Finance Committee can be said to publish its findings at all, and it probably can't, Rob Lucas's Twitter page is where it happens.

So SA effectively has two public accounts committees. Or, perhaps more correctly, it has one public accounts committee, it is just that its functions are spread across two committees, three if one includes the Statutory Authorities Review Committee. The result, however, is less than the sum of its parts. Whereas the Economic and Finance Committee has the established processes and infrastructure, the legislative

⁷ *Report on the Operations of the Budget and Finance Committee of the Legislative Council, 2009–2010*: 1–2.

mandate (albeit broadly constructed), and what one might call the ‘Parliamentary provenance’, it hasn’t the inclination to inquire into the State’s financial administration. The Budget and Finance Committee has the inclination to inquire in spades, a pretense (a motion in the Council justifying its presence and the existence of public finances as a field of inquiry) but no desire to do anything with its evidence other than promulgate it, often for tactical political advantage (or possibly see an issue spin off into a separate specific select committee with actual findings). Between them there might be a functioning public accounts committee worthy of the name. This situation brings a sharply and probably unintentionally ironic edge to the preamble of the Budget and Finance Committee’s Annual Reports where they state:

The establishment of the Budget and Finance Committee by Resolution of the Legislative Council arose from the Council’s desire to develop a process for budget and finance monitoring that suits the SA experience, with the ultimate goal being to improve the accountability of the executive arm of government to the Parliament.

Just what constitutes ‘the SA experience’ is anyone’s guess, but it is not hard to view it as a series of haphazard outbreaks of parliamentary scrutiny piggybacking on political maneuvering and making useful contributions to public policy and accountability on those occasions when accountability and a political imperative happen to coincide. Indeed this paper is an expression of the ‘SA experience’ to the extent that it reflects the particular issues confronting our Parliament and its committees. It has been an observation of mine over the last decade that the community of parliaments resemble in many ways the Galapagos Islands and their fauna. While each island contains species and environments generally comparable to every other island, there exist strange, powerful submarine currents between them that prevent constant cross-fertilisation of groups meaning similar but distinctly different strands develop on each.

So too have I tended to view the various reports and articles concerning parliamentary committees emanating from research units, universities and other parliamentary officers: interesting, worthy of consideration but somehow missing some critical insight with respect to our State’s situations. Perhaps it is ever thus, one’s problems are always more important than other peoples. But the time is fast approaching in South Australia where arguments finessing the finer points of committee output and whether it can be quantitatively or qualitatively measured will be reduced to naught alongside the more pressing issue of whether committees are producing anything at all outside a narrow political game of advantage. The issue is about trying to restore some equivalence into the Parliament/Executive relationship, something that is difficult, dynamic and uncertain in most parliamentary environments. Halligan, Miller and Power rather understate it when they say ‘[p]arties and executives continue to set parameters’ but are correct to argue that even in parliaments where the committee system has in their view been strengthened over recent decades — their example being the Commonwealth Parliament — there are entrenched difficulties around arming committees with

powers, sanctions and the breadth of autonomy that would enhance their ability to not just inquire but follow through on issues after the report has been published.⁸

I have not surveyed all the arguments around improving committee processes, such as promoting the role and power of committees so that when one is asked, as I was on my first day as a ministerial adviser, whether it was necessary to reply to a committee's request and what could they do about it, one might reply something other than 'probably' and 'not much'. Nor do I have space to critique proposals for enhanced parliamentary autonomy — including Senator Murray's proposal for parliaments to raise their own funds (a political ideal of such trenchant purity a teat pipette's worth could kill a thousand mice) — so I will deal with what occurs to me as the most effective way to enhance the committee system in the SA Parliament: abolish it and start again. If severing the arm to save the body sounds a bit drastic, it is worth considering that in many ways parts of the current committee system have been operating like a phantom limb for some years already.

While this paper has focused on the Economic and Finance Committee and its particular issues, this committee has always been a magnet for political controversy. With such a broad remit, the committee has the capacity to do almost anything, and yet is compelled to do almost nothing. That it has inhabited the latter range of its spectrum of late is barely the fault of the committee as an entity: its constitution is perfectly suited to manipulation by an executive with intent.

Perhaps a more plangent indicator of the drift of parliamentary committees in SA is the trajectory of the Public Works Committee. This committee is the only one with any real, comprehensible power (outside the Legislative Review Committee and certain semi-serious powers granted to planning and environment committees) in that its approval is required for any government project over \$4 million to proceed. Upon entering the SA Parliament in 2001, I worked as a researcher to the Public Works Committee which was, at that time, chaired by the quixotic member (and later controversial independent Speaker of the House), Peter Lewis. As Lewis had left the Liberal Party (he had voted himself into the chair's position with the support of Opposition members over the presumptive (Liberal) chair while still a Liberal member), there was no government majority on this most sensitive of committees. Nevertheless, the spirit of the membership was, by and large and with due allowances for natural political difference, 'parliamentary' with very few dissenting reports and a general preference for consensus. The importance of the committee's role — the 'responsibility', to quote the Queensland report — was a perceptible factor in this behaviour. Over the past decade, however, while the Public Works Committee has not embarked on a program of disrupting the government's capital works program, the demeanour of the committee has become more fractious, with hearings taking on a more political tenor and meetings being subject to sometimes flamboyant displays of dissent for the benefit of the media. Significantly, attempts

⁸ John Halligan, Robin Miller and John Power, *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles*, Melbourne University Press, 2007: 247.

to amend the Act to enable the increase of the threshold for referral to the Committee from \$4 million, a figure that twenty years of inflation has reduced to an inconvenience rather than a serious cost trigger, to \$11 million was undermined after agreement between the government and the opposition could not be reached and the proposal lapsed with the end of the 51st parliament (2010): it remains in limbo with an interim arrangement to sift projects currently in place.

While there has not been a series of derailed public works projects as a result of the committee's increasing truculence, there is an adversarial nature to the process that speaks more to a political purpose than a parliamentary scrutiny function (although there are connections to the extent that Oppositions often want access to more information than governments may want to provide and a feedback loop of suspicion and defensiveness leads to an intensification of emotions on both sides which inevitably affects the committee's normal functions). There is also the issue of what kinds of projects are referred to the committee — an issue that has not been restricted to this government's tenure — and the attitude the committee takes to executive decisions not to refer projects on the basis of their financial arrangements (the recent decision not to refer the \$2 billion New Royal Adelaide Hospital to the committee on the basis it is a Public Private Partnership being the latest such example⁹). Whereas in the past decisions not to refer projects for reasons with which the committee did not agree were generally met with a united response from the members, it is now less certain whether a negative government position would result in a consistent or politically split response.

I made reference earlier to an analogy between parliaments and the Galapagos Islands; recently one such island has seen a profound change in its environment in the form of the recent reforms to the committee system of the Queensland Parliament. While the nature of the reforms is, to continue the analogy, adequate to that location — the new portfolio committees address particular issues arising from Queensland's unicameral system and the perceived need for the review of proposed legislation as much as the continuing scrutiny functions of committees — the principles behind such a significant change to not just the format but the function of committees is, I think, applicable across jurisdictions. While put in terms not dissimilar to those tabled in the SA Parliament twenty years ago, the Queensland Committee System Review Committee's proposed commitment to 'giving members greater responsibility for the scrutiny of the executive' and 'giving the parliament a committee system that is strong and dedicated to the purpose of scrutiny, review and deliberation' goes to the core of what a committee system should do.

⁹ Sth Aust Liberal Party Media Release: 'Secret Labor Blocks Hospital inquiry'
<http://www.isobelredmond.com.au/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1099/Secret-Labor-blocks-hospital-inquiry.aspx>

In his article, 'Preferential Roles of MPs on Parliamentary Committees', Grant Jones asserts, 'Committees are what the members make them'.¹⁰ This is true and often reflects not altogether well on members' internal contest between parliamentarian and politician; yet complaining about it has done little to fix it. If the committees do not function as well as they ought; if there are an inconsistent spread of committees with overlapping remits or too broad a range of issues (South Australia has two environment committees; three public accounts-related committees; a Social Development Committee and an Aboriginal Lands Committee, for example, with various inception dates); if the political and policy priorities of the executive have now effectively overridden the 'parliamentary' functions of the committees then they need to be redrafted in a way that prescribes their role in a much more specific way than currently exists.

To quote the Clerk of the Queensland Parliament, Neil Laurie, from his appearance before the Committee System Review Committee:

My strong issue is that I think we should start it almost with a blank page in the sense that every time the committee system has been reviewed and altered in the last 25 years, or thereabouts, we have essentially started with this system and we have tinkered with it. I think we have outgrown that. That is my view. I think that there has been a lot of good work done over the last 20 years since the committees were introduced, but the current system has really outgrown itself and does not necessarily give the parliament what I think it now needs. We need to evolve to the next stage...¹¹

The SA committee system needs to move to the next stage. There needs to be a reconsideration of the purpose and principles of a committee system and a new process implemented to give voice to those principles. From the point of view of someone who has worked in committees for a decade, in a small parliament dominated by two parties the provision of too much discretion in a committee's remit is an invitation to manipulation and underperformance. Prescriptive roles allied to real functions that have real consequences are critical to the effectiveness of committees in this context. A public accounts committee must have a defined role with a defined outcome, something that makes it clear to the members that unwarranted disruption will reflect badly on the committee and the members; it is currently too easy to grind a committee to a halt — and even to cede many of its functions to a parallel, self-appointed rival in the other House — because the calculation is that 'I won't make waves down here and any waves in the Council will never be large enough to hurt us'. Pain is a motivation and pain must be built in to the system.

Committee should have functions that cover the breadth of executive powers and roles; if the Queensland model offers any solutions to a state like South Australia it

¹⁰ Grant Jones, 'Preferential Roles of MPs on Parliamentary Committees', *Australian Parliamentary Review*, Autumn 2008, Vol. 23(1): 80.

¹¹ Neil Laurie, *Hansard — Committee System Review Committee — Review of Parliamentary Committee System: Friday 20 August 2010*: 10.

is less in the legislative scrutiny aspect, SA being furnished with a functioning house of review, but in the deliberate spreading of committee remits across the scope of government activity. Bearing in mind the size of the Parliament and the availability of members, the committees could be more effectively spread in South Australia and deal with much more than they currently can or do. Such a model might also profit from a reconsideration of the everyone-gets-a-prize attitude of governments when it comes to handing out Ministries and other offices; a functioning committee system needs people able (and prepared) to populate it more than it needs anything else.

Allied to this must be a reconsideration of the resources committed to a committee system. Currently some standing committees have a secretariat of one person, members sit on the selection panels recruiting committee executive officers and secretaries, all committees have identical budgets that do not reflect their functions and the relative costs involved, members get allowances for being on committees ranging from ten to seventeen percent of their salaries, the chairs of two particular committees receive a white car and a driver. All of this needs to change; much of it needs to go. If what it takes to make the committee system work again is a sacrifice then we must accept it. A properly resourced, well staffed, motivated (whether by instinct or compulsion or both) committee system, furnished with effective functions and responsibilities, bolstered by the considerable powers of the parliament, engaged with the public and committed to a bipartisan (as far as possible) examination of the actions of the executive is worth starting again for.

The Parliament cannot complain about being sidelined unless it advocates for itself. It may be that effective reform of the committee system — and the parliament as a whole, in fact — is not possible until it coincides with the political cycle (a minority government receptive to the big ideas of suddenly powerful independents; a longstanding government seeking measures to refresh itself and demonstrate a capacity and commitment to reform and transparency), but that only means it should engage in the process of making itself heard in preparation for that moment's arrival. The comments of Neil Laurie provide an example of parliamentary officers advocating reform to the members. Too often stagnation results from the inability of all the players to get together, to arrive on the same page.

The members are interested whilst on the committee — indeed whilst in the committee room — but will say it only forms part of their brief and constituent issues are primary, meaning maintaining their engagement is difficult. And of course, the parties to which members are joined have their own views — especially those in government — which do not always find common cause with parliamentary reform.

Parliamentary management are more or less at the other end of the spectrum, concerned primarily with the operation of the chamber and keeping the institution on an even keel; it tends to work on a more geological time scale (members, governments and, hence, problems tend to come and go eventually) and there is an

inherently minimalist tendency to their approach (on arriving at the House of Assembly, several Clerks ago, I was told the management line was beautifully simple, you were free to approach the Clerk with any idea or request you liked and the answer was always ‘no’). Management is sensitive to the capacity of the institution to take its members along: ‘resistance’ is a concept that occupies the forefront of their minds; how much can be done before members start digging in? The corollary of that, of course, is that doing very little meets very little resistance.

Committee staff, somewhere in the middle, are forced to muddle through — obeying two masters and satisfying neither. Committee reform, especially the ad hoc incremental reform that most often occurs (and is hardly reform) and which Neil Laurie referred to as ‘tinkering’ is perhaps best represented in the Philip Larkin poem ‘The Life With the Hole in it’:

Life is an immobile, locked,
Three-handed struggle between
Your wants, the world's for you, and (worse)
The unbeatable slow machine
That brings what you'll get. Blocked,
They strain round a hollow stasis
Of havings-to, fear, faces.
Days sift down it constantly. Years.

Committees are the vital organs of the parliament; they are the speaking, moving, living faces of the legislature and potentially form a critical connection between the community and an arm of government unlike any other that exists in our system. In many ways our system of government operates like a mass, consensual hallucination: if we all believe in it then it exists. A degraded committee system is a misrepresentation of the purpose of parliament and risks the credibility of the institution, risks shattering the illusion, if it is seen to be merely a hand-puppet to the executive's desire for the control of policy and debate. In Catholic theology despair is defined as ‘the sin by which a person gives up all hope of salvation or of the means necessary to reach heaven’,¹² the cynicism I referred to at the start of this paper is a form of despair, a capitulation to the idea that the ideals and potential of parliaments cannot be realised because the executive — out of fear, or resentment, or contempt, or a simple desire to control as many democratic processes as possible to maximise their time in government (all of which is, in its own way, unsurprising and even reasonable) — will not let it and there is nothing to be done.

Walter Bagehot said “the cure for admiring the House of Lords was to go and look at it”,¹³ it might be a wonderful thing if reform of the committee system in the SA Parliament provoked the rejoinder that the cure for cynicism about the Parliament was to go and look at it and participate. ▲

¹² Catholic Dictionary, ‘Despair’: <http://www.catholicreference.net/index.cfm>

¹³ Walter Bagehot, *The English Constitution*, 2nd edn, 1873: 108.

Jonathan O'Dea MP is Chair of the NSW Public Accounts Committee

The role of public accounts committees

Jonathan O'Dea

A valuable safety mechanism

The title of this conference is 'The Executive versus Parliament: who wins?'. While the notion of one arm of government competing against another is not surprising in the context of Australia's adversarial political system, hopefully both the Executive and Parliament can operate well together in a balanced way so that ultimately it is the public who wins. Nevertheless, there is a need for safety mechanisms in Westminster style Parliaments, in which the elected arm of Government is best placed to keep the Executive arm of Government in check.

Parliament has a crucial function of holding the Executive Government to account in the time between the ultimate public accountability of election days. Parliament forces the Government to justify legislation, explain its motives and rationale, and defend its actions or omissions. It does so through a range of instruments and forums, including committees. In New South Wales, two such committees are the Legislation Review Committee and the Public Accounts Committee (PAC). PACs are one of the most powerful and valuable safety mechanisms to ensure greater accountability and scrutiny of the Executive.

Public accounts committees across Australia

PACs date back some 150 years to England and are known by various names in different Australian jurisdictions. While operational variations also exist between different jurisdictions, each PAC scrutinises the actions of the Executive on behalf of the Parliament. They help ensure appropriate use by Government of public money and recommend improvements to the efficiency and effectiveness of Government activities. This paper makes observations particularly relevant to the New South Wales experience. While it will not examine the differences across Australia, they are well summarised in a useful baseline study published in 2006 by KPMG's Government Advisory Services for the La Trobe University Public Sector Governance and Accountability Research Centre.

However, it is worth noting that the Public Accounts and Estimates Committee of the Victorian Parliament, a joint house investigatory committee, is unique in Australia in having the dual responsibility of scrutinising both the public accounts and the budget estimates. Regional forums of PACs also exist, such as the Australasian Council of Public Accounts Committees, which New South Wales will host in early 2013. Other forums likewise exist across the globe, which bring together and facilitate the exchange of ideas, information and examples of best practice.

The existence of a PAC in New South Wales dates back to 1902. It has primary functions to examine and report on opinions and reports of the Auditor-General, explore issues relating to financial reports and undertake inquiries referred by Parliament or a Minister (particularly where it is a policy matter). Since 1983 it has also been able to launch self-initiated inquiries without government direction. The PAC was instrumental in the adoption of annual reporting rules and guidelines for statutory bodies as well as reviewing the operations of Audit Committees, risk management practices and the use of accrual accounting in NSW. The PAC publishes an Annual Report and has the power to report conclusions, recommend improvements and follow up on these. It currently meets at least once every sitting week and is undertaking or planning a number of inquiries relating to Auditor General performance audits and financial audits as well as topics including cost of public housing maintenance, relative costs of alternate energy options and public sector procurement.

Six key success factors

Reviewing the efficiency and effectiveness of Government will always involve a political context. In acting as a safety mechanism and check on Executive power, there are six major factors one can highlight as influencing the success of a PAC.

1. Impartiality

Opposition WasteWatch Co-ordinators/Committees do not attempt to be impartial. They operate with far less structure and resources than PACs, and are a function of Opposition. They will be more directly critical of perceived waste and mismanagement within a relevant Government and its Executive. As a party-based entity, they are generally driven by the Co-ordinator/Chair, with an overt and unapologetically political agenda. As such, they attract no Secretarial support from the Parliament's bureaucracy. In contrast, PACs operate in a more bipartisan way, on behalf of Parliaments and their electors. They have cross-party membership and generally formulate consensus recommendations. A formal committee structure (supported by resources along with statutory inquiry powers and obligations) enables fuller consultation as well as more opportunity for balanced debate, proper research, interviewing witnesses and hearing testimony from experts in the field.

The committee's agenda is predominantly based on helping manage good public outcomes and delivering value for money.

While the NSW PAC includes the Shadow Treasurer and the Independent former Speaker, it has a majority of backbench Government MPs. This reflects the composition of the Lower House of the Parliament as elected by the people. It is chaired by the author, also a Government MP. A discussion point that has attracted significant comment in recent years is whether a PAC is best chaired by a member of the Government (as mostly occurs in Australia) or Opposition (as in Britain and Canada). While there are arguments for both approaches, when a Government is functioning healthily (this was highly questionable in the final years of the previous NSW Government), the author believes that PACs are best directed by a member of the Government who is able to understand, access and navigate through relevant processes and personalities. Where Governments are dysfunctional, the role of the Opposition in holding a Government accountable, including through the WasteWatch function, is enhanced.

Situations may arise where there is a risk of tension between a Chair's loyalty to a Government and scrutiny of the Executive. However, Committee procedures and the standing orders function to support a Chair to fearlessly and fairly promote a higher duty to the public. Furthermore, the actions of a properly motivated parliamentarian Chair in promoting the broader public interest should increase rather than reduce the likelihood of later Ministerial service, should that be desired. In any event, the personal characteristics of the Chair are far more important than whether they are part of the Opposition or Government of the day. In addition to the attitude and leadership of the Chair, the motivation and capability of other committee members is paramount. They must be able to act on the PAC in a non-party political fashion, despite also serving in a generally highly partisan legislature.

2. Stage in political cycle

The level of activity and focus of a PAC will often vary depending on the stage of a political cycle. This is in both the context of each individual Parliamentary term as well as the number of terms any political party has been in power. With fixed four year terms in New South Wales, there is a disincentive for a PAC with majority Government representation to undertake a potentially critical inquiry of the Government in the immediate lead up to the next election, although less controversial issues might still be pursued at such a time. The longer any Government stays in power, the less likely it may be that a Government controlled PAC will aggressively pursue politically sensitive inquiries that may embarrass the Executive. A properly functioning Executive should welcome scrutiny and can deflect potential criticism through being seen to respond appropriately to highlighted issues. However, the Executive and PAC working cohesively in such a way is an ideal that may not always be a political reality, particularly as a Government ages.

3. Resources available

There is a tension in that funding for the PAC Secretariat and other Committee resources is reliant on Executive allocation. It is important to have a Treasurer and Executive that properly respects the oversight role of the PAC and provides for appropriate resource allocation. This may be made more difficult where there is a period of under-activity from the Committee that in part prompts a reduction in overall resources being made available, as occurred in NSW in 2009. While there is now a very active PAC in New South Wales following the change in Government in March 2011, issues of resourcing potentially threaten effective operation of the PAC. Secretariat staffers are no longer solely dedicated as part of a permanent PAC Secretariat in NSW. A PAC specific annual budget is also not currently possible, with a record number of other committees now competing for a pool of generally common staff and other shared resources, allocated according to each committee's current workload. There is a risk that inadequate resources might mean a less proactive and rigorous approach to fulfilling PAC functions. The extent of this resource issue may become more apparent over time. Evaluating the appropriateness of the current staff and budget arrangements might be assisted by a future exercise benchmarking resources and measuring relevant committee outputs against other relevant jurisdictions and committees.

4. Parliament's level of interest

While Parliaments trust PACs to perform a scrutiny function, there should also be a strong culture of accountability within each Parliament that promotes appropriate consideration of and debate on PAC reports. The reality is that Committee reports are not thoroughly read by most members of Parliament, who have many competing demands for their attention. In the previous NSW Parliamentary term, Committee reports were considered on a Friday when there was no Question Time and many MPs did not even attend Parliament. As a consequence there was sometimes inadequate consideration of Committee reports, with those members who had sat on the committee sometimes left to debate reports between themselves. In the new NSW Parliament, with Question Time now occurring every sitting day, all MPs will be present in the House on the day when committee reports are listed for debate. This should promote a better culture of accountability and improved attention to committee reports. There is no formal mechanism for ensuring that the Government acts upon recommendations, although in NSW there is an obligation for the Government to at least respond to reports/recommendations within 6 months. In practice however, the response may be inadequate. For example, the previous NSW Labor Government failed to respond to a PAC report on State Plan Reporting for almost two years. A response was only forthcoming when the matter was ultimately highlighted in Parliament and in the media (with the author playing a role in both as an Opposition MP).

5. Level of media involvement

In pursuing improved Government efficiency, effectiveness and cost control, a PAC will sometimes need to rely on the media to convey crucial messages to a broader domain. This information dissemination in turn assists to engage public stakeholders and promote intelligent debate, which can create powerful expectations for the Executive to act in an accountable way. As a backbench MP and committee chair, a quality parliamentary speech may not sufficiently communicate an issue of public importance. Issuing a media release and briefing journalists can have its place in highlighting the need for an issue to be addressed in the public interest. A concern for increased community engagement is as important for committees as it is for the work of the House.

6. Healthy relationship with audit office

Parliamentary Committees are more effective in holding the Executive to account when they work closely with independent authorities charged with scrutiny functions. For example, this applies in New South Wales with the Auditor-General/Audit Office and the PAC, as it does for The Independent Commission Against Corruption (ICAC) and the ICAC Parliamentary oversight committee, as well as for other watchdogs and watchdog committees. A healthy relationship between the PAC and Auditors-General in NSW is essential to public sector accountability. While the PAC is responsible for commissioning periodic reviews of the Audit Office, the two operate independently. PACs should play a role in protecting the independence and integrity of the Auditor-General in scrutinising public accounts. Both entities should operate co-operatively and in practice discuss potential areas of inquiry that either might undertake. A PAC complements the work of the independent office of an Auditor-General by following up aspects of Auditor-General audit reports to Parliaments on administrative performance and financial matters. PACs are able to use political force and expertise to subject the audits to greater Parliamentary scrutiny and thus encourage Government Departments to respond to Audit Office recommendations and take appropriate action.

Conclusion

PACs obviously have an important role as mechanism of Parliaments to help keep the Executive in check. There are various factors that will impact on how successful PACs will be in performing this function. However, in order to add optimal value, PACs should be seen as more multidimensional than just a means for a Parliament to compete with the Executive arm of Government. The aim should be appropriate balance rather than adversarial competition. A properly operating PAC should complement as well as confront; support as well as scrutinise; and co-operate as well as challenge. In this way, good governance and democratic process can be better promoted, with the public more likely to be declared as the winner. ▲

Teresa McMichael is Principal Council Officer, NSW Legislative Council

Prorogation and principle: The Gentrader Inquiry, government accountability and the shutdown of parliament

Teresa McMichael[#]

Introduction

The interpretation of prorogation in most Westminster parliaments is that it terminates all business pending before the House until parliament is summoned again for the next session. The question of whether committees can continue to sit and transact business during prorogation, without legislative authority, has however been a source of contention. While there has been rigorous debate on the issue, the matter remains largely unresolved. The effect of prorogation on committees in the NSW Legislative Council was considered in late 2010 — early 2011 during an inquiry by the General Purpose Standing Committee No. 1 into the sale of state electricity assets (the ‘Gentrader inquiry’). Conflicting opinions were expressed by the Clerk of the Legislative Council¹ and the Crown Solicitor as to whether the Committee could meet, whether it could summon witnesses, and whether statements made or documents provided would be protected by parliamentary privilege. The circumstances are considered in detail later in this paper.

The issue of committees meeting during prorogation was the subject of a 2010 paper by the Clerk of the SA Legislative Council, Ms Jan Davis, entitled ‘Matters concerning the effect of prorogation: An argument of convenience’.² Davis examined the effect of prorogation on committees in South Australia, Queensland, Western Australia and the Commonwealth Parliaments, in considering whether select committees of the SA Legislative Council have the power to meet during prorogation. This paper will build upon Davis’ paper by examining the experiences of the NSW Parliament in light of the recent Gentrader inquiry.

Overview of the effect of prorogation on committees

There are differing views regarding the effect of prorogation on committees. The power of prorogation originated in the British monarchy, when parliament was only an advisory council. Prorogation was used by the monarch to terminate the

meetings of the parliament when the monarch no longer required the parliament's advice, and was often used as a tool to dispense with rebellious parliaments.³ There is no record as to whether the House of Commons ever authorised its committees to meet during prorogation⁴ (although that is not to say that the House of Commons has no such power, but rather that such a power has not been used).⁵ The view expressed in Erskine May's is that '[t]he effect of prorogation is at once to suspend all business, including committee proceedings, until parliament shall be summoned again, and to end the sittings of parliament.'⁶ This view has been adopted by the House of Representatives, which states in House of Representatives Practice that committees continue in existence after prorogation, but may not meet and transact business after prorogation.⁷ While the House of Representatives has made some exceptions to this,⁸ it has not authorised a committee to sit during prorogation since 1959.

In contrast, it is standard practice for Senate committees to function notwithstanding any prorogation of the parliament.⁹ Senate committees formed for the life of a parliament continue in existence until the day before the next parliament first meets. This practice is firmly entrenched in standing orders and has also been confirmed by declaratory resolution. Odgers' Australian Senate Practice states that the power of the Senate to authorise its committees to meet derives from the Senate's character as a continuing House¹⁰ and from the Commonwealth Constitution. The Qld Parliament has followed House of Representatives practice, stating in its *Parliamentary Procedures Handbook* that standing and select committees appointed for the life of the parliament continue to exist during prorogation, but may not meet unless expressly authorised to do so by statute, standing orders or resolution.¹¹ The Qld Parliament also allowed two exceptions, however both were in the early 1900s. The SA Parliament has also authorised its committees to function during prorogation, with numerous examples over a period of 77 years of select committees of both Houses being given leave to sit.¹² However, as discussed in Davis' paper, this practice came into dispute in 2005 when the SA Legislative Council passed a resolution authorising seven select committees to sit during recess. The Government opposed the resolution, and disputed the ability of the parliament to pass it. The Government sought advice from the Crown Solicitor, who agreed that select committees are not entitled to sit after prorogation, and stated that any privileges attached to committee proceedings cease to exist upon prorogation unless provided by statute.¹³ A similar situation occurred in Western Australia in 1971, when the WA Legislative Council resolved to authorise a select committee to function during prorogation. The WA Solicitor-General subsequently expressed the view that neither House had the power to authorise this action. In response the Clerk of the WA Legislative Council said: 'we undertook a great deal of research of whether we had the power to do this, but nothing we could find prevented us from authorising these Committees to continue'.¹⁴

Until recently this has also been the view of the NSW Legislative Assembly. *NSW Legislative Assembly Practice, Procedure and Privilege* states that standing committees continue to exist after prorogation but may not meet or transact

business unless authorised by legislation.¹⁵ However, as will be discussed later, the Assembly has changed its practice following the Gentrader inquiry.

Looking at the practices of the different Houses of Parliament, with the exception of the SA House of Assembly, and of course the unicameral parliament of Queensland, there appears to be a distinct dichotomy between the views of Upper and Lower Houses regarding the power of committees to sit during prorogation. The practice of the SA House of Assembly may perhaps be explained by the fact that the SA Parliament usually prorogues every year even though select committees usually take longer than a year to complete their inquiries, whereas the Senate and WA Parliament and NSW Parliament prorogue less regularly. Digging a little deeper, it appears that this dichotomy only appears to emerge in Upper Houses with a non-government majority. The 1971 example from Western Australia, 2005 example from South Australia, and the 2010–11 example from New South Wales, all occurred as a result of Upper Houses with non-government majorities trying to exert their power to scrutinise the Executive during prorogation. This concept is not new. Odgers (8th edn) states:

... prorogation provides the executive government, the ministry, with a handy weapon to use against troublesome upper houses. A government can normally use its compliant party majority in the lower house to adjourn that house, but where such a majority is lacking in the second chamber prorogation may be the only means of avoiding embarrassing parliamentary debate or inquiry.¹⁶

With regard to South Australia, Davis stated that prorogation had provided a ‘convenient vehicle to cease the operations of certain Select Committees of the Upper House, their terms of reference being a source of considerable frustration to the Government of the day’, and ‘prorogation has been resorted to in an endeavour to stop the Upper House with a non-Government majority from continuing with Select Committee inquiries into sensitive Government issues which would continue to cause disquiet in the public domain prior to elections.’¹⁷

Prorogation in New South Wales

By examining the effect of prorogation on the NSW Legislative Council’s standing committees¹⁸ it can be seen that from the beginning of the Council’s standing committee system in the 1980s it has always been assumed that the standing orders provided that these committees had the power to sit during ‘the life of the parliament’. Standing committees of both Houses were established by the parliament in 1982, following two earlier failed attempts by the Opposition to create a system of standing committees in the Legislative Council. To permit appointment of the committees the parliament adopted a number of new standing orders, including standing order 257C, which read: ‘Such committees shall have authority to report from time to time and have power to sit during the life of the Parliament in which they are appointed.’

In speaking to the motion for the adoption of standing order 257C, the Leader of the Government in the Council, the Hon Paul Landa, said: ‘The proposed term of the

standing committees is the term of the Parliament and the work will be of a continuing nature.’¹⁹

Consistent with the Government’s interpretation of standing order 257C, in early 1993, the President referred to the Privileges Committee an inquiry into a Special Report from the Joint Select Committee Upon Police Administration concerning the unauthorised disclosure of *in camera* evidence, despite the prorogation of the parliament. In doing so, the President specifically referred to the provisions of standing order 257C. The first two meetings of the Privileges committee to consider the matter, on 2 February 1993 and 8 February 1993, were also held while the House remained prorogued.²⁰

It is also notable that from 1966 onwards a series of Parliamentary Committees Enabling Acts were routinely passed from time to time to enable certain committees to sit during prorogation. Even so, until 1994 the Legislative Council’s standing committees were not included in these Acts, as it was seemingly accepted that these committees had the power under standing order 257C to sit during prorogation. However, this changed in 1994 when the Crown Solicitor provided advice to the Legislative Assembly stating that while standing committees continue in existence after prorogation, they may not meet and transact business unless authorised by statute. The advice was given after the parliament was prorogued on 7 December 1994, several months before the election on 25 March 1995. At the time, the Government, which was minority government, was accused of using prorogation to avoid parliamentary debate on potentially damaging reports on the superannuation payout to a former Government minister.

The Crown Solicitor, who applied the view expressed in *House of Representatives Practice* (outlined earlier), commented:

The rationale for this view appears to be that a committee only exists, and only has power to act; as far as directed by an order of the House which brings it into being. The committee is subject to the will of the House. The House may at any time dissolve a committee or recall its mandate, and it follows from the principle laid down that the work of every committee comes to an absolute end with the close of the session.²¹

The Crown Solicitor acknowledged that a contrary view was expressed in *Odgers*, however argued that *Odgers’* view was not applicable to the situation in New South Wales as the NSW Parliament has no equivalent to s 49 of the Commonwealth Constitution (s 49 provides that the power, privileges and immunities of the Australian Parliament and its members and committees shall be such as are declared by that Parliament). The Crown Solicitor also contested the validity of Legislative Assembly standing order 374A (and its Legislative Council equivalent — standing order 257C), arguing that they went beyond the power conferred by s 15 of the *Constitution Act 1902* (NSW)²² to the extent which they purport to authorise committees to sit after prorogation. The Crown Solicitor stated:

I cannot see how the continuation of the transaction of business by Standing Committees could be regarded as relevant to the 'orderly conduct' of the Council and Assembly within the meaning of para (a) once Parliament is prorogued. It is difficult to accept the argument that Standing Committees can continue to function given that the bodies to which they owe their existence, the two Houses of Parliament, cannot themselves transact business.²³

Upon receipt of the Crown Solicitor's advice, the Premier's Department issued a memorandum indicating that any transfer of documents or submissions to standing committees should cease immediately. The President subsequently wrote to the chairs of the Legislative Council's standing committees advising that in light of the Crown Solicitor's advice committees should not hold deliberative meetings, conduct hearings or table reports, nor should the chairs carry out any functions as committee chair. As a result, several active inquiries were terminated.

As mentioned earlier, until recently, the Crown Solicitor's advice was accepted by the Legislative Assembly. The view of the Legislative Council, on the other hand, has been more equivocal. Following the 1994 advice, on the prorogation of parliament, the then Clerk of the Legislative Council, Mr John Evans, issued written advice on two occasions to members of the Council drawing attention to the content and effect of the Crown Solicitor's advice. However, as noted in *New South Wales Legislative Council Practice*, both Evans and the current Clerk of the Council, Ms Lynn Lovelock,²⁴ have consistently taken the view that, at least in modern times, the Crown Solicitor's 1994 position was based on 'an extremely restrictive view of the powers of the Council'.²⁵

Lovelock & Evans further acknowledge in *New South Wales Legislative Council Practice* that '[i]t is possible that another counsel may provide different advice on this matter and that, should the matter ever come before the courts, there may be a different outcome to that suggested by the Crown Solicitor.'²⁶ Of note, between 1996 and 1999, the courts — including the High Court — handed down a series of three landmark decisions, the *Egan* decisions,²⁷ judicially confirming the fundamental role of the Council in scrutinising the activities of the Executive Government and holding it to account. As will be discussed later, this scrutiny role arguably extends to standing committees.

It should also be noted that since 1994, the NSW Parliament has only passed two Parliamentary Committee Enabling Acts (in 1996 and 1997). Both Acts contained, for the first time, reference to the Council's standing committees. It is evident that these references were a direct result of the Crown Solicitor's advice. The conflicting views of the Crown Solicitor and Clerk of the Legislative Council recently came to a head as a result of the inquiry into the Gentrader transactions (the 'Gentrader inquiry').

The Gentrader inquiry

The ‘Gentrader transactions’ were certain transactions for the trading rights to the electricity generation of nine State-owned power stations to the private sector (the ‘Gentrader’ model). The transactions, which were finalised at a quarter to midnight on 14 December 2010, resulted in eight directors of the Boards of the State-owned corporations resigning in protest, and the subsequent hasty appointment by the Treasurer of new directors to facilitate the completion of the transactions.

On 22 December 2010, under the self-referencing powers of General Purpose Standing Committees, three members of the Legislative Council’s General Purpose Standing Committee No. 1 requested that the Clerk Assistant of Committees convene a meeting of the Committee to consider an inquiry into the transactions. On the same morning, the Governor, on the advice of the Executive Council, prorogued the parliament, several months before the election of 26 March 2011. The Government issued a press release indicating, amongst other things, that committees were not able to sit and transact business during prorogation unless empowered by statute. The Government’s position reflected the Crown Solicitor’s 1994 advice. At the time, the Government was accused in the media of using prorogation in an attempt to avoid the Inquiry. The Clerk of the Legislative Council subsequently advised the Chair that the Committee could continue to meet and transact business despite prorogation. The Clerk expressed the view that the Committee was not bound by the Crown Solicitor’s restrictive view of the powers of the Legislative Council, while acknowledging that the matter had yet to be tested before the courts. Consequently, the Committee met on 23 December 2010 and resolved to proceed with the Inquiry.

On 2 January 2011 the Government received updated advice from the Crown Solicitor, who reiterated his 1994 advice that standing committees of the Council cannot function during prorogation without legislative authority to do so. In support of his argument he pointed out that it had been the practice of the NSW Parliament for at least 30 years between 1966 and 1997 to pass enabling legislation to allow committees to meet. The Crown Solicitor argued that the successor to standing order 257C (standing order 206) was invalid, insisting that it was not a standing order for the ‘orderly conduct’ of the Legislative Council under s 15(1)(a) of the *Constitution Act 1902* (NSW). The Crown Solicitor said it followed that the Committee had no power to compel attendance of witnesses or require them to answer questions, and that there was a risk that statements made and documents provided to the Committee would not be protected by parliamentary privilege. The Clerk of the Legislative Council respectfully disagreed with the Crown Solicitor. The Clerk noted that while the House can be prorogued under s 10 of the *Constitution Act 1902*, the House has the power under s 15 to regulate its own business. The Clerk argued that there is no limitation in standing order 206 regarding the right of standing committees to sit during any recess of the House. The Clerk said it is common ground that the life of the parliament does not come to an end on prorogation (only a session comes to an end), and that there is no

statutory or judicial warrant for treating prorogation as effectively ending the life of a parliament.²⁸ She argued that the only constitutional restriction on the dispatch of business by the Council or its committees is s 22F of the *Constitution Act 1902*, which provides that Council's standing committees must cease to meet and dispatch business once the Assembly has been dissolved. The Clerk highlighted the system of responsible government in New South Wales, which she emphasised has changed over time. This was expressly recognised in *Egan v Willis*, where the High Court observed:

A system of responsible government traditionally has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament' ... It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that to secure accountability of government activity is the very essence of responsible government.²⁹

The Clerk stated:

While the traditional understanding of prorogation was that committees may not meet, a contemporary reading of the system of responsible government is that the Council, through its standing committees, must be able to exercise its constitutional role of scrutinising the actions of the executive government.³⁰

The Clerk concluded that under this contemporary system of responsible government, standing committees must have the power to conduct inquiries after prorogation as a matter of 'reasonable necessity', and further that enabling legislation is not required for standing committees which are appointed for the life of the parliament and thus able to operate during prorogation. The Clerk's views were subsequently supported by independent legal advice from Mr Bret Walker SC. Walker agreed with the Clerk's argument regarding the system of responsible government, commenting:

It is clear from the reasoning of all justices in the High Court in *Egan v Willis*, various as their approaches were, that questions of parliamentary power depend not only on statutory wording but also their broad, beneficial and purposive reading of provisions for such a central institution. And at the heart of that functional approach, in my opinion, lies a paramount regard for responsible government in the sense of an Executive being answerable to the people's elected representatives. It is not possible, in my view, to read any of the historical and especially English accounts and explanations of prorogation without noting the radical shift from a King against Parliament to Ministers responsible to democratically elected representatives of the people. What possible justification could there be, in modern terms, for permitting the Executive to evade parliamentary scrutiny by taking care to time controversial or reprehensible actions just before advising the Governor to prorogue the chambers?³¹

In response to the Crown Solicitor's argument regarding the validity of standing order 206, Walker pointed out that the standing order, having been 'laid before the Governor' and 'approved' by the Governor, was therefore 'binding and of force'

under s 15(2) of the *Constitution Act 1902*.³² He noted that it was not in question that the standing orders may regulate some aspects of prorogation, such as the revival of bills in a new session of parliament, and that such matters legitimately fall within the ‘orderly conduct’ of proceedings. He suggested that by extension, there is no reason why the standing orders should not be held to regulate other aspects of prorogation, such as allowing a committee to sit ‘during the life of a parliament’ (including any period of prorogation) and to report in the next session. Walker concluded that the ‘orderly conduct’ of the LC certainly includes providing for continued inquiry into the doings of the Executive notwithstanding prorogation.³³ Despite these differing legal opinions, and the Government’s position that the Committee did not have authority to proceed, the Premier, Treasurer and Leader of the Opposition all appeared voluntarily before the Committee and gave evidence. However, the key witnesses — the resigned directors of the State-owned corporations — refused to appear before the Committee, even after being issued with summonses under the *Parliamentary Evidence Act 1901*(NSW), citing concerns as to whether their evidence would be protected by privilege. The Committee subsequently wrote to the President requesting that she seek a warrant from a judge of the Supreme Court for the apprehension of the eight former directors under s 7 of the *Parliamentary Evidence Act*, with a view to compelling them to appear. However the President refused this request, indicating her view that the refusal of the witnesses to attend was, in the circumstances, with ‘just cause or reasonable excuse’,³⁴ given that the witnesses had no guarantee that they would be protected by privilege should they appear and give evidence.

As the matter did not go to the courts for resolution, the issue of whether the Committee’s proceedings were properly constituted and had the protection of parliamentary privilege remains unresolved.

Preventing the ‘misuse’ of the prorogation power

If state parliaments wish to prevent prorogation being ‘misused’ for political purposes to shut down or prevent committee inquiries, there are several options that can be considered. One is to pass enabling legislation in individual instances (as per the past practice of the NSW Parliament) authorising committees to function during prorogation. In the case of the NSW Legislative Council, while the Clerk did not consider such legislation necessary for standing committees (which are appointed for the life of the Parliament), it would at least eliminate any doubt over the matter. Another option is to pass more permanent legislation making it clear that committees have the power to sit during prorogation. This occurred, for example, in the SA Parliament in relation to standing committees. Section 25(1) of the *Parliamentary Committees Act 1991* (SA) provides that standing committees ‘may sit and transact business during any recess or adjournment of Parliament and during an interval between Parliaments’. Following the Gentrader inquiry the Greens did in fact move such a motion in the Legislative Council, however the motion was negatived.³⁵ Alternatively the Parliament could pass a resolution authorising

committees to function during prorogation. This option was taken by the NSW Legislative Assembly in the new Parliament following the Gentrader inquiry. On 22 June 2011, in the resolution appointing committees, the Assembly expressly authorised standing committees (and any of their sub-committees) to meet and transact business ‘despite any prorogation of the Houses of Parliament.’³⁶ A fourth option would be to introduce legislation limiting the period in which the Government can advise the Governor to prorogue the Parliament. As discussed, as a result of the Gentrader inquiry, the Governor (on advice of the Executive Council) prorogued the Parliament three months before the state election. In the past, most prorogations of the NSW Parliament have been timed so as to provide only a brief interval between sessions.

This option has also been taken in the NSW Parliament. On 10 May 2011, the newly elected Coalition Government amended the Constitution Act 1902 to prevent the Government from advising the Governor to prorogue the Parliament at any time after the fourth Saturday in September and before 26 January in the lead up to a general election (held the fourth Saturday in March every four years).

Perhaps the best option of all would be not to prorogue at all. This option was supported in Odgers (6th edn) which states:

In the evolution of parliamentary government, one ponders, too, the need for retaining the device of prorogation. In its early use, prorogation was a device employed by English monarchs to rid themselves of troublesome Parliaments and unwelcome legislation. A lost head or two changed all that and the parliamentary time-table is now, in practice, very much in the control of the elected representatives. Certainly the Australian Federal Parliament has not suffered by at times continuing a session of Parliament for the three years’ life of the House of Representatives, without prorogation ... So perhaps prorogation could be discontinued and the Houses of Parliament left unhampered to get on with their work between periodical elections.³⁷

Odgers goes on to say:

But, if the practice of prorogation is still useful and is to continue, let its interference with the work of Parliament be minimal and not more than the Houses of Parliament may determine.³⁸

However, this option is a topic for another paper.

A continuing debate

The Gentrader inquiry has merely added fuel to the ongoing debate about the effect of prorogation on committees. The matter remains unresolved in New South Wales, having not gone to the courts for resolution. However, at least steps have been taken by the NSW Parliament to limit the problem from arising again. Apart from some minor deviations following the Crown Solicitor’s 1994 advice, the NSW Legislative Council’s practice has followed the path already laid by a number of other Upper Houses. That is not to say though that Lower Houses have not been justified in

following a different path. The different positions may just reflect the different roles of Upper and Lower Houses — i.e. Lower Houses form Government, while Upper Houses provide checks and balances as a House of Review.

As noted there have been some exceptions to Lower House practices in Australia, firstly the SA House of Assembly and now the NSW Legislative Assembly. While the SA House of Assembly's position might be explained by its almost annual prorogations, the NSW Legislative Assembly's recent amendment provides a new twist to the debate. The Assembly's actions may however be a political response to the Gentrader controversy, rather than a general shift in the practice of Lower Houses.

Nevertheless it will be interesting to see if prorogation continues to be 'misused' as a tool to prevent Upper Houses from holding governments to account, and whether Australian parliaments will take steps to remove all possibility of this occurring. ▲

Endnotes

- ¹ The Clerk of the Legislative Council at that time was Ms Lynn Lovelock.
- ² Jan Davis, Clerk of the SA Legislative Council, 'Matters concerning the effect of prorogation: An argument of convenience', 41st conference of Presiding Officers and Clerks, Darwin, 2010.
- ³ Evans H (ed.), *Odgers' Australian Senate Practice*, 12th edn, Department of the Senate, Canberra, 2008, p 504.
- ⁴ Davis, *op. cit.*, p 6.
- ⁵ 5th Conference of Presiding Officers and Clerks, Perth, 1972, Transcript.
- ⁶ Jack M (ed.), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th edn, LexisNexis, UK, 2011, p 145.
- ⁷ Harris I (ed.), *House of Representatives Practice*, 5th edn, Department of the House of Representatives, Canberra, 2005, p 632.
- ⁸ For example, the House of Representatives gave several committees the power to sit during recess between 1956–1959.
- ⁹ *Odgers'*, 12th edn, pp 380–81. n.b. Senate committees also have the power to meet notwithstanding the dissolution of the House of Representatives, however this paper will only consider the power of committees to meet during prorogation, prior to dissolution.
- ¹⁰ The same argument could be applied to the NSW Legislative Council where only half its members face the voters at each general election.
- ¹¹ QLD Legislative Assembly, *The Queensland Parliamentary Procedures Handbook*, 2000, at 4.3.
- ¹² Davis, *op. cit.*, p 1.
- ¹³ Davis, *op. cit.*, p 4.
- ¹⁴ Davis, *op. cit.*, pp 7–8, referring to 5th Conference of Presiding Officers and Clerks, Perth, 1972, Transcript.
- ¹⁵ NSW Legislative Assembly, *Practice, Procedure and Privilege*, 2007, p 22.

- ¹⁶ Evans H (ed.), *Odgers' Australian Senate Practice*, 8th edn, Department of the Senate, Canberra, 1997, p 483.
- ¹⁷ Davis, *op. cit.*, p 11.
- ¹⁸ Debate during the Gentrader inquiry only concerned the Council's standing committees. Select, sessional and statutory committees were not discussed.
- ¹⁹ *LC Debates* (17/3/1982) 2681.
- ²⁰ n.b the 1993 prorogation was unconnected with a pending election.
- ²¹ Crown Solicitor's Advice, 'Status of Standing Committees after prorogation of the Parliament', 13 December 1994, p 2.
- ²² Section 15 authorises the NSW Parliament to prepare and adopt Standing Rules and Orders regulating the orderly conduct of its Houses.
- 23 Crown Solicitor's Advice, 13 December 1994, p 4.
- 24 See endnote 1.
- ²⁵ Lovelock L & Evans H, *New South Wales Legislative Council Practice*, Sydney, The Federation Press, 2008.
- ²⁶ *Ibid.*
- ²⁷ See the decisions of the NSW Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650, the High Court in *Egan v Willis* (1998) 195 CLR 424 and the NSW Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563.
- ²⁸ In New South Wales a 'parliament' commences on the date of the first meeting of the parliament following a periodic election for the Council and a general election for the Assembly, and ends on the dissolution or expiry of the Assembly.
- ²⁹ (1998) 195 CLR 424 at 451 per Gaudron, Gummow and Hayne JJ.
- ³⁰ Clerk of the NSW Legislative Council, 'Advice to the President of the Legislative Council on the power of standing committees to sit during the prorogation of the House', 11 January 2011, p 2.
- ³¹ Walker B, 'Legislative Council's General Purpose Standing Committee No. 1 — Effect of Prorogation', (authorised to be published by resolution of the Committee on 24 January 2011), 21 January 2011, p 7.
- ³² *Ibid*, p 3.
- ³³ *Ibid*, pp 6–7.
- ³⁴ Under s 7 of the *Parliamentary Evidence Act 1901*, if any summoned witness fails to attend and give evidence in obedience to such notice or order, the President or the Speaker (as the case may be), upon being satisfied of the failure of such witness so to attend and that the witness's non-attendance is without just cause or reasonable excuse, may certify such facts under the President's or the Speaker's hand and seal to a Judge of the Supreme Court.
- ³⁵ LC Minutes, 10 May 2011.
- ³⁶ NSW Legislative Assembly, 22 June 2011, Votes and Proceedings No 23. Item 12.
- ³⁷ *Odgers' Australian Senate Practice*, 6th edn, Royal Australian Institute of Public Administration, ACT Division, 1991, p 974.
- ³⁸ *Ibid.*

**AUSTRALASIAN STUDY OF PARLIAMENT GROUP
CONFERENCE 2011 —
THE EXECUTIVE VERSUS THE PARLIAMENT:
WHO WINS?**

Redressing the imbalance: recent developments

David Gibson is the Member for Gympie in the Parliament of Queensland

Breaking down the barriers: when parliaments display leadership and the executive follows

David Gibson

The problems of deafness are deeper and more complex, if not more important, than those of blindness. Deafness is a much worse misfortune. For it means the loss of the most vital stimulus--the sound of the voice that brings language, sets thoughts astir and keeps us in the intellectual company of man.

Helen Keller (Blind & Deaf American Author and Educator 1880–1968)

As long as we have deaf people on earth, we will have signs... It is my hope that we will all love and guard our beautiful sign language as the noblest gift God has given to deaf people.

George Veditz, 1913 (Former President of USA National Assoc of the Deaf)

Introduction

During the 2011 summer floods and cyclones in Queensland, the public saw someone new in their television picture. Along with the familiar political faces and those of senior emergency services staff, there appeared a face without a name but everyone knew what they were doing and why they were there; even if they did not understand what they were saying. This was the first time interpreters for the deaf were being used translating every spoken word of the hourly media conferences into Australian Sign Language (Auslan) for the deaf and hard of hearing members of the community. This paper will look into the background of the involvement of the deaf community in the Queensland parliament since 2006 and how those first steps by the parliament lead to a greater use of Auslan interpreters during the floods in 2011.

Background

It is estimated that approximately one in six people in Australia have some form of hearing loss and that about 15,500 people are deaf. Whilst it is widely known that hearing loss primarily affects language and communication, what is not as widely recognised is that sign languages such as Auslan have their own unique vocabulary and grammar and are not a complete representation of written or spoken English.

Therefore those members of the deaf community who rely upon sign language often lack a common language to the rest of the broader community. The deaf community have been lobbying to access government services in their own language in much the same way that services are now provided to non English speaking people. They seek access to government programs and services in their own language rather than simply text-based solutions in recognition of the unique elements of Auslan. Across Australia all levels of government and parliaments have statements and documents that outline their access policies for the disabled including the deaf. Whilst these documents are a good starting point and along with the various international conventions and legislation which make a commitment to inclusiveness for those with a disability it is not until we see the real life implementation of those policies that we can determine the effectiveness of them.

It was after my election in 2006 that my thoughts turned to the writing of my maiden speech and it was at this point I realised that as the child of deaf parents I wanted to give some if not all of my speech in Auslan to honour my parents. A request was made to the new Speaker of the Queensland parliament and what began a simple idea resulted in the education of the parliament in what providing real access to the deaf community entailed. After some discussion the parliament was able to accommodate the request and, on 11 October 2006, the first speech was given in an Australian parliament in Auslan. I was able to give the first part of my speech in Auslan myself and the remainder was translated by a professional interpreter. The use of Auslan interpreters in the Queensland parliament was seen as a major step forward in greater access and inclusiveness for the deaf community. As previously mentioned the deaf community had been lobbying for years for greater provision to Auslan from all levels of Government with haphazard success. This was in part due to the difficulty in gaining access to the appropriate decision makers and from competing priorities within the various bureaucracies. The experience of the Queensland parliament in 2006 highlighted a new opportunity for the deaf community to pursue.

Deaf engagement

Whilst it has been said that deaf people often feel politically and socially isolated from the broader hearing community. A common mistake of governments is that they tend to think about the deaf community from the perspective of issues that relate solely to deafness rather than issues that affect everyone. A good example of this was the introduction of compulsory fire alarm legislation in Queensland in 2007. It became very evident early on that no consideration had been given to the impact upon the deaf community and how the stated policy objective would be achieved when a person could not hear a standard fire alarm. Deaf people are of course interested in their own unique issues such as SMS emergency relay services, better captioning and interpreting services, but they also have an interest and concerns in more 'mainstream' issues like health services, taxation, education and law & order to name a few. This narrow perspective that if the issue is not directly deaf related then the deaf community is not interested, restricts the view of policy

makers to deal effectively with members of the deaf community. These negative impressions leave many deaf people with the feeling they are powerless to change their circumstances. Often this is in part as a result of their lack of understanding or access to the political and policy making processes, and leaves them feeling helpless to change conditions or to develop services that are needed in their communities. It is from this position that the simple act by the Queensland parliament in allowing a speech to be given in Auslan was viewed as a significant achievement.

National Week of Deaf People

Each year in Australia the third week in October is designated the National Week of Deaf People (NWDP). The aim of the NWDP is to give an opportunity for the deaf to celebrate their community, language, culture and history, recognise their achievements as well as making the public aware of their local, state and national communities.¹ It is important, however, to keep in mind that, like any other minority community, the deaf community includes significant diversity even though its members share many characteristics, preferences, and perspectives. Deaf people are also members of other groups such as unions, the aged, property owners, sporting groups, the GLBTG as well as many others. It is however through the NWDP that the deaf community has had an opportunity for their diverse group to work together to raise awareness of deaf issues and achievements.

Following the willingness of the Queensland parliament to provide for a speech to be translated into Auslan, a request was made in 2007 by Deaf Services Queensland to the Speaker for the parliament to look at ways to support the NWDP. To ensure this request had bipartisan support Deaf Services Queensland approached Carolyn Male MP (ALP) and myself (LNP) to co-sign the request letter. This request resulted in the Community Engagement section working with Deaf Services Queensland to determine the best way for the parliament to engage with the deaf community during the NWDP. The final result was the provision of Auslan interpreters within the public gallery for one session of Question Time during NWDP. Over the following years this support has continued and seen other events being included such as a debate between MP's and members of the deaf community as well as morning teas to meet MP's. This support provided by the Queensland parliament is highly regarded amongst the deaf community.

Flexibility of the parliament

The ease of access to the parliament offered an entirely different dynamic to the deaf community. With low levels of bureaucracy between the decision makers and the community, it meant that proposals could be put forward easily and potential obstacles could be identified and ultimately overcome. What was found was that the structure of the parliament provided greater flexibility. This may be in part as a

¹ Deaf Australia Inc, State Branches Information Kit Section 5.9-1 — National Week of Deaf People

result of the goal of parliaments to have all members of the community engaged in the democratic institution enabling full citizenship and full participation in democratic society. The ease at which the parliament is able to work directly with the community to remove any barriers which obstruct these goals highlights its flexibility over the executive. Another advantage the parliament has over the executive is that it is able to engage with the deaf community without having a predetermined position, thus resulting in true engagement. Often the difficulty minority groups' face is that when they engage with policy makers they find there is already a defined position and if that position is not in line with their needs a great deal of resources can be spent trying to change the position.

In working with the parliament the deaf community was able to focus on the strengths and characteristics of their communities rather than in accordance with the policy position of the government and in doing so they were able to highlight their needs. It also provided an opportunity for direct access to ministers and MP's and to familiarise them with the broader needs of the community and the challenges faced with the existing available resources. This willingness to work directly with the deaf community also led to the executive gaining a greater understanding of the issues faced. Instead of just one or two ministers being aware of issues as they pertained to relevant portfolios the parliament was able to give exposure to all its members. Thus, when the Minister for Emergency Services was facing the flood disasters, he already had as a result of the actions of the parliament exposure to the deaf community and a better understanding of their unique needs with Auslan. The ability to raise awareness of their needs through the parliament has proven to be an effective strategy for the deaf community. Especially when compared in contrast to policy agendas that often seem focused on providing major funding for 'techno fixes' for deafness rather than direct assistance.

The events of 2011

Much has been written about Queensland's floods and cyclone in January 2011. During the unfolding crisis, the government commenced regular media briefings from the Emergency Services Complex at Kedron in Brisbane's northern suburbs that were often broadcasted live as information became available. This meant that the use of close captioning was not available or provided and the deaf community was left without a timely source of vital information in their own language. However, shortly after the media briefings commenced and the shortcomings were identified, approaches were made to the government to inform them of the problem and offer Auslan interpreting services. The fact that the need for these services was not previously identified by the government as being required, highlights that there is still much work to be done. However, the confidence shown by the deaf community in being able to approach the Government during a crisis and the understanding by the Premier and Minister for Emergency Services in the importance of the request highlights that progress has been made in accepting the needs of the deaf community.

Conclusion

The awareness of the importance for the use of Auslan in communicating with the Deaf community had its genesis in the actions of the Queensland parliament directly engaging with the deaf community. The willingness of the parliament to embark on an initiative for greater inclusivity displayed leadership and flexibility and, from that leadership, the executive gained a greater understanding of the issues faced by the deaf community. The parliament had also set the new benchmark in this important area of access that ultimately influenced the executive.

With a significant percentage of the broader community experiencing deafness or hearing loss the importance of developing awareness of the needs of these members and the impacts of policy and legislation upon them is necessary. The ongoing program of engagement by the parliament has had multiple benefits, from a greater awareness on the internal workings of democracy to a greater sense of empowerment and engagement by the Deaf community. In short, the needs of the Deaf community were 'heard' by the parliament when for so many years they fell on the 'deaf' ears of the executive. ▲

Graham Hassal is Associate Professor in the School of Government, Victoria University of Wellington

Pacific Island parliaments: developmental aspirations and political realities¹

Graham Hassal

A concept paper on ‘legislatures and good governance’ prepared for UNDP by Johnson and Nakamura articulated four fundamental goals of legislative development (build internal support for legislative strengthening, strengthen representation, strengthen lawmaking, and strengthen legislative organization and facilities), and distinguished between the roles of two types of external agencies (funding, and legislative/parliamentary associations). A subsequent practice note by UNDP on Parliamentary Development set out that organization’s concept of ‘what parliamentary institutions do’ and identified eight ‘principal entry points’ for its ‘role and niche’ in parliamentary development (United Nations Development Programme 2003). This article draws such development agency literature to identify the current issues facing Pacific Island parliaments and the efforts underway (or not) to address them. It includes a review the Pacific Islands context, consideration of recent parliamentary dynamics, and a review of parliamentary development activities.

The context of Pacific Island parliaments

The first important characteristic of the context of Pacific Island parliaments is their unique geographic location: they are established by societies which are small and strongly influenced by their archipelagic setting. Whereas this geographic feature may seem obvious, its impact on social, political and economic development — and therefore on constitutional and legal structure and operation, is equally inexorable. Development agencies therefore recognise the special needs of ‘small island developing states’ (SIDS). Most significantly, these include a lack of human and financial resources, and such constraints inhibit the operation of parliaments in the

¹ The author thanks the following persons for providing information: Robert Tapi (Bougainville), Ian Rakafia, Taesi Sanga (Solomon Islands), Frederick Cain (Nauru), Lily Faavae (Tuvalu), Fetuao Toia Alama & Valasi Iosefa (Samoa), Joe Suveinakama (Tokelau), and Lino Bulekuli dit Sacsac (Vanuatu). Research for this paper was provided by Avinash Kumar, Amrita Nand, Anupam Sharma, Smita Singh, Raijieli Bulatale and Ilana Burness.

same way as they inhibit other areas of state functioning. As noted by Johnson and Nakamura:

Assuming the existence of the desire for and adequate political space for a greater legislative role, the need to create greater capacity to fulfil functions poses the current challenge to legislative development efforts. The power and even obligation to introduce legislation is not worth much without the support required to do it. The power to shape the budget is not very useful without the knowledge to do so. And legislatures need some means of overseeing or checking executive power beyond the ultimate power of removal. (Johnson and Nakamura 1999)

At a fundamental level, a lack of material resource affects the material form of the parliamentary complex. Not all legislatures in the region operate from purpose-built facilities. The Cook Islands legislature, for instance, was first erected as a hostel for contractors building the international airport. It is adjacent to the Pacific Ocean and vulnerable to cyclones and high tides, and was once disrupted by five cyclones in a single year. In 2004 a site was selected further inland for relocation but met resistance from a public wary of large capital expenditure on the project. Tuvalu's parliament meets in a basic *maneaba* (open air meeting house) and has no permanent facilities. Ironically, Fiji's parliamentary complex, completed in 1992, is one of the most developed in the region. It is modelled on a traditional Fijian village, with the *e Vale-ni-Bose Lawa* (Main Chamber) replicating a *Bure* (House) raised on a *yavu* (earth mound) to place it higher than surrounding buildings.² However, like most other Pacific parliaments, there is little or no office space for individual members. In the case of Solomon Islands, a significant parliamentary complex was completed with donor assistance, but a second building, intended to house MP offices and other staff, has only recently commenced construction. Papua New Guinea's parliamentary complex, modelled on a Sepik *haus tambaran*, provides a substantial chamber and office space and facilities for MPs and parliamentary staff, but suffers from lack of maintenance to such essential services as air conditioning and internet. In the north Pacific, one notable legislative complex is in Palau, where a new capital city was built at Ngerulmud on the island of Babeldaob, in an architectural style that replicates the US congress.

Other implications of 'smallness' for Pacific Island parliaments, apart from physical facilities, concern the extent and quality of support services, including legislative drafting, library and research, committee secretariats, *Hansard*, management of human and financial resources, and establishment and maintenance of ICTs such as a parliamentary website and internet services for MPs and support staff. All such services depend on provision of budget, preferably established through an independent process. The operations of the Samoan parliament are provided through an appropriation that is a statutory provision, although there are differential levels of support for activities which are not specified in the statute. Refreshments and travel costs are incorporated into the Office of the Clerk's budget, but there are minimal funds for civil education programs or up-skilling of MPs. Most Pacific

² <http://www.parliament.gov.fj/parliament/about/about.aspx?curid=cphouse> visited 22 September 2011.

parliaments, however, lack separate appropriations, and struggle to meet basic costs let alone extraordinary expenditures caused by unanticipated sessions and committee activities.

The second important contextual characteristic of Pacific Island parliaments is the continuing influence of the colonial period on post-independence social and political life. The choice of parliamentary or presidential form of government was made principally on the basis of familiarity with the system under which colonial rule was experienced. Most colonies had legislative assemblies with limited local representation and authority.³ Fiji and Solomon Islands emerging from British rule in 1970 and 1978 respectively, Papua New Guinea from Australian administration in 1975, and Vanuatu from joint British and French control in 1980. New Caledonia remains a French overseas territory, although recent agreements have moved the territory closer to autonomy, if not outright independence. In the case of former British, Australian and New Zealand colonies, Lamour has suggested that the Westminster system was adopted at the time of independence with just a modicum of consideration of alternatives:

Westminster spreads by a process of replication, almost independently of the underlying conditions in which it finds itself. The deliberation and rejection of alternatives in the Solomon Islands shows how this is not an automatic ineluctable process, but can be a result of deliberate choices by Members of Parliaments. Westminster succeeds not because of its internal virtues (which are somewhat arbitrary), or its appropriateness to local conditions (which may not matter). It succeeds because it was there first. (Lamour, 2002: 39–54)

Kiribati, Fiji and Nauru are amongst the few Pacific states that have switched between systems — Kiribati commencing as part of the British colony of GEIC but adopting a presidential system and Fiji shifting from a British colony to a hybrid Republic. Nauru opted for a republican model based on a complex electoral procedure. The autonomous province of Bougainville has incorporated a directly elected president to its 41-member legislature, which includes three women representatives and representatives of former combatants. A number of Pacific Island states also integrate traditional authority into their constitutional system and parliament.

Because parliamentary systems were ‘transferred’ quite rapidly rather than developed locally and over a longer period of time, some of their characteristics are defined by law rather than convention so as to ensure the existence of practices which might otherwise take a much longer time period to settle on. The minimum number of days per annum for which parliament must meet, for example, has been established in by the Supreme Court of Papua New Guinea (63 days) to ensure at least basic compliance. The roles of ‘the government’, ‘the opposition’, and political parties have in some places been legislated rather than explored through practice. Provisions about the offices of speaker and attorney-general, as well as the major parliamentary committees, are also detailed in some constitutions. On

³ On the Legislative Assembly in Papua New Guinea, see Connor, 2009.

Bougainville, for example, MPs elect their speaker from candidates outside the House, while in Solomon Islands the speaker must similarly be a non-politician. Committees — especially the Public Accounts Committee — are intended to play a significant role in the effective functioning of virtually all Pacific Island parliaments, and considerable attention has been paid to this by development agencies, as indicated below.

Table 1: Pacific Populations and constitutional adoption dates

Country	Mid-Year 2015 Total	Date of adoption	Comment
Fiji Islands	868,198	1970 1990 1997	Adopted after domestic and external pressure to review 1990 constitution
New Caledonia	273,074	1998	Noumea Accord. On UN list of non-self governing territories since 1986
Papua New Guinea	7,476,504	1975	Adopted at independence from Australia
Solomon Islands	624,667	1978	Adopted at independence from UK
Vanuatu	277,572	1980	Adopted at independence from UK and France
Federated States of Micronesia	113,864	1986	Compact of Free Association with USA
Guam	212,011	1950	Unincorporated territory of USA
Kiribati	110,280	1979	Adopted at independence from UK
Marshall Islands	57,127	1986	Compact of Free Association with USA
Nauru	11,006	1968	Adopted at independence from Australia
Northern Mariana Islands	66,591	1978	Part of US Commonwealth
Palau	21,168	1994	Compact of Free Association with USA
American Samoa	70,039		Unincorporated territory of the USA
Cook Islands	15,747	1964	Adopted on entry into 'free association' with NZ
French Polynesia	283,577	2004	Constituent country of the French Republic
Niue	1,328	1974	Adopted on entry into 'free association' with NZ
Samoa	185,440	1962	Adopted at independence from NZ
Tokelau	1,153		A non-self governing territory of NZ
Tonga	104,851	1875	Adopted to stave off colonial rule
Tuvalu	11,445	1978	Adopted after separation from Kiribati and at independence from UK
Wallis and Futuna	13,110	2003	French overseas collectivity
Total	10,798,752		

Source: <http://www.spc.int/prism/population-mid-year-2010-projections>

In keeping with the small populations of Pacific states, the Island parliaments have small numbers of seats and small electorates. In Tuvalu's 15-member *Fale i Fono* 8 members form a government with seven in opposition. The Nauruan parliament has 18 members who serve a three-year term. In Tokelau the 21-member *General Fono* is composed of nominated representatives of the Island's three main villages.⁴ The Cook Islands parliament has 25 members⁵ serving a population of 15,324 on 15 islands, for a 4 year term. In Samoa, 49 MPs serve a 5 year term in 35 single-member and 6 two-member seats. Two seats are elected to represent voters of mixed descent. All candidates must be *matai* (chiefly title holders), and need endorsement of their village major testifying to ongoing contribution to the village, and to five years continued residence in Samoa. In Vanuatu there are 52 MPs, who must be a minimum age 25, and who serve a four year term. Until recent amendments, Tonga's parliament included separately elected representatives of commoners and nobles. The largest parliament in the region, in Papua New Guinea, has 109 seats. The small size of constituencies implies that members generally have close familiarity with their electorates. Whilst this can be a good thing, it can also lead to difficulties for the member, who is subject to intense expectations about patronage.

Few women have been elected to Pacific parliaments. In 2006 the Pacific Islands Forum Secretariat commissioned a study on the status of women in Pacific Parliaments (Pacific Islands Forum Secretariat 2006). UNIFEM, UNDP, and other international agencies have put significant effort into promotion of 'temporary special measures', but these have not succeeded to date (the Samoan government recently announced its intention to introduce TSM legislation). Not all opposition to TSM is offered by males: in Nauru, where two-thirds of the members of a recent constitutional convention were women, a proposal to reserve seats for female members failed after female representatives stated their preference that women compete on an equal footing with men (a similar argument was put by male MPs during debate on a TSM bill in the Papua New Guinea parliament).

A third significant feature of the Pacific Islands context is the extent of political conflict, which has affected the role and functioning of several parliaments. Papua New Guinea experienced civil war over the status of Bougainville Province; Fiji has been jolted by four coups since 1987; New Caledonia experienced extensive violence in the 1980s as different social and ethnic communities struggled over the issue of independence; violence erupted in Vanuatu at the time of independence and recurs periodically when groups vent their frustration at some aspect of government policy; Solomon Islands and Tonga are also reconstructing systems of governance following periods of violence. In the case of Solomon Islands, five years of inter-island conflict (1998–2003) prompted creation of RAMSI (Regional Assistance Mission to the Solomon Islands), whilst in Tonga, a steady rise in tension around

⁴ Atafu — 8 members, Fakaofo — 7 members, and Nukunonu — 6 members.

⁵ 10 members from Rarotonga, 10 from the southern group and 4 from northern.

expectations for democratic reform resulted in the destruction of much of Nuku'alofa in 2006. In the case of Bougainville, a parliament has been established under a constitution that creates an 'autonomous province' that was part of the peace process, but divisions remain on the island and those in authority are in a race against time to deliver sufficient levels of social and economic development to prevent any return to conflict.

A final comment on the context of Pacific Island parliaments concerns the existence and role of political parties. Few such parties existed in the Pacific in the years immediately prior to independence, but there was a clear expectation that they would emerge and flourish in response to the opportunity and need created by the contest for power within the Westminster system. At independence, parties were formed to contest seats in the larger legislatures (eg, Papua New Guinea, Solomon Islands, Vanuatu, Samoa), but the elected members of smaller chambers, including those of Tonga, Tuvalu, Kiribati and Nauru, coalesced around 'factions' rather than formalised parties.

Whereas parties have thus been duly established in all but the smallest of the Pacific states, they have not necessarily replicated the 'two major party' political and parliamentary cultures on which the Westminster system has traditionally relied. Henderson has pointed to the dilemma that political parties present in Melanesia: they are seen as essential to the operation of Westminster democracies, but they 'have proved to be a particularly divisive factor in the Pacific Context' (Henderson 2003). Fiji's Ratu Sir Kamisese Mara, for one, promoted the notion of a 'government of national unity' both prior to and after independence:

... I first floated this alternative to the Westminster system in December 1969, during the preparatory talks for the 1970 Constitutional Conference, and I had found that the membership system worked along those lines, though it did not fully recognize it at that the time... I proposed it to a meeting of the Alliance Council at Sabeto in 1980, only to find that it was strongly opposed by some of my colleagues. I was disappointed, for they were people who were happy to use my name, and indeed my presence at their meetings, but they were unwilling to support this initiative. Were some of them fearful they would lose their ministerial positions? Perhaps that was the reason, for a unity government would certainly have had that effect. (Mara, 1997)

In a similar manner, the aspiration of Fiji's 1997 constitution that government be formed through inclusion of parties in proportion to their parliamentary numbers failed in implementation: in 2003 the ethno-nationalist Qarase government rejected the model even in the face of a court direction; when such an effort was finally initiated following the 2006 general election the labour party, which stood to gain from the opportunity, imploded rather than grasp it.

There has also been an undercurrent of concern about the need for parties in the Pacific context. There is, after all, no cleavage in Pacific political economy (in the Melanesian states at least) similar to the class divisions between the ruling and

working classes of Europe, which gave rise to the conservative and labour ideologies of the modern period. Thus, on Bougainville, concern about the role of parties was expressed during 2004 debates of the Constituent Assembly:

1. People do not want political parties because:
 - They will cause division in Bougainville
 - that division will come from different people and groups in Bougainville supporting different parties
 - we need to maintain the unity developed during the peace process
 - the activities of political parties in PNG work against the interests of the people — we do not want that in Bougainville
 - political parties do not operate on the basis of principle or policy. All they are seeking is power. They are not looking after the people.
2. Political parties can come later:
 - after the systems of government are tried and tested
 - after the referendum
3. What's wrong with Melanesian consensus? Political Parties are not consistent with consensus politics because they highlight division not unity. They are by their nature looking for an opportunity to criticise their opponents not at how they can work together to find consensus. (Bougainville Constitutional Commission 2004, p. 226)

In Vanuatu, a 2001 review of decentralisation offered as part of its political analysis: 'The political groupings present a huge challenge for governance and more so for decentralization and service delivery in Vanuatu. During consultations, DRC [Decentralization Review Commission] heard many examples of politics ruining the effective operation of the Central, Municipal and Provincial Governments. DRC views seriously the fact that political interference in the work of Councils and in staffing decisions at all levels, and makes recommendations to prevent this throughout its Report ...' (Government of Vanuatu. Decentralization Review Commission 2001). In the Solomon Islands context Kabutaulaka has suggested that the 2006 riot originated in the operation of Westminster in that country (Kabutaulaka).

In just a few instances were parties formed on the basis of clear philosophical or policy platforms. In Vanuatu, Solomon Islands, Papua New Guinea and New Caledonia, parties were focused on achieving independence, and in the cases of Vanuatu and Papua New Guinea (perhaps more than elsewhere) there was an interest in 'Melanesian socialism'.⁶ John Momis, currently President of the

⁶ In Vanuatu approximately fifteen parties are currently registered, of which only the Vanu'aku party established by Walter Lini before independence has clear a membership, complete with regional sub-committees, a Commissars' council, and a central administrative council. Such other parties as the National United Party, the Union of Moderate Parties, the Vanuatu Republican Party, the Grin Pati, the People's Progressive Party, the Melanesian Progressive Party, the National Community Association, the People's Action Party, or the Namangki Aute — maintain no membership lists.

Autonomous Province of Bougainville, is among the few politicians in Papua New Guinea who has consistently adhered to a political philosophy of 'integral human development'.⁷ Tonga's emergent parties are focused on the characteristics of 'Tongan Democracy'.⁸ There were also parties premised on sub-regional or ethnic concerns, and in Fiji the National Alliance Party succeeded for several decades on a doctrine of cooperative multi-racialism; but no party has grounded itself on broader Pacific regionalism. Given the Pacific's reliance on agriculture, the land, and the sea, one might expect green parties to figure more prominently.⁹ This absence of underlying political philosophy has had a significant effect on subsequent political dynamics within Pacific Island legislatures, since MPs are not tied to each other by values and party ideologies so much as by strategic interests. When speaking on the bill for an Organic Law on Integrity of Political Parties in the PNG parliament, then Prime Minister Sir Mekere Morauta described party formation to that time as 'a secret business, illegal, unmanaged and totally unacceptable'.¹⁰ This raises the question as to whom political parties in Pacific jurisdictions represent? In 1999 the PNG parliament passed the *Integrity of Political Parties Act* in an effort to establish political stability, and in 2003 it changed from a FPP electoral system to limited preferential voting in an effort to boost the legitimacy of representation. In 2010 the Courts found the constraints set out in the Organic Law to be unconstitutional, and this resulted in an immediate shake-up of political affiliations, which an opposition spokesman explained in these terms:

We have decided on this bloc because for too long we have been marginalised, overlooked for ministerial positions in government and funding for the electorates. We have to change this situation and the time has come...¹¹

The Westminster model, which systemically requires the formation of a 'government' and an 'opposition', presumes in the Pacific Islands context the existence of political thought and association of a type that rarely exists, and depends on a model of political debate that rarely reflects Pacific traditions of discourse. The evidence concerning the legal basis of political parties suggests that party memberships are small and imprecise, and that as a result, parties struggle for the most part to satisfy the requirements of representativeness, inclusiveness,

⁷ And perhaps in an earlier period Utula Samana (1988).

⁸ The Human rights and democracy movement, established in 1970, has recently become the country's first 'party'.

⁹ The Australian Labor Party has sought to cultivate pan-Pacific party links.

¹⁰ Quoted in Rich, 2002. In 2008–09 the matter of 'party-hopping' came to the fore in Samoa, when the government vigorously sought to suppress the flight of MPs from the ruling party in the context of opposition to its decision to shift traffic from 'left hand' to 'right hand' drive.

¹¹ Chimbu Governor, Father John Garia, MP
<http://www.pina.com.fj/?p=pacnews&m=read&o=10766175684c3bf73f289324d5d186>

or authenticity as entities established in pursuit of the public interest.¹² We can only conclude that party structures remain ‘fluid’ to maintain political ‘room to manoeuvre’ (Duncan and Hassall, 2010).

Parliamentary dynamics

It is in the context of unique geographic and historic circumstances, as well as a fluid political context, that Pacific Island legislatures seek to fulfil their parliamentary functions: Representation; Legislation; Deliberation; Scrutiny; Budget setting; Making and breaking governments; Redress of grievances (see Donahoe, 2002, and Searing, 1994). Johnson and Nakamura reduce these to three: representing publics, making laws, and exercising oversight, and suggest that ‘Enhancing the capacity to perform these functions in less developed legislatures has often been the focus of development assistance’ (Johnson and Nakamura, 1999, p. 3).

Sitting days

Pacific parliaments generally meet for at least three sessions per year, including two regular sessions and one extraordinary. In some instances, such as Cook Islands in 2004, sitting days were as low as ten per year.¹³ The Fiji Parliament averaged 51 sitting days per year between 1998 and 2006, notwithstanding the impact of the coup of May 2000 (which did have significant impact on passage of legislation for that year). Over the last 10 years parliament has sat on average about 18 days per year (Cain, 2011). The Papua New Guinea parliament averaged 43 sitting days per year between 2003 and 2009.

¹² In the case of Solomon Islands, for instance, 12 of 17 currently active ‘parties’ have legal personality under the *Charitable Trust Act* of 1964. The five without such registration include the Solomon Islands Party for Rural Advancement, which claims a membership of between 7000–8000 but which like the National Party, the People’s Alliance Party, the Solomon Islands Liberal Party, and the Solomon Islands Democratic Party, maintains no official records of party membership or meetings. Of twenty currently or previously active parties in the country, eight had memberships under 100, ten between one and five-hundred, and only two claimed to have memberships in excess of 1000; and few if any of these parties kept records of party meetings and decisions, or membership subscriptions. The Solomon Islands Social Credit party led by Manasseh Sogovare is alone in claiming to maintain official record of some 10,000 members. The National Party, which estimates its support base to be 400–500, holds an annual convention in addition to a monthly executive meeting, raises funds through fundraising activities and sponsorship from business interests including logging countries, but is under no legal obligation to report the size or origins of donations.¹² Parties are generally only activated during electoral periods, and at other times remain dormant.

¹³ Data on sitting days, bills introduced, and legislation passed, has been supplied by the Office of the Clerk in the Parliaments cited.

There may be several reasons for the minimal number of sitting days, including the prohibitive cost of transporting and accommodating members. However, the dominant cause is the executive branch's attitude toward and power over the legislature. Whereas parliamentary theory suggests that constituency representation is a major function, this is not as significant a driver in the absence of strong civil society, public interest advocates, and mass media. Oversight of executive action also becomes secondary, leaving the main functions as passage of legislation and money supply.

'Floor-crossing' tactics have had considerable impact on the formation and exercise of legislative and executive power. The most direct impact of party fluidity is executive instability, which is manifest in no-confidence votes, shifts of allegiance, pre-occupation by successive heads of government with maintaining loyalties, and the performance of legislatures (numbers of sitting days, performance of parliamentary committees, progress with passage of legislative programs etc). Responses to these problems have focused on reforms to mandate stability: party registration, discouragement of independent MPs, restraints on party-hopping, automatic triggering of dissolution through no-confidence votes, power of constituencies to exercise recall, and enlargement of cabinet size to accommodate more sectional interests.¹⁴

When opposition members put the first no confidence motion in the Marshall Islands parliament in September 1998 the parliament ceased to function for some six weeks while the government sought to avoid it. Although the courts instructed the parliament to resume, the matter was not finally settled until the Supreme Court upheld a lower court's ruling one year later. In Papua New Guinea 'no-confidence' motions removed four governments since independence, and threatened the existence of many others. This constant spectre of instability prompted passage of a law prohibiting no-confidence votes in the first 18 months and final six months of the five-year parliamentary term (suspending Westminster in order to preserve it?). The parliament averaged 43 sitting days per year between 2003 and 2009: in 2009 it sat 31 days before adjourning from August to November to avoid introduction of a confidence vote, and in 2010 it was suspended on July 21st for the same reason, despite the risk of facing a court challenge for not sitting for 63 days in the year as required by law.

At times Papua New Guinea's opposition has sought the court's assistance in the recall of parliament. Lack of sitting days in 2010 and 2011 threatened the integrity of the appointment of the head of state, and passage of constitutional reforms and legislation required ahead of general elections in 2012 (constitutional recognition of two new provinces — Hela and Jiwaka — required to establish their constituency

¹⁴ In 2007 PNG Prime Minister Somare allocated ministry or vice-ministry positions to at least one member of each of 14 parties in his coalition and wanted to expand the cabinet beyond the existing 28 ministries. An expansion in the size of cabinet has also been made in Tuvalu.

seats before the 2012 general elections).¹⁵ Sitting for insufficient days also prevented leaders from meeting such parliamentary responsibilities as the tabling and consideration of reports, scrutinising bills, considering committee findings, and engaging in general debate. Commissions of Inquiry reports remained unexamined — or else incomplete and not followed up. Public Accounts Committee recommendations went unheeded. Most government reports statutorily tabled remained unread. Constitutional changes required in anticipation of the 2012 general elections will not be made on time.¹⁶

In both the Solomon Island and Vanuatu parliaments ‘no-confidence’ motions are moved on a regular basis. The Solomon Island parliament averages three meetings per year, but lacks a firm parliamentary calendar, such that parliament convenes when the Prime Minister say so. The Vanuatu parliament has experienced numerous motions of no-confidence since attaining independence in 1980.¹⁷ Just two ordinary sessions are required per year but additional sessions can be called, and in some years parliament has only agreed to sit following judicial orders pointing to its Constitutional requirement to do so.

Following years of instability and minimal session times, the Cook Islands parliament promised in 2011 to sit for a minimum of 100 days. In Nauru there have been more than 38 changes of government since 1977. In 2010 there were 2 general elections within 2 months. The government is always in the minority — it has a president plus five cabinet members. The working majority is 9 for passage of legislation. Parliamentary sessions are called at just 24 hours notice, giving MPs little time to prepare (Cain, 2011). In 2011 the situation remained politically volatile and this has affected the public service, as changes of government are followed by changes of heads of department, which in turn result in policy changes. Inhibition about calling parliamentary sessions increases where the executive is politically weak — as is often the case in Pacific jurisdictions where governments consist of unstable coalitions. This proposal can be tested by examining the sessional records of the presumably stronger executives formed under the congressional or republican model, or where the head of the executive is elected by popular vote in elections separate to legislative elections.

A small number of parliamentary sitting days inevitably constrains the ability of a parliament to complete its work-load: whether consideration of new bills, and their second and third readings; consideration of reports tabled as constitutionally

¹⁵ MacPherson, 2009. The Task Force for Government and Administrative Reforms noted in May 2010 that there remain barely sufficient parliamentary sittings to accommodate the requisite three readings of the amendments and thus allow the changes to be incorporated in accordance with the rule of law. In addition, the Task Force points out that the Boundaries Commission is required to make recommendations concerning new boundaries, and this has not happened (Tuck, 2010).

¹⁶ See the assessments of Macpherson, 2009 & 2010.

¹⁷ Instability to 2001 is described in Hassall, 2007.

required or otherwise; as well as legislative reform generally; and questioning ministers of the government of the day with or without notice. The average number of bills passed into law in the Pacific states appears to be approximately 20 per year — which number includes all appropriations and other legislation of a fiscal nature, which facilitates the work of government without otherwise contributing new legislation.

The absence of stable political parties fuelled the movement of MPs between parties and has created within parliaments as political actors vie for executive power. In 2010 Pacific legislators agreed to a statement of basic principles that recognizes the need to stabilise party systems through regulation whilst maintaining the right of MPs their ‘freedom of association’.¹⁸

The role of Speaker

In each parliament the crucial role played by the Speaker is developed in the passage of time. In several Pacific jurisdictions, contest over the Speaker’s actions has had significant impact. In small legislatures — or indeed in any legislature in which the division of seats amongst the parties is almost even — the ‘yielding up’ of a member of one’s party to the position of Speaker can jeopardize the executive’s hold on power. Such was the case in Nauru in recent years, where refusal by both major parliamentary groups to offer a candidate led to months of stalemate. Parliament has approved a bill adding an additional parliamentary seat to ensure that votes on the floor cannot be evenly split (Cain, 2011).

In Vanuatu, successive speakers appear to have struggled with maintaining a non-political approach to their office. In 2011 the issue focused on rivalry between speaker Maxime Carlot Korman and Prime Minister Sato Kilman. Kilman was intent on removing Korman as speaker but parliamentary standing orders state that a written motion — such as is required to remove a speaker — can only be debated on Tuesdays and Thursdays from four to five in the afternoon, and speaker Korman, for obvious reasons, refused to allow a sitting at these times — including in the face of a court order obtained by the government (Korman was in his third term as speaker, having been the parliament’s speaker at independence in 1980 and again 2008–2010; he was also Prime Minister 1991–1995).

¹⁸ 4. POLITICAL PARTIES, PARTY GROUPS AND CROSS PARTY GROUPS

4.1 Political Parties

4.1.1 The right of freedom of association shall exist for legislators, as for all people.

4.1.2 Any restrictions on the legality of political parties shall be narrowly drawn with the International Covenant on Civil and Political Rights.

and:

4.3 Cross Party Groups

4.3.1 Legislators shall have the right to form interest caucuses around issues of common concern such as Health, Education, Community, Private Sector Development, Women or MDGs. (Commonwealth Parliamentary Association, Forum Presiding Officers Conference et al. 2010, p 9–10)

In Papua New Guinea, too, the position of Speaker has proven controversial. In December 2010 the court found speaker Jeffrey Nape breached parliamentary rules concerning election of the Governor-General. On several occasions in 2010-2011 Nape appeared to stifle debate and even adjourn parliament by ignoring the voices opposing his ruling. Whereas many of these rulings appeared to protect the interests of a struggling Somare government, Nape took a decision in August 2011 to disqualify Somare from parliament on the basis that he had failed to attend three consecutive meetings without written permission (Somare had been suspended from office in December 2010 to face a leadership tribunal and in April 2011 had departed for heart surgery in Singapore. His family announced in June his resignation from parliament but he had returned to Port Moresby in August, disputing his family's legal right to announce his retirement). At the end of 2011 the O'Neill government which replaced Somare's refused to acknowledge a court ruling in favour of the deposed Prime Minister and the country entered the new year with rival claimants to numerous government positions, including that of Prime Minister.

Executive oversight

In theory, effective oversight of the bureaucracy is a principal concern of a Westminster parliament. In practice, the ability of parliaments to deliver oversight — whether from the government's position or the opposition's — has fluctuated, in some cases due to lack of resources, in others through use of the system in the interests of the government of the day rather than the parliament as a whole. Whereas individual committees operate well from time to time there are some systemic issues to address, such as the tendency for governments to use committee appointments as a form of patronage (in some cases giving committee chairs considerable remuneration and conditions and thus ensuring their continued loyalty), and the danger that MPs only attend meetings for a period sufficient to collect their allotted per diems. Public Accounts Committees play a crucial role in oversight of the financial affairs of government on behalf of the parliament. Some PACs have status under a public financial management act as well as Parliament's standing orders. However, even the most productive of PACs — that of Papua New Guinea — comprises a staff of just three. In recent years it has made more than 50 recommendations to prosecute public servants, with not a single one subsequently facing charges.

Constituents and constituencies

In a number of jurisdictions it appears that MPs are more actively involved in activities at constituency level than in parliamentary processes. However, there are significant gaps in the literature on politics and political parties in the Pacific islands. There are no studies, for instance, concerning how MPs in Pacific parliaments occupy their time when parliament is not in session. Nor have political cultures and organization been properly assessed. Very few statistically valid surveys of 'public opinion' have been undertaken. The figures for parliamentary sessions suggest that a backbencher may have no parliamentary sessions to attend

for 300 days of the year. Cabinet members will, of course, be busy with supervision of their ministry and departments, and those committee members whose committees are functioning will have business to attend to — although many committee dates are aligned with parliamentary sitting dates in order to reduce operational costs.

The increasing size and scope of constituency funds is causing concern.¹⁹ Across Melanesia, MPs are allocated considerable constituency funds and a certain amount of time will be spent in their electorates supervising their disbursement. Each member of the Papua New Guinea parliament is currently entitled to 10 million kina per year for use under the DISP — District Improvement Services Program. This amounts to approximately 118 million kina annually for 109 members of parliament. As this is a fairly new program no audit information has yet been made publicly available concerning the disbursement of funds or project impact (a review has been completed but not made public). In Solomon Islands there is a double concern, first over accountability of funds distributed to MPs (both financial and performance concerns), and secondly because this assistance has given directly to MPs by the government of Taiwan rather than through formal government channels.

An additional issue concerns the legitimacy of MPs in Papua New Guinea having automatic membership in provincial government by virtue of their membership in the national chamber. The CPAs 2010 principles state at section 1.3.2: ‘In a bicameral Legislature, a legislator may not be a Member of both Houses’. (Commonwealth Parliamentary Association, Forum Presiding Officers Conference et al. 2010, p 3)

Participation of MPs in the planning and delivery of services has such unintended effects as drawing resources away from the line departments ordinarily responsible for such activities, or possibly leading to overlaps in the delivery of services. Furthermore, the involvement of MPs in service planning and delivery leaves them little time for other parliamentary duties, such as the development of legislation, committee service, and scrutiny of government. A more sceptical view would be that MPs have simply sought to exercise control over budgets, specific programs, and statutory bodies. This tends to confuse the lines of accountability: if MPs engage in work that government departments are otherwise responsible for, who is accountable for the success or otherwise of these? In the long term, the role of the MP will require clarification, particularly as a more educated public begins to ask incisive questions concerning the ideal role of elected representatives. Given the size of electoral development funds (constituency funds), and the role of MPs in decision-making concerning the expenditure of these funds, it is important to consider the relationship between legislative and executive powers.

What has fuelled the growth of constituency funds in the Melanesian states? Culturally, there is an expectation that the MP distribute resources in the tradition of

¹⁹ This concern is shared more widely than Pacific: see van Zyl, 2010.

a ‘big man’.²⁰ Leaving aside the issue of whose resources are being distributed, a second impetus to the involvement of MPs in service delivery has been perception of poor performance by the executive branch of government. This has been, at least, the justification put forward by MPs. It raises the issue of the proper role of a member of the legislature, whether of the government or opposition side, in oversight of executive power. Benchmarks for Pacific Island parliaments issued in 2009 state at 1.3.3:

A legislator may not simultaneously serve in the judicial branch or as a civil servant of the executive branch. (Commonwealth Parliamentary Association, Forum Presiding Officers Conference et al. 2010, p3)

The integrity of members

Whereas the civic virtues of individual members of parliament are questioned in jurisdictions throughout the world, the task of ensuring integrity in office remains constant. In a number of high-profile instances, electorates have chosen representatives with known criminal records, whilst in others, representatives have been removed from office for breaches of leadership codes or criminal activities. Whereas Pacific island electorates have long been described as ‘forgiving’ for their apparent unconcern about their representatives’ illegal activities, a younger generation of voters is sharing information about MPs on the internet and through consciousness-raising activities in both rural and urban settings.²¹

The benchmarks published by the Pacific legislators in 2010 state at point 10:

ETHICAL GOVERNANCE

10.1 Transparency and Integrity

10.1.1 Legislators should maintain high standards of accountability, transparency and responsibility in the conduct of all public and parliamentary matters.

10.1.2 The Legislature shall approve and enforce a code of conduct, including rules on conflicts of interest and the acceptance of gifts.

10.1.3 Legislatures shall require legislators to fully and publicly disclose their financial assets and business interests.

10.1.4 There shall be mechanisms to prevent and detect corruption, and bring to justice legislators and staff engaged in corrupt practices. (Commonwealth Parliamentary Association, Forum Presiding Officers Conference et al., 2010, p 17)

²⁰ Throughout the Pacific, but particularly in Melanesia, ‘big man’ is used to refer to an important public figure. The concept combines elements of contemporary politics with traditional notions of the obligations of people holding high status.

²¹ The qualifications and experience of MPs elected to the SI parliament at general elections in 2010 are listed at <http://degacliff.blogspot.com/p/solomon-islands-elections-2010.html?zx=72e816b32d1d2d7a>. In the Papua New Guinea context, blog sites had asserted for several years that Minister for Finance and National Planning Paul Tientsin was misappropriating development funds, and when police sought the Minister for questioning in September 2011, he temporarily fled the country.

In the case of Solomon Islands, recent ‘integrity issues’ include the disproportionate allocation of scholarships for education in Taiwan to the children of sitting MPs,²² and the size of MP entitlements determined by the Parliamentary Entitlements Commission (PEC).²³

Parliamentary development

In recent decades, ‘new professionalism’ has been a distinct feature of public sector reform processes worldwide,(Ives 2002) and similar expectations are now shifting to political as well as public sector leadership. There are at least three regional parliamentary associations (FPOC, APIL & APPF), and two international associations having Pacific Island members (CPA and IPU). However, these are more focused on the *use* of capabilities than on the *development* of capabilities. APIL, for example, was established in 1981 by legislators from the north Pacific, with a secretariat in Guam, ‘...to organize a permanent association of mutual assistance by representatives of the people of the Pacific Islands’²⁴

The Pacific Islands Forum Secretariat has played a specific role in promoting leadership development in Pacific parliaments through the establishment in 2000 of the Forum Presiding Officers Conference (FPOC). Under then Governance Advisor at the Forum, Mose Saitala, FPOC generated the Forum Principles of Good Leadership and individual legislatures considered adopting leadership codes. FPOC has since been amalgamated with the Pacific Parliamentary Assembly on Population and Development (PPAPD) and been allocated resources for the establishment of a secretariat in the Cook Islands.²⁵

The development needs of Pacific Island parliaments have been assessed by a range of agencies, over an extended period of time. An informed list of developmental issues was presented in 2005 by Governance Advisor to the Pacific Islands Forum Secretariat Mose Saitala, at a Commonwealth Secretariat-sponsored conference on ‘Government and Opposition’:

1. Parliaments lack real independence, especially from the executive branch.
2. The role of speaker must be enhanced. Five parliaments seek speakers from outside house membership in order to make the position impartial; but in general the position lacks status and speakers are not well compensated.

²² ‘Solomons Politicians Accused of Abusing Authority: *Children allegedly get preference in Taiwan scholarships*’, Melbourne, Australia (Radio Australia, 2 September, 2011).

²³ The PEC has status separate from the Parliament, but is headed by the Minister for Finance. When in 2009 then Minister Snyder Rini awarded large entitlements not only to MPs but to their spouses, public outrage was such that the Sikua Government was obliged to respond and did so by challenging the PEC’s decision in the courts. On 22nd October Chief Justice Sir Albert Palmer quashed the PEC’s ruling on the basis that it had gone beyond its powers in making an award not only to MPs but to their spouses, who were not members of Parliament and who were not therefore entitled to such benefits.

²⁴ (<http://www.apilpacific.com/whoweare.htm>, visited 22 September 2011).

²⁵ The joint Secretariat is aptly named the “PPAPD-FPOCC Secretariat”:
http://www.spc.int/ppapd/index.php?option=com_content&task=view&id=100&Itemid=80.

3. Many Elections Offices lack independence;
 4. There are weaknesses in regulatory framework governing parliaments: constitutions and standing orders need to be aligned with best practices of parliamentary democracy;
 5. The relationship of parliament and constituents needs cultivation: there is a lack of civic education by parliaments. Weak emphasis on part of public in legislation and law making. There are youth parliaments to educate
 6. There are prolonged absences of MPs from sittings
 7. There is too short a time between reading of bills.
 8. There is lack of will to exercise oversight functions
 9. There is need to strengthen audit bodies — and who audits the auditor?
 10. Parliaments are poorly resourced. They lack, for instance, resources for per diems for committees, and this leads to a lack of sittings.
- There is much political instability within legislatures. (Saitala, 2005)

Table 2: Regional parliamentary associations

State	Association of Pacific Island Legislators www.apilpacific.com	Asia-Pacific Parliamentary Forum www.appf.org.pe	Commonwealth Parliamentary Association www.cpahp.org
American Samoa	√		
CMNI	√		
Cook Islands			
Federated States of Micronesia (incl. Chuuk, Kosrae, Pohnpei & Yap)	√ √ √ √	√	
Fiji Islands		√	√
French Polynesia			
Guam	√		
Hawaii	√		
Kiribati	√		√
Marshall Islands	√	√	
Nauru	√		√
New Caledonia			
Niue			√
Palau	√		
Papua New Guinea		√	√
Samoa			
Solomon Islands			√
Tokelau			
Tonga			√
Tuvalu			√
Vanuatu			√

The development needs of Pacific Island parliaments have been assessed by a range of agencies, over an extended period of time. An informed list of developmental issues was presented in 2005 by Governance Advisor to the Pacific Islands Forum Secretariat Mose Saitala, at a Commonwealth Secretariat-sponsored conference on ‘Government and Opposition’:

1. Parliaments lack real independence, especially from the executive branch.
2. The role of speaker must be enhanced. Five parliaments seek speakers from outside house membership in order to make the position impartial; but in general the position lacks status and speakers are not well compensated.
3. Many Elections Offices lack independence;
4. There are weaknesses in regulatory framework governing parliaments: constitutions and standing orders need to be aligned with best practices of parliamentary democracy;
5. The relationship of parliament and constituents needs cultivation: there is a lack of civic education by parliaments. Weak emphasis on part of public in legislation and law making. There are youth parliaments to educate
6. There are prolonged absences of MPs from sittings
7. There is too short a time between reading of bills.
8. There is lack of will to exercise oversight functions
9. There is need to strengthen audit bodies — and who audits the auditor?
10. Parliaments are poorly resourced. They lack, for instance, resources for per diems for committees, and this leads to a lack of sittings.
11. There is much political instability within legislatures. (Saitala, 2005)

These issues have been elaborated on at a number of conferences and by the region’s key development partners. Principal events and processes have included a Pacific Regional Conference on Governance for Parliamentarians (March 2000); UNDP ‘legislative needs assessments’ and ‘parliamentary strengthening’ programs; Transparency International’s survey of ‘National Integrity Systems’; the Pacific Islands Forum’s several protocols promoting good governance and leadership; and activities of such international agencies as International IDEA, the Asian Development Bank; the Parliamentary network of the World Bank; Parliamentarians for Global Action; the Association of Pacific Island Legislatures (APIL); the Centre for Democratic Institutions; and United Nations Agencies such as UNIFEM’s Pacific Regional Office’s ‘Women in Politics’ program.²⁶

In 2000 the UNDP and other agencies convened a regional conference on Governance for Pacific Islands’ Parliamentarians to promote strengthening the performance of parliament in several urgent respects: upholding good governance best practises and public accountability; parliamentary oversight; committee performance; reporting to and by parliaments of statutory offices and state owned enterprises; and consultative processes with civil society (UNDP, ESCAP et al. 2000). That meeting identified a range of major challenges for Pacific leadership:

²⁶ <http://pacific.unifem.org/index.php?cat=15>

- an adequate and independent budget for Legislatures;
- a fully resourced and autonomous Office of the Presiding Officers;
- an autonomous legislative service;
- a strengthening and/or establishment of independent parliamentary/ legislative counsels;
- an active Committee System as an effective tool of Legislatures;
- strengthening and ensuring the independence of constitutional offices;
- appropriate usage and reference to legislatures of subordinate legislation and regulations;
- legislatures' key involvement in treaties and international obligations;
- consultative mechanisms to ensure engagement of civil society;
- adequate information and advisory service for members of legislatures; and
- effective dissemination of information to the community and, through the education system, improved understanding about the role of the Legislature and the ethics and practices of good governance.

At the same time UNDP commenced 'legislative needs assessments' of Pacific parliaments, completing eight between 2000 and 2003.²⁷

Between 2000 and 2003, LNAs were carried out for eight Pacific Island Countries (PICs) through the UNDP project — Governance for Livelihoods Development (GOLD). The analysis indicate that whilst PICs have different systems in place, different colonial histories and are of different sizes, they were unified by shared obstacles to good parliamentary governance. Following the completion of the LNAs and extensive consultations, parliamentary support projects were designed and mobilized in Fiji, Marshall Islands and Solomon Island from 2005 to 2007. But unlike for the Fiji Project, these other projects have commenced implementation of Phase II design. Likewise in 2007, UNDP also designed a Parliamentary Strengthening Project for Nauru which is yet to be implemented.

In Tuvalu and Kiribati, UNDP commenced with a Parliament. Preparatory Assistance (PA) Projects in early 2008 that would culminate in a design of a larger 3 year project. Activities include an update of the Legislative Needs Assessment, an Orientation Workshop, a Committee Workshop and Capacity Assessments. Similar PA projects were also undertaken for the Federated States of Micronesia, Palau, Tonga and Vanuatu in 2008.²⁸

A 2005 UNDP workshop identified as four challenges that Pacific parliaments had in common: lack of independence in matters of funding, staffing policies and committee functioning; ineffective committee systems; unsystematic approach to the introduction of bills and their debating; and lack of training for members of parliament and parliamentary support staff (Lindroth, 2005).²⁹

²⁷ These are online at <http://www.undppc.org.fj/pages.cfm/our-work/democratic-governance/strengthening-parliaments-democratic-institution/pacific-parliaments/undp-pacific-parliamentary-resources/#Pacific%20Legislative%20Needs%20Assessments>

²⁸ UNDP — Fiji Multi-Country Office, <http://www.undp.org.fj/index.cfm?si=main.resources&cmd=forumview&cbegin=0&uid=democraticgov&cid=99>, accessed 10 November 2009.

²⁹ online at <http://www.undppc.org.fj/userfiles/file/Final%20Workshop%20Report%20050505.pdf>

Parliamentary assistance

Following extensive needs assessment activities from 2000, a range of short and long-term parliamentary assistance projects have been initiated in the Pacific region. The UNDP's Parliamentary Support Program convened a Parliamentary Assistance Roundtable in Nadi, Fiji, in 2007 to distil good practice and lessons learned from past assistance to legislatures. Key findings of this meeting included:

- The need for sustainable, flexible, and responsive, programs of technical support to parliamentary secretariats and legislators which are adapted to context, and time and resources available to legislators;
- support to legislatures in the Pacific should translate into legislative activities which contribute to better development.
- legislatures often do not have primary carriage for issues-based policies and laws, but must engage more strategically with executives if they are to play an effective role in policy-making and implementation processes.
- The desirability of closer cooperation in providing support to Pacific legislatures amongst academic, UN and other organisations, including Pacific parliamentary associations which already exist in the region, including the Commonwealth Parliamentary Association, Association of Pacific Island Legislatures and the Forum for Presiding Officers and Clerks. (United Nations Development Programme, 2007)

There is thus considerable convergence of views on content of development agendas for Pacific parliaments: education and learning — (civic and professional), resources (human, financial, and material), and mustering sufficient will to enforce rules and to implement change. Subsequent assistance projects have included induction programs for new members (Fiji, Kiribati, Solomon Islands (twice), Marshall Islands, Palau, Papua New Guinea, Tuvalu, and Vanuatu), or longer-term parliamentary support programs (Fiji, Marshall Islands, Papua New Guinea, Solomon islands).³⁰ UNDP-sponsored parliamentary assistance programs, such as that for Solomon Islands have become recognised for their enduring impact on parliament.³¹ Assistance has included strengthening of the parliamentary library and website, and committee functioning, with each of these measures having beneficial impact on the performance of MPs, who enter the legislature with better research, and well-considered committee reports. The Solomon Islands Parliamentary Strengthening project is widely credited as having had significant impact on the conduct of parliamentary procedures, provision of information and research support for members, committee functioning, human resource management, parliamentary education, and community engagement.³² Up to 2006, the main divisions or parliament departments within parliament were the speaker, clerk, and mps, at the

³⁰ The program for Fiji was suspended consequent to the military's take-over of government in December 2006, and Papua New Guinea's program has not been implemented.

³¹ <http://www.parliament.gov.sb/index.php?q=node/177>

³² http://www.undp.org.fj/pdf/SOI_Parliamentary_Strenghtening_Project_Phase2.pdf

centre, supported by sergeant at arms, the library, finance, and Hansard. In the period 2006–2012 this organisation was complemented with procedures office (established towards the end of 2010 with support from NSW Parliament), committee Secretariat, information services (ICT), civic education, and the establishment in 2010 of a human resources department. Recent achievements have been in the development of corporate services — a five year parliamentary strengthening project, a new human resources department, the establishment of internal committees, monthly reporting, and recruitment of staff.

Across the region more broadly, training programs include induction programs, tailored workshops, familiarisation tours. MPs are also being targeted to show leadership on specific issues, such as reproductive health (The Pacific Parliamentary Assembly on Population and Development) and democratic oversight of the security sector (UNDP), human rights, AIDS, climate change, gender, business, etc. Induction programs have generally been approximately 5 days in duration, and have brought in resource people with particular parliamentary experience, whether in debating skills, committee skills, or knowledge of parliamentary procedure. Although such programs undoubtedly have value, there is no compulsion for MPs to attend, and there may be a tendency for the very MPs who require skills upgrading to absent themselves from these learning opportunities.

The Centre for Democratic Institutions (CDI), based at the Australian National University, has run workshops for members of parliament since 1999. Between its establishment and 2004 some 77 participants from nine legislatures, including many from the Pacific, had benefitted from the Centre's initiatives, and many additional retreats have been held in the years since. In the process, CDI has developed a valuable set of resources on its website. The World Bank also conducts training for MPs. In 2008 the leadership program at USP hosted a Parliamentary Professional Development Course convened over a broadband connection, which was attended by Fiji's parliamentary staff and at least one former MP (Krishna Datt).

Considerable development assistance has also been given to the matter of the digital capabilities of Pacific parliaments (Hassall 2007). Whereas the majority of Pacific parliaments now have homepages and at least some legislation and parliamentary activity on-line, the quality websites varies greatly, with some sites benefiting from donor assistance and others having no regular IT support. Parliamentary websites are listed in the following Table 3.

Whilst the establishment of these websites marks a significant advance in the dissemination of knowledge of the activities of these parliaments, there is equally significant variation in the levels of service provided. The most complete sites are supported by Solomon Islands, Papua New Guinea, and some of the Micronesian legislatures. In 2008 the Cook Islands parliament's website went online but bills and papers are not put up as the policy remains that they be sold rather than freely distributed. The Samoan *Fono* has commenced posting its Committee reports. Vanuatu's website has been established but is not being updated.

Table 3: Parliamentary websites

State	Web address
American Samoa	-
CMNI	www.cnmileg.gov.mp
Cook Islands	www.parliament.gov.ck
Federated States of Micronesia	/www.fsmcongress.fm/
Fiji Islands	www.parliament.gov.fj/main/index.aspx
French Polynesia	www.polynesie-francaise.gouv.fr
Guam	www.guamlegislature.com
Hawaii	www.capitol.hawaii.gov
Kiribati	www.parliament.gov.ki
Marshall Islands	www.rminitijela.org
Nauru	www.naurugov.nr/parliament/index.html
New Caledonia	www.congres.nc
Niue	
Palau	
Papua New Guinea	www.parliament.gov.pg
Samoa	www.parliament.gov.ws
Solomon Islands	www.parliament.gov.sb
Tokelau	www.tokelau.org.nz/General+Fono.html
Tonga	parliament.gov.to
Tuvalu	-
Vanuatu	www.parliament.gov.vu

A further form of parliamentary assistance involves ‘twinning relationships’. The Commonwealth Parliamentary Association has established relationships with Australian and Pacific legislatures, as set out in the following chart:

Australian Region Parliament	Pacific Region Parliament
Australian Capital Territory	Kiribati
New South Wales	Bougainville (Papua New Guinea)
New South Wales	Solomon Islands
Northern Territory	Niue
Queensland	Papua New Guinea
Queensland	Vanuatu
South Australia	Tonga
Victoria	Nauru
Victoria	Tuvalu
Victoria	Fiji
Tasmania	Samoa
Western Australia	Cook Islands
Norfolk Islands — to join should they wish to do so	

In 2010 a 'Pacific Parliaments Network' website was established through collaboration by the New Zealand and Australian parliaments and the UNDP's Pacific Office, although the site has attracted minimal use by other stake-holders.³³ Also in 2010, the New Zealand parliament commenced a study program for Pacific parliamentary support staff.

Conclusions

This paper has outlined some of the key challenges facing Pacific parliaments at the present time and the extent to which parliamentary development is being introduced through national, regional and international development assistance programs. In reality, the functioning of both legislative and executive branches of government in Pacific Island countries still require a strong development focus, in which not only MPs and administrators but also constituents and civil society also have an important developmental role to play. With the range of programs and agencies involved, coordination is an important consideration. However, development assistance is taking place in the context of 'imminent instability' in Pacific Island parliaments, which lack the stable party systems that parliamentary systems based on Westminster now expect.

Is the answer greater institutionalisation of party systems, incremental maturation of political cultures, or a re-examination of more fundamental processes? The future operation of parties and their impact on government stability in Westminster systems will remain problematic: the courts will rule, in keeping with fundamental principles of free expression and association as set out in the International Covenant on Civil and Political Rights, that it is improper to legally restrain MPs from choosing and changing allegiances; but the lack of philosophic boundaries between MPs will continue to facilitate such shifts with more prospects of success than of failure (there is no censure for changing sides as affects a conservative who becomes progressive and vice versa). In the context of this on-going challenge concerning the very structure of parliament, development assistance programs are seeking to strengthen the gamut of parliamentary capacities, from MP training and support, to physical infrastructure, administrative capacity. ▲

Bibliography

- Bougainville Constitutional Commission (2004). *Report of the Bougainville Constitutional Commission. Report on the Third and Final Draft of the Bougainville Constitution, prepared by the Bougainville Constitutional Commission*. Arawa and Buka, Bougainville Constitutional Commission.
- Cain, F. (2011). 'Features and Challenges of the Parliament of the Republic of Nauru'. presentation to New Zealand Parliamentary Study Programme Wellington, 30 May 2011 to 10 June.

³³ <https://sites.google.com/site/pacificpin/home>

- Commonwealth Parliamentary Association, Forum Presiding Officers Conference, et al. (2010). Recommended Benchmarks for Pacific Island Democratic Legislatures. London.
- Connor, M. (2009). 'Constructing a parliament'. *Quadrant* 53(9): 84–86.
- Donahoe, A. R. (2002). 'The Value of Parliament'. *Australasian Parliamentary Review* 17(1): 109–18.
- Duncan, R. and G. Hassall (2010). How Pervasive is Clientelist Politics in the Pacific? *The Political Economy of Economic Reform in the Pacific*. R. Duncan. Manila, Asian Development Bank.
- Government of Vanuatu. Decentralization Review Commission (2001). Report. Vol. 1. Port Vila, Government of Vanuatu. Decentralization Review Commission.
- Hassall, G. (2007). Pacific Islands Parliamentary Websites: A Preliminary Survey. *Development Problems and Prospects in Pacific Islands*. B.C. Prasad & D.C. Roy. New York, Nova Science Publishers: 121–36.
- Hassall, G. (2007). *Security and Development in the Pacific Islands: Social Resilience in Emerging States*. M.A. Brown. Boulder, Colorado, Lynne Rienner.
- Henderson, J. (2003). 'The future of democracy in Melanesia: What role for outside powers?' *Asia Pacific Viewpoint* 44(3): 225–241.
- Ives, D. (2002). "'New Professionalism" as an emerging concept in public sector reform.' CAPAM Biennial Conference, Glasgow, UK.
- Johnson, J. K. and R. T. Nakamura (1999). A Concept Paper on Legislatures and Good Governance, UNDP.
- Kabutaulaka, T. T. 'Westminster meets Solomons in the Honiara riots'.
- Larmour, P. (2002). 'Westminster Constitutions in The South Pacific: A "Policy Transfer" Approach'. *Asian Journal of Political Science* 10(1): 39–54.
- Lindroth, H. (2005). Report on the Regional Workshop on Strengthening Parliaments in the Pacific, 23, & 25–26 April 2005, Suva, United Nations Development Programme.
- MacPherson, J. (2009). Electorates for the next Parliament and related matters. Port Moresby, Institute of National Affairs.
- MacPherson, J. (2009). 'General Election and Size of Parliament'.
- MacPherson, J. (2009). Timelines and Deadlines: Electorates for the Next Parliament and Related Matters. Port Moresby, Institute of National Affairs. 98.
- MacPherson, J. (2010). Creating Parliaments to Realise the Vision: a Government Score Card. Port Moresby, Institute of National Affairs.
- Mara, K., Ratu Sir (1997). The Pacific way : a memoir / Ratu Sir Kamisese Mara. Honolulu, Center for Pacific Islands Studies, University of Hawai'i, Pacific Islands Development Program, East-West Center : University of Hawai'i Press.
- Morgan, M. (2001). Integrating Reform. Legislative Needs Assessment. Republic of Vanuatu. Suva, United Nations Development Programme.
- Pacific Islands Forum Secretariat (2006). A Woman's Place is in the House — the House of Parliament; Research to Advance Women's Political representation in Forum Island Countries. Suva, Pacific Islands Forum Secretariat.
- Rich, R. (2002). 'The Quality of Democracy in the Pacific'. 2002 Roundtable of Heads of Government of Commonwealth Pacific Islands Countries on the Challenges of Democracy in the Pacific.
- Saitala, M. (2005). 'Developments in Forum island Legislatures'. Government and Opposition — Roles, Rights and Responsibilities, A workshop organised by the Commonwealth Secretariat and Commonwealth Parliamentary Association in cooperation with the Pacific Islands Forum Secretariat and the Pacific Islands

- Association of Non-Governmental Organizations, Sheraton Royal Denerau Resort, Nadi, 29–31 August 2005.
- Samana, U. (1988). *Papua New Guinea: Which Way?* Melbourne, Arena Publications.
- Searing, D. (1994). *Westminster's World. Understanding Political Roles*. Cambridge, MA, Harvard University Press.
- Tuck, G. (2010). Local-Level Government Elections. Seminar on Constitutional And Electoral Matters. Port Moresby.
- Tuck, G. (2010). Number of Districts. Seminar on Constitutional And Electoral Matters. Port Moresby.
- Tuck, G. (2010). Number of Seats in Parliament. Seminar on Constitutional And Electoral Matters. Port Moresby.
- UNDP, ESCAP, et al. (2000). Pacific Regional Conference on Governance for Parliamentarians 27–30 March 2000. Suva.
- United Nations Development Programme (2003). *Parliamentary Development: Practice Note*. New York, United Nations Development Programme.
- United Nations Development Programme (2007). *UNDP Pacific Islands Parliamentary Assistance Roundtable 4–5 September 2007*, Nadi, Fiji. Suva, UNDP.
- van Zyl, A. (2010). What is Wrong with the Constituency Development Funds?, International Budget Partnership. Budget Brief. **10**

PARLIAMENTARY CHRONICLES

Robyn Smith is Executive Officer, Office of the Clerk, Legislative Assembly of the Northern Territory

‘FROM THE TABLES’ A round-up of administrative and procedural developments in the Australasian Parliaments

Robyn Smith

Australian parliament

In a dramatic final sitting day of the year, the Member for Scullin Harry Jenkins resigned as Speaker of the House of Representatives and, after considerable theatrics from the floor of the Chamber, was replaced by former Coalition MP and Member for Fisher, Peter Slipper. Amid much media speculation that the move was intended to shore up the numbers for the Labor minority government’s legislative agenda, the sleeping giant in the mix was the Member for Dobell, Craig Thomson, whose political future was in the hands of a second police investigation, this time in Victoria, and Fair Work Australia. The nature of the allegations against Thomson pre-date his entry into parliament, but under section 44(ii) of the *Australian Constitution*, any person who is convicted and sentenced for ‘any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer...shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives’. These events have yet to play out but render the tenuous Government numbers far from certain in a parliament which has until November 2013¹ to run.

Following a March 2011 report from the Joint Select Committee on a Parliamentary Budget Office, the Parliamentary Service Amendment (Parliamentary Budget Officer) Bill was passed by both houses during the final sitting of the year. This bill creates the Parliamentary Budget Officer, a fourth parliamentary department responsible to both houses. A Parliamentary Budget Officer will be appointed by

¹ The earliest date for an election is August 2013 unless there is an earlier dissolution of the House; the latest is November 2013. See AEC web site.

the Presiding Officers subject to the approval of the Joint Committee of Public Accounts and Audit for a period of four years.

The House Committee of Privileges and Members' Interests, having received a reference in November 2010, presented a discussion paper on a Members' Code of Conduct in November 2011. The Committee did not make specific recommendations on either adopting or implementing a code of conduct, but made two significant observations: first, any code should be a broad guide to acceptable behaviour rather than a detailed, prescriptive document; and second, any code should be adopted by resolution of the House rather than a statutory instrument because the latter had the potential to expose the conduct of members to the scrutiny of courts.

A Joint Select Committee on Australia's Clean Energy Future was appointed by both Houses to inquire into and report on a suite of 19 bills which were introduced on 13 September 2011. The Committee was required to report by 7 October 2011 and did so out of session. The report included a minority report and a dissenting report.

A Joint Committee on Human rights was established to examine bills for compatibility with the seven core UN human rights treaties to which Australia is a signatory, and to inquire into any matters relating to human rights referred by the Attorney-General. The Committee is required to report to both Houses. Members introducing bills are now required to table statements of compatibility with the relevant UN treaties.

Australian Capital Territory

A Select Committee on Privilege was established following allegations of a possible interference in the free exercise of authority by the Standing Committee on Public Accounts during its consideration of the proposed nominee to the position of Auditor-General. The allegations arose because the Chief Minister had issued a media release in respect of the nominee at about the same time a letter from her advising of the nominee was received by the Committee. It was further alleged that approaches were made to the PAC Committee Chair by both the nominee and the Chief Minister whilst the Committee was considering the nomination. The Privileges Committee found that no contempts had been committed, however recommended that a resolution of continuing effect be developed to deal with practices in relation to the executive and legislature dealing with statutory appointments.

The first report of the Independent Reviewer of Government Campaign Advertising was presented to the Assembly by the Speaker in September 2011. The Reviewing officer is required to examine government advertising campaigns which cost in excess of \$40,000. During the period under review (February to June 2011), the Reviewer found 10 instances of expenditure over \$40,000 and reported that all were compliant with the *Government Agencies (Campaign Advertising) Act 2009* and regulations.

Following a recommendation of the Standing Committee on Administration and Procedure, Professor John Halligan of the University of Canberra undertook an assessment of the three branches of government against the CPA's Latimer House principles. Professor Halligan's report, tabled by the Speaker on 20 November, found that the ACT performs strongly against the criteria, although he identified shortfalls and noted that there is considerable potential for improving governance in a number of respects. Arising from this report, the Standing Committee on Administration and Procedure announced a review of the Australian Capital Territory (Self-Government) Act.

New South Wales

During the period under review, Clerks Russell D Grove (Assembly) and Lynn Lovelock (Council) retired. Ronda Miller and David Blunt were respectively appointed in their stead.

The Joint Select Committee on the Parliamentary Budget Office (PBO) reported to both Houses on 2 December 2011. The Committee's report found that the PBO had been unable to provide a timely assessment of budget implications of election policies for the 2011 NSE election because parties either had not submitted any policies for costing or had failed to submit them within the required timeframe. The Committee recommended that parliamentary leaders be required to submit all publicly announced election policies for scrutiny by the PBO and that the PBO exist only for six months prior to a state election. The Committee made other recommendations in respect of the PBO, including oversight by a joint parliamentary committee.

The 2011 Budget Papers failed to include the Parliament (Appropriation) Bill, which has been a standard budget item since 1993. The Parliament is now funded under the standard Appropriation Bill in which it is treated as a government department.

A dispute arose between the Police Integrity Commission and the Inspector of the Police Integrity Commission whereby the Inspector was criticised for uploading reports and findings to his web site prior to their tabling in parliament. Each organisation is required by statute to report to parliament and there are provisions for tabling reports with Presiding Officers when the House is not sitting. The Inspector's reports have been critical of the Commission, in particular procedural fairness and natural justice. This has given rise to something of a turf war in which the weapons of choice are legal opinions, the Commission furnishing its advice from Bret Walker SC that the Inspector has no legislative authority to self-publish without the direction of Parliament. The Inspector's Annual Report, which included a number of 'complaint reports' as attachments, was presented to the Presiding Officers in September. The Commission argued that the Inspector had no power to make 'complaint reports'. The Speaker decided not to make the report public forthwith, as the Inspector had recommended, but sought her own advice from the

Crown Solicitor who agreed that the Inspector has now power to make complaint reports. In the meantime, the Commission had furnished the Presiding Officers with a number of ‘special reports’ in response. Ultimately, all reports were tabled on 11 October after the Presiding Officers wrote to the Inspector indicating regret that Parliament was the vehicle for pursuit of what was essentially a difference of legal opinion between the Inspector and the Commission. On 10 November, a Government review of the *Police Integrity Commission Act* was tabled in both Houses and recommended that the Act be amended to provide that the Inspector may report on any of his statutory functions if it is in the public interest.

The Joint Houses have referred a matter to the Independent Commission Against Corruption for investigation and report. It is the first time a matter has been referred under section 73(1) of the *Independent Commission Against Corruption Act*. For investigation are the circumstances surrounding the granting of a coal exploration licence to Doyles Creek Mining Pty Ltd in 2009.

Changes to the Council sitting pattern in 2012 resulted in the adoption of Sessional Orders setting down new times for meeting of the House, conduct of Question Time, debate on committee reports and adjournment of the House.

In August, the Council adopted a Sessional Order limiting time for debate on Government bills. Whilst itself controversial, the resolution followed debate on the Government’s highly controversial Industrial Relations Amendment (Public Sector Conditions of Employment) Bill in May and June during which one Member spoke for five hours and 58 minutes amid claims by the Government that Opposition and minor parties were filibustering to delay the bill’s passage.

For the first time in 154 years, the Legislative Council sought a free conference with the Legislative Assembly over differences arising from the Graffiti Legislation Amendment Bill.

For the first time since 2006, the Ethics’ Advisor’s post-separation employment advice was tabled in the Legislative Council. At issue was former Minister John Hatzistergos’ offer of employment with the University of Technology, Sydney. The Ethics Advisor, pursuant to the *Code of Conduct for Ministers of the Crown*, endorsed the former Minister’s proposed employment. Advice from the Ethics Advisor is not required in cases where former Ministers elect not to take up proposed employment.

Legislative Council General Purpose Standing Committee No 5 has commenced its inquiry into Coal Seam Gas. Of note in respect of this committee are the large numbers of people attending public hearings.

The Legislative Council established a Select Committee on the Kooragang Island Orica Chemical Leak in August and elected as its chair the Hon Robert Borsak. In November, however, Mr Borsak sought advice from the Clerk in respect of ‘direct

pecuniary interests' on the basis of companies in which he had interests. On the advice of the Crown Solicitor, Mr Borsak resigned as Chair of the Committee.

New Zealand

A general election on 26 November 2011 resulted in the re-election of a National-led Government, which, on its own, secured 59 of the 121 seats and entered into agreements with the ACT New Zealand and United Future parties. Agreement was also reached with the Maori Party. John Key secured a second term as Prime Minister.

On the same date as the election, a referendum was put to New Zealand voters about whether or not to retain the Mixed Member Proportional (MMP) voting system. The result was a 57.77% vote to retain the system compared with 42.23% who wished to change it.

Following a triennial review (unrelated to the election) of the Standing Orders, amendments to the Standing Orders were adopted. They include:

- provision (in Standing Order 54) for extended sitting hours.
- cognate bills (SO 266)—two or more bills that the Business Committee determines may be debated together at any or all of their first, second, and third readings.
- there will now be debates on instructions to select committees that reduce the time for report on a bill to less than four months, or that give committees special powers to meet while the House is sitting to consider bills.
- the Business Committee will be able to determine how the committee of whole House will deal with a bill, so that debate is not necessarily part by part.
- Members who wish to propose Members' bills can now lodge them at any time, and fair copies of proposed bills will be posted to the Parliament website.
- Members who wish to refer to matters before the court, or matters suppressed by a court order, must inform the Speaker in writing before doing so (SO 112).
- The Standing Orders Committee recommended the establishment of a published record of members' attendance at parliamentary business and approved absences, and provision for a streamlined procedure for the consideration of revision bills.
- The committee recommended that the House refer to a select committee an inquiry into Parliament's legislative response to a national emergency, particularly in terms of how it enables ongoing response and recovery. This followed concerns that were raised about constitutional issues arising from legislation to enable the recovery from the Canterbury earthquakes.
- The committee recommended that the *Legislature Act* 1908 be amended to improve legal protections for Parliament's proceedings, and that scrutiny by

officials on Bill of Rights and other constitutional matters arising from Government bills be strengthened.

Northern Territory

The matter of statehood has stalled in the Northern Territory. Notwithstanding a public announcement made on 17 June 2011 about a constitutional convention to be held in April 2012, which had bipartisan support, debate in the Assembly on the bill to facilitate election of delegates to the convention in November resulted in the passage of the bill subject to the Opposition's conditions that election of delegates would not take place in conjunction with local government elections on 24 March 2012 (as proposed) and would not happen until after the general election on 25 August 2012. Effectively, this places the matter of statehood in the Twelfth Assembly, which has yet to be elected.

The Council of Territory Co-operation, a select committee established under the 'Parliamentary Agreement' between the Independent Member for Nelson and the Chief Minister, received a referral on 4 May 2011 in respect of animal welfare governance. The reference arose from 2009 complaints to various parties and ultimately an Ombudsman's Report, which was tabled in the Assembly in October 2010. At issue was animal cruelty and deaths (horses and cattle) at Mataranka Station near Katherine, an animal husbandry training facility of Charles Darwin University. The CTC established an Animal Welfare Governance Sub-Committee, which included Opposition Members.² The Sub-Committee reported in October 2011 and made 21 recommendations. During her tabling statement, Chair of the Sub-Committee Lynne Walker said the subcommittee found that 'systems and processes failed at all levels at Mataranka Station, the university and within government agencies'.

A Select Committee on Youth Suicides was appointed during the August sitting of the Assembly. The Committee has held extensive public hearings across the NT and its focus has been drawn to the alarming rate of youth suicides, particularly in Aboriginal communities. The Committee is expected to report during the March parliamentary sitting.

Queensland

Speaker Mickel made a statement to the House on 25 August to the effect that if a Speaker's ruling is not supported by the majority of Members, he does not consider this a reflection on the Speaker and does not consider that the Member presiding who made the ruling should resign in those circumstances. His views were similar in relation to dissent motions, citing judicial cases which go to appeal but do not result in the judge who presided over the original matter resigning.

² Opposition Members resigned from the CTC proper in November 2010.

The Member for Burnett was suspended from the service of the Assembly for five sitting days on 17 November in accordance with recommendations from the Ethics Committee arising from a breach of the *sub judice* rule. At issue was the tabling of documents which failed to protect the identity of a child and tabling a document which was the subject of criminal proceedings before the District Court.

The Ethics Committee also considered a matter of privilege in which it was alleged that a Member deliberately misled the House. The Committee found that the Member's comments, which were factually incorrect, were reckless, which fell short of the standard required to hold a Member responsible for deliberately misleading the House and recommended that the Member correct the record and apologise to the House. The Member complied with the Committee's findings.

Standing Orders were amended to further clarify the role of the new Committee of the Legislative Assembly (CLA) in respect of monitoring and reviewing the business of the Assembly for the efficient discharge of business and similar monitoring and review of the referral of bills to Committees and, where appropriate, vary the time for reporting. Standing Orders were also amended to provide for statements in relation to fallen members of the military, which may be followed by Members rising and observing one minute of silence as a mark of respect.

The Committee of the Legislative Assembly (CLA) considered a proposal to make the Register of Related Persons' Interests a public document. The CLA decided against the proposal on the basis that there was no evidence that the current arrangement had failed and that the individuals involved had not been consulted. Further, the CLA was of the view that before the proposal was further considered, the individuals involved should be consulted and appropriate policy, legal and logistical advice should be sought.

Changes to the Members' Entitlements Handbook in 2011 resulted in the Premier tabling, for the first time, a report on the travel benefits for former Members. The document was tabled on 27 October 2011 together with the annual report on Members' daily travelling allowance claims.

Tasmania

There has been a significant increase in the number of Assembly Committees, which has strained staff resources. There are two joint committees; two standing committees; and seven select committees to which four officers work directly.

Debate continues on the number of Members in the Tasmanian Parliament. At present, the prevailing view appears to be that the number of Members in the Assembly should be restored from 25 to 35 if the economy improves sufficiently. There has been no indication that anything will happen prior to the 2014 general election.

Heather Thurstans retired as Second Clerk-Assistant in October 2011. Laura Ross was appointed in her stead in November.

Victoria

The Legislative Assembly Standing Orders Committee received a reference in respect of reflections on a ruling of the Speaker by the Member for Albert Park who posted comments on Twitter following Speaker Smith's ruling to disallow his question on the basis that it did not relate to Government business. The Committee, following its first meeting, stated its firm view that reflections on the Chair by any means were disorderly. The Member subsequently apologised to the Speaker in Chambers, and the Committee is considering wider issues in respect of the use of social media. The Committee has not yet released its expected reporting date.

Members who are suspended from the Assembly or Chamber are fined a day's pay for each day of suspension during a sitting period. The proceeds of these fines are donated annually to charities of the Presiding Officers' choice. Following doubt about whether parliament has the power to impose fines, the rules in relation to the new regime were incorporated into the *Parliamentary Salaries and Superannuation Act*. The first fine was imposed on the Leader of the Opposition in the Assembly in October. In the Council, no Member has yet been fined.

Arising from a debate on 7 December during which the Member for Yan Yean requested that the Attorney-General withdraw remarks on the basis that they were a personal reflection, the Speaker ruled that only comments which are a personal attack on a Member should be ordered withdrawn rather than remarks that have been made collectively.

The Council adopted a new Sessional Orders to alter the time for the interruption of business on Wednesdays if there is notification that a Standing or Select Committee is meeting that day, to alter speaking time limits for specific business and provide greater speaking times for the Greens, and to limit the opportunity for Members to seek explanations for unanswered questions on notice to Wednesdays only.

A question of *sub judice* arose in the Council in October when a Member gave notice of a motion seeking production of all documents relating to the prison transfer of the deceased prisoner Carl Williams whose accused murderer had been convicted but not sentenced. Citing *May*, President Atkinson ruled that debate should not proceed on the motion whilst the case was before the courts but could proceed when it was clear that there was no danger of the matter breaching the *sub judice* principle.

Two new joint investigatory committees have been appointed in the Victorian Parliament following the passage of bills late in the sitting year. One is charged with overseeing the Independent Broad-based Anti-corruption Commission; the other is charged with overseeing the Freedom of Information Commissioner's

activities. This brings to 14 the number of joint investigatory committees in Victoria.

Western Australia

Two bills before the Council potentially encroach on parliamentary privilege. The first, the Evidence and Public Interest Disclosure Legislation Amendment Bill will provide 'shield' provisions for journalists in respect of disclosing their sources. Whilst this is becoming standard practice across Australian jurisdictions, this bill will apply, according to the Parliamentary Secretary representing the Attorney-General, to inquiries 'such as hearings before the Legislative Assembly or Legislative Council, or committee hearings of both Houses of Parliament'. Arising from concerns raised by the Clerk of the Council, the matter was referred to the Procedure and Privileges Committee which, in its report tabled on 29 November, recommended that either unmistakable language be incorporated into the bill to effect the qualification of parliamentary privilege or a prohibitive clause be incorporated to exempt proceedings of parliament. The Council has yet to consider the matter.

Similarly, the Criminal Investigation (Covert Powers) Bill protects covert operatives from having their identities revealed in court under certain circumstances. 'Courts' are defined in the bill as including 'commissions, boards or committees' established by the Governor or either House of Parliament. The bill has been referred to the Standing Committee on Uniform Legislation and Statutes Review.

In the first major review of Standing Orders since 1952, the Council reduced the number of Standing Orders from 438 to 240. The new Standing Orders reflect the Council's wish to: streamline and simplify the procedures of the House and its committees; rationalise the priority of business; adopted successful practices from Temporary and Sessional Orders; eliminate obsolete and unnecessary Standing Orders; retain the rights of all Members to contribute to proceedings in the House and committees; use plain English and gender-neutral language; and re-order the Standing Orders in a user-friendly sequence. ▲

BOOK REVIEW

David Clune is Honorary Associate, Department of Government and International Relations, University of Sydney

The Fog on the Hill: How NSW Labor Lost its Way

Frank Sartor, Melbourne University Press, Carlton, 201, pp x + 373, rrp \$34.99

David Clune

There are a number of facets to Frank Sartor. There is the public image created by his — shall we say? — vigorous personality. There is also behind the scenes the diligent, hard working Minister who inspired respect and admiration. Then there is the side most on display in this book: Sartor the man of ideas and passionate vision. This is not to say that there isn't dogmatism, self-justification and denigration of foes, but this aspect is not predominant. At first sight, Sartor's book is a rather indigestible mix of memoir, insider's account, analysis of the political process, essays on public policy — yet somehow it works. One reason is Sartor's writing style: racy, engaging, argumentative, expository, magisterial. Even the most intractable material is dealt with lucidly. Detailed analyses of complex policy issues are leavened with interesting personal examples and anecdotes from Sartor's long experience as Lord Mayor of Sydney (1991–2003) and State Minister responsible for a variety of areas: energy, cancer research, planning, environment (2003–2011).

The heart of the book is, perhaps, the second chapter where Sartor defines his concept of good government. The bedrock is that politicians should have conviction, commitment and a sound system of beliefs. Good government itself has five key elements: good policy, good politics, good communication, sound implementation and transparency. Sartor is not naïve about his prescription: 'Political compromise is okay, and often essential, as long as we understand the real purpose of any government action — the policy objective we are trying to achieve'. He describes politics as an 'art form': 'The assessment of a good intuitive politician is often worth more than dozens of focus groups'. Sartor argues that under Premiers Rees and Keneally good government was replaced by a tactical game to keep government. The 'ill-conceived' sale of electricity assets, the unchecked blow out in the cost of the solar bonus scheme — both described in devastating detail — and other decisions of Labor's final years 'failed the good policy test, represented poor or even woeful politics, and suffered from incompetent administration'.

Sartor also has some forthright things to say about the process of government. He attributes much of the dysfunctionality of the public sector to the pervasive influence of Treasury which he describes as riddled with arrogant 'pro-market ideologues that have never been in business and don't understand how the market works'. After the effective partnership of Bob Carr with Treasurer Michael Egan,

ALP Governments allowed Treasury to ‘stifle, obstruct, undermine and prevent many initiatives’ and mismanage others.

The Fog on the Hill contains perceptive, well-researched chapters on transport, planning, development and political donations that give valuable insights into what is really going on in these areas. Sartor avoids the approach of some ex-politicians whose books consist of wedges of documents salvaged from the ministerial office linked by a few self-serving lines. Not everyone will agree with his diagnoses and solutions but his arguments are invariably thought-provoking.

The media come in for swingeing criticism: biased, shallow, inaccurate, manipulative, unprincipled. Sartor disparages many current journalists as entertainers rather than investigators who beat up non-stories while missing significant ones. There is a strong ‘Cranky Franky’ side to this chapter — although Sartor does give convincing evidence of the unfairness and inaccuracy of some of the personal attacks on him. Yet, as with this book in general, he has some interesting things to say. The constant obsession of governments with flooding the airwaves with ‘announceables’ to deprive opponents of ‘oxygen’ means that politicians ‘cease to speak about matters of substance and effectively start speaking about nothing, providing pure unadulterated hot air’. Leaders are allocating too much time ‘to selling and not enough to producing good product. Maybe this is one of the reasons why governments are losing the plot and drifting between media hits’. Sartor writes that as Lord Mayor he had fruitful personal contact with the media but as a Minister was insulated by media advisers and scripted announcements. As a consequence, ‘I wasn’t able to develop relationships with the press gallery’. When negative stories emerged ‘they had no reason to believe me. My messages were too filtered and the resultant media reports gave them little weight’.

Not unnaturally, Sartor has plenty to say about the ALP. This is, however, far from being the major theme of *The Fog on the Hill*. It is perhaps unfortunate — if understandable — that the book has been marketed as being about Labor and its current problems (down to the gimmicky title): there is much more to it than that. This part of the book is, in fact, the most mixed in terms of quality. Chapter Three, for example, contains an unnecessary and, at times, inaccurate rehash of early ALP history. Lang was not, as stated, given control by Conference of MPs’ preselections, although his massive personal following gave him much *de facto* influence. There is a rather trite account of the McKell legacy. He did not allow ‘control of the party by the unions so long as the unions delivered what the government wanted’. What he did achieve, greatly assisted by the fact that all players had been scarred by the internecine warfare of the Lang years, was a *modus vivendi*, where the Parliamentary and extra-Parliamentary Party (affiliated unions, Party machine and rank and file) respected each others strengths and prerogatives to their mutual benefit. ALP Governments did not, as Sartor says in the conclusion, ‘dominate’ NSW in the 20th century: they governed for about half of it.

Sartor is more interesting and informative when he talks about the era he knows from personal experience. He disagrees with union dominance of the ALP, arguing that affiliated unions have lost interest in Labor's broad agenda 'as well they might, given they represent only 8% of the voters'. Unions now only show 'any enthusiasm at all' when an issue affects their members in the public sector. Instead of supporting ALP administrations and providing 'the ballast needed to stabilise the Party as it held the middle ground, the affiliated unions effectively became a parasite on Labor Governments'. This disengagement of the unions has allowed Party Secretaries to overstep their role and interfere in areas that were traditionally the domain of Governments. The new breed of Party officials are careerists, driven by 'the motto of expediency, convenience and ambition'. These officials further weakened the ALP by 'outsourcing preselections' to right wing powerbrokers Eddie Obeid and Joe Tripodi. MPs 'served silently, doing only what they were told, waiting for their rewards'. As a result, Cabinet and Caucus 'grew progressively weaker'.

The Fog on the Hill finishes with a long — in fact, over long — chapter on ALP reform. This is the only part of the book where quotes from documents, in this case the 2010 National Review of the ALP, become tedious. Sartor bluntly states that Labor cannot complacently assume its traditional base will return: 'that base is gone. People have moved on economically, educationally and philosophically'. If the Party is to recover from its unprecedented defeat in March 2011 'we have to win the support of a broad coalition from both ends of the political spectrum. We have no choice but to improve the quality of our policies and programmes, avoid wasting public money, and show that we can run government competently, while inspiring people to our cause'.

The final years of the ALP Government in NSW may not have produced much in the way of good government but they did produce some worthwhile books. *The Fog on the Hill* joins Rodney Cavalier's *Power Crisis* as a work that has important things to say about the current state of politics, government and public policy in Australia. ▲

Australasian Parliamentary Review Interested in submitting to the APR?

The APR is a journal of issues affecting the operation of Parliaments in Australia, New Zealand and the South Pacific. APR is published twice a year and is committed to encouraging and stimulating research, writing and teaching about the parliamentary institutions of the region. APR also publishes material on issues relating to parliament, whether arising from policy debates, major committee reports, political and electoral matters, referenda or significant court decisions. Where relevant to the Australasian experience, the Editor also welcomes manuscripts relating to international events.

All material submitted is internally refereed by Members of the APR Editorial Board using the single or double blind review process. The Editorial Board comprises academics and practitioners qualified to provide constructive evaluation of the value of the submission for publication in the journal. The Editor is also a member of the Editorial Board and reserves the right to accept or decline submissions.

Double blind review submissions will be subject to more judicious assessment in terms of observing high academic standards of originality, insight, clarity and rigour and, if accepted for publication, will be noted as such in the journal. Authors may request a double blind review, however, in so doing should be aware of these requirements.

Material submitted to the APR may be considered more suited to publication on the website of the ASPG as Occasional Papers — see www.aspg.org.au.

Contributions will ONLY be accepted in electronic form to the Editor jennifer@aldred.com.au and should include a 100–200 word abstract stating what the article has to offer the reader. Full contact (email address essential) and institutional affiliation details of the author(s) should also be supplied on submission and kept current prior to publication.

In submitting the manuscript, the author(s) warrants that:

- The article is an original work written by the author(s) whose name appears on the manuscript;
- The article has not been previously published elsewhere unless otherwise agreed to by the journal editor;

- The author(s) has the full power and authority to grant that right.

Articles should be between 4000–6000 words in length. In exceptional cases, articles of up to 10,000 words will be considered. Shorter pieces, particularly those dealing with current research projects or findings are invited.

As the APR encourages a lively and constructive exchange of views, readers' commentaries on published work are actively encouraged as a short article of 800–1000 words or in the form of a Letter to the Editor of not more than 400 words in length.

Review articles dealing with a significant book or set of books on emerging themes in the areas of interest to the APR readership are welcomed.

Allow at least three months for review and consideration of submissions to be completed. Pre-publication proof copies of articles are NOT made available to authors.

COPYRIGHT: By submitting the manuscript to the Editor of the APR, the author(s) — or other copyright owner — agrees that it may be published in the journal and therefore sold or distributed within the journal, on its own, or with other related material. Moral rights and copyright of the original manuscript belong to the author(s). As such the author(s) have the right to republish the article after first publication in the journal subject to full bibliographic citation of the original publication in the APR.

DISCLAIMER: Views and opinions expressed in the APR are the views of the author(s) and do not necessarily reflect those of the Editor, the Editorial Board or the ASPG. Every effort is made to ensure the accuracy of all the information contained in the journal, however, the APR and the ASPG make no representations or warranties whatsoever as to the accuracy, completeness or suitability for any purpose of the content and disclaim all such representations and warranties whether express or implied to the maximum extent permitted by law.

For more information go to [www.aspg.org.au/Australasian Parliamentary Review/Guidelines for Contributors](http://www.aspg.org.au/Australasian%20Parliamentary%20Review/Guidelines%20for%20Contributors) or contact the Editor (see above).

Membership of the Australasian Study of Parliament Group

Membership

The ASPG provides an outstanding opportunity to establish links with others in the parliamentary community.

Membership includes:

- Subscription to the ASPG Journal *Australasian Parliamentary Review*;
- Concessional rates for the ASPG Conference; and
- Participation in local Chapter events.

Rates for membership in are:

Individual Membership	A\$45
Corporate Membership	A\$400
Library Subscriptions	A\$70

These rates keep ASPG membership among the least expensive professional bodies in the political science/law field.

Membership Application/Renewal

Title (Please Circle): Mr Mrs Ms Miss Dr Prof

Name: _____

Address: _____

Email (optional): _____

Contact telephone number: _____

Chapter: ACT/Cth NSW NT NZ QLD TAS SA VIC WA

I wish to join the Australasian Study of Parliament Group

(tick as appropriate)

☐ Please find enclosed my cheque/money order for A\$45

☐ Please debit my credit card (Visa/Mastercard only) for the value of A\$45

Card type: _____ Number: _____ Expiry: _____

Signature: _____ Date: _____

Please send to:

| Kay Saunders, ASPG Treasurer, Finance Office, R1-61, PO Box 6021
Parliament House, Canberra ACT 2600